IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 181
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
BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Plaintiff
AND	NEWZEALAND FUSION INTERNATIONAL LIMITED First Defendant
AND	SHENSHEN GUAN Second Defendant

Hearing:	8, 9, 10, 11, 12 and 24 July 2019 and supplementary submissions filed on 7 August 2019 (Heard at Rotorua)
Appearances:	R Denmead, counsel for plaintiff S Guan in person and agent for first defendant
Judgment:	11 December 2019

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Translation of this judgment into Mandarin for the complainants

[1] The Labour Inspector is directed to provide a translation of this judgment in Mandarin to each of the three complainants to enable them to fully understand my reasoning and the orders I am making. The point is that it is important that those affected by employment breaches understand the way in which the Court deals with

them. Ms Denmead, counsel for the Labour Inspector, agreed with my suggestion at hearing that such a step would be appropriate in the circumstances.

Background

[2] The first defendant company owns a holiday park in Reporoa (the park). Ms Guan is sole director and a shareholder of the company. She was finding it difficult to attract employees to work at the park and advertised on a Chinese social media site. The advertisement caught the interest of two people living in China, Mr Meng and Ms Xueli Wang (also known as Sherry Wang). Both wanted to come to New Zealand for personal reasons. They individually approached Ms Guan and she arranged to meet with them on one of her numerous trips to China. She offered them work in New Zealand. Each offer of employment was conditional on payment of a bond of ¥200,000 (yuan) (around NZ$45,000 at today's rate). Under the bond agreement the money would be repaid after they had worked for Ms Guan for two years. They were asked to sign employment agreements in China, which they did.

[3] $45,000 is a substantial amount of money for most people, and Mr Meng and Ms Xueli Wang were no exception. Mr Meng organised a mortgage over the family home, despite his wife's reservations. He was prepared to do this because he wanted to come to New Zealand to better the life prospects of his young sons. Ms Xueli Wang cashed in her savings (which had been set aside for her daughter's university education). She also believed that securing work in New Zealand would pave the way to a better future for her family. As it transpired, their aspirations were far from met.

[4] Mr Meng transferred the ¥200,000 into Ms Guan's personal account, as did Ms Xueli Wang. Both required work visas to work lawfully in New Zealand. Applications for visas of this sort are made online and are supported by documentation from the intending employer. Ms Guan provided the necessary documentation. In the intervening period Mr Meng and Ms Xueli Wang made arrangements, in conjunction with Ms Guan, to travel to New Zealand. They did this on visitor visas. Ms Guan says that she made it clear to both of them that they should wait until their work visas came through. I was not drawn to this evidence. It was clear that Ms Guan wished to obtain their services sooner rather than later and the visitor visa option provided a

convenient means of getting them to New Zealand and securing an earlier start date for their work. On arrival in Auckland Mr Meng and Ms Xueli Wang were driven to the park and they started work immediately.

[5] Ms Guan arranged for Mr Meng and Ms Xueli Wang to apply for work visas. She provided written employment agreements by way of supporting documentation. Ms Xueli Wang's differed from the employment agreement which had been provided in China.

[6] Mr Meng did outside jobs; Ms Xueli Wang did inside work. They each worked seven days a week and received no pay whatsoever. Several months later they began to make inquiries about being paid. Ms Guan was not receptive to these requests. Nor was she receptive to subsequent requests to repay the bond money they had each paid to her.

[7] Mr Meng was in desperate financial circumstances, with no money coming in and a mortgage (in relation to the ¥200,000) to deal with. The bank was pressing for repayment. Mr Meng's visitor visa was expiring and he had not been issued with a work visa. He decided to return to China. Ms Guan took him to the airport. He asked her to sign a piece of paper confirming that she owed him ¥200,000 and undertaking to repay it. Ms Guan signed the piece of paper and Mr Meng boarded his flight out of the country. Mr Meng has never received his money.

[8] Ms Xueli Wang was also in a distressed state by this time. She too decided to return to China. She has never received her ¥200,000 bond money either.

[9] A Chinese journalist working in New Zealand learned of the situation. She spoke to Mr Meng and Ms Xueli Wang (who were by that time in China) and made a complaint to the Labour Inspector. The Labour Inspector assigned to the case, Ms Tsui, undertook an investigation. She travelled to Reporoa to visit the park and spoke with various people. One of those people was Ms Min Wang, whom she met in the reception area. Ms Tsui asked Ms Wang what her role was. Ms Wang advised that she was scanning documents for a student visa. Ms Guan described her as a family friend.

[10] Ms Guan was adamant that neither Mr Meng nor Ms Xueli Wang had been employees. Ms Tsui asked Ms Guan to provide wage and time records and she confirmed that none had been kept for them. She made it clear that she was well aware that neither of them could work in New Zealand lawfully unless and until they had validly-issued work visas. Neither had visas of this sort and so neither had undertaken work at the park. That meant that there was no need to maintain wage and time records.

[11] As it later transpired, Ms Min Wang had also heard about a job opportunity with Ms Guan while living in China, had applied for work and been offered a role as motel manager at the park. She had paid a ¥200,000 bond to Ms Guan, had come to New Zealand on a visitor visa, and had moved into the park where she had carried out numerous activities, including at the reception desk. Ms Min Wang was a solo mother. She had wanted to come to New Zealand to make a better life for her young daughter. She has never received any pay for the work she did at the park, nor has she been repaid the ¥200,000 she gave to Ms Guan by way of bond.

[12] The Labour Inspector's investigation broadened to include Ms Min Wang's circumstances. Ms Tsui formed the view that Mr Meng, Ms Xueli Wang and Ms Min Wang had been employees of the company and that there had been a significant breach of their minimum entitlements. The Labour Inspector pursued an action on their behalf, claiming wage arrears and outstanding holiday pay, a declaration of breach of minimum standards, pecuniary penalties, compensation orders, and a banning order in respect of the company and Ms Guan.

[13] A number of issues arise. I deal with them in the following order:

(a) *Threshold issue* – employment status.

- Was each of the three complainants an employee of the first defendant company?

- If so, during which period/s was each of the three complainants employed?

(b) *Issue one* - *Declaration of breach* appropriate under s 142B?

- Did each of the three complainants receive their minimum entitlements pursuant to the Minimum Wage Act 1983 and the Holidays Act 2003 during their employment? (s 142B(2)(a)(i))

- If not, was Ms Guan involved in the minimum entitlement breach/es? (s 142B(2)(a)(ii))

- Are the established breaches serious? (s 142B(2)(b))

- Should a declaration of breach be made against the first and/or second defendant?

(c) *Issue two – Should pecuniary penalties be awarded* against the first and/or second defendants? (s 142E)

- If so, in what amount?

- Should a portion of any pecuniary penalty award be ordered to be payable to the complainants affected by the breaches and, if so, what proportion?

(d) *Issue three – Should a compensation order be made* against the first and/or second defendants? (s 142J)

- If so, in what amount? (s 142L(1))

- Against whom should such an order be made? (s 142J(1),(2); s 142L(2))

(e) *Issue four – Should a banning order be made* against the first and/or second defendant? (s 142M)

- If so, on what terms and what duration? (s 142N; s 142O)

(f) *Issue five* - Should *interest* be ordered and, if so, at what rate and from and to what dates?

(g) *Issue 6* - Where should *costs* lie?

[14] The civil standard of proof applies in assessing issues one to four (s 142S).

Racial profiling?

[15] I deal at the outset with Ms Guan's submission that Ms Tsui's investigation was tainted because it proceeded on the basis of racial profiling. There was no evidence to support this submission, even if it would otherwise have been relevant to an assessment of the Labour Inspector's claim. The issue can be put to one side.

Threshold issue – Each of the complainants was an employee

[16] I have no difficulty in concluding that each of the three complainants was an employee of the first defendant. Each undertook work for the company's benefit under the close direction and control of Ms Guan, who was the sole director and a shareholder, and her husband (Liu Xiaofu), who was an employee at the park. This was confirmed in the evidence of each of the complainants and reinforced by evidence of others who were either residents of the park from time to time, visitors to the park or who lived nearby. They presented a broadly consistent pattern of evidence that each of the complainants undertook work around the park, including cooking, cleaning, garden maintenance and reception work.

[17] The evidence was further reinforced by the contemporaneous documentation, including the advertisements Ms Guan posted advising that vacancies for employment existed at the park, the terms of the employment agreements entered into in China and later in New Zealand, and the arrangements Ms Guan made in China to bring the complainants to New Zealand.

[18] All of this was underscored by evidence of WeChat communications between Ms Guan and Mr Meng and Ms Xueli Wang once they moved into the park. Ms Guan

required them to post a daily report as to what they had done around the park each day. The reports are informative and paint a clear picture of the duo working (and the conditions under which they undertook their work). Ms Guan gave evidence that she required reports at the end of each day because she was concerned that they were taking it on themselves to do various tasks unasked and she wished to protect her assets. I do not accept that. The real reason for the requirement was to ensure that Mr Meng and Ms Xueli Wang were doing the work assigned to them. The following examples taken from "Motel work group WeChat" records suffice to illustrate the point:

July 7, at 17.37pm

GUAN: … From now on, I don't care what your work arrangements are. You must do the work I ask for, no more excuse and reason. OK? From today, [every one] of you must send me a work report at the end of day before you go to sleep. If you don't do that, I will count it as your absence of that day. No excuse of not sending, you must send it to me even just one sentence. I hope you understand I am not making things difficult to you, this is a work discipline. Please also pass my message to the girls who work here for free accommodation, they should follow our work discipline. Thank you! …

Sherry: OK

GUAN: From now on, no matter who works here, work discipline should be followed. I don't like undisciplined team.

…

MENG: I just came back to my room. Today I finished the work on the right side of road ramp down the riverside. I also helped Tipuna to prune the tree. I have a plan for the lawn. According to Liu's experience, it's appropriate to mow the lawn every 3 to 4 weeks (subject to the weather condition)

GUAN: OK

MENG: (*photo*)

…

GUAN: … Sherry remember to send me the photos tomorrow, especially the BBQ area.

…

GUAN: How's the weather the recent days? The fence needs to be fixed as well if the pruning on the trees down there almost done.

MENG: I had painted twice at the bottom part where the paint peeled off yesterday.

MENG: 13th July. Today's works were [focussed] on re-painting motel 21 and 22. They are very dirty at the back with lots of paint peeled off. I painted the whole two walls, also fixed the room where Tipuna lives. But [I] didn't paint the white walls in the room where Joseph lives and the nearby No. 8, 10, 11 and 12(no white paints available). I just helped Joseph to fix the lawn mower.

MENG: *(photo)*

…

…

Sherry: Work diary: today is a busy day. Beside the daily cleaning at the public kitchen and toilets, I cleaned the checked-out flat 27 and did a complete maintenance for cabin 5 which has not been used for a long time. I also cleaned the staff laundry. Today's check-in rate is quite good. Cabin 1, 2 sold. Motel 16, 18 sold.

MENG: 16th July. Kept working on maintenance in the tool room today. Nearly done! Show you some photos after finished tomorrow.

…

Sherry: Work diary: besides the day to day cleaning at public area, I cleaned all the checked-out rooms. With the help of Frank, I opened the door to the hot water cylinder, cleaned up the animal droppings (possum or hedgehog) and maintained the vacuum cleaner.

MENG: 17th July, the maintenance of tool room has finally finished. All tools and other [stuff] were sorted in order. It took me the longest time to sort out the nails. A wooden shelf against the wall in the room was built. All the [stuff] on the floor were put up to the shelf e (sic) to clear the floor for further maintenance (it's dark, no light in the room. I can't take photo. I will take photo tomorrow). The rotten supporting wood at the back window in [cabin] 5 had been replaced. A non-slip mat was placed at the gate of [the] linen room. The old one is so slippery. Quite a few accidents happened before. Maintenance done.

…

GUAN: The lawn in the garden should be maintained according to plan. The grass at No. 19 is too long. Wear glove when working to avoid blister.

Periods worked

[19] It is not unusual in cases such as this for there to be a lack of detail as to the precise hours worked, particularly in the absence of any time records. That is one of the reasons the Employment Relations Act 2000 (the Act) reverses the burden in such cases, requiring the employer to disprove the hours claimed to have been worked.[1]

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1 Section 132(2).

[20] Each of the complainants gave evidence in respect of the days and hours they worked. Ms Min Wang's evidence was somewhat inconsistent. While she said in evidence-in-chief that she had worked a full day, seven days a week, she later accepted that it had been four hours a day during a period she had a sore wrist. Mr Meng and Ms Xueli Wang's evidence was clearer and supported by the work diary each was required by Ms Guan to maintain. Each of the complainants' evidence was supplemented by evidence from other witnesses, although that too was (by necessity) patchy.

[21] I am satisfied that Mr Meng worked the days and hours set out in the schedule of work prepared by the Labour Inspector who took over responsibility for the file, Ms MacRury. I am satisfied that Ms Xueli Wang worked the days and hours set out in Ms MacRury's schedule. I am not satisfied that Ms Min Wang worked the hours originally claimed. I find that she worked four hours a day during the period her wrist was sore, as set out in Ms MacRury's revised calculations, detailed in a further affidavit referred to on the last day of hearing.

Issue one – Declarations of breach appropriate?

No receipt of minimum entitlements

[22] I understood Ms Guan, who appeared on behalf of the company and on her own behalf as second defendant, to accept that if the three complainants were found to be employees, they were owed money because none had received any payment for the work they did. However, she says that any amount should be offset against the food and accommodation they received throughout the period they stayed at the park. That is irrelevant in terms of deciding whether they received their minimum entitlements under the Minimum Wage Act and the Holidays Act. In any event, both Mr Meng and Ms Xueli Wang were entitled to free board and lodgings under the terms of their employment agreement. And while s 7 of the Minimum Wage Act allows a deduction in wages of up to 15 per cent for board, in this case there is still no question in relation to Ms Min Wang as she did not receive any wages at all.

[23] None of the three complainants received any wages or holiday pay. Accordingly, they did not receive their minimum entitlements.

Ms Guan was involved in the breaches

[24] Ms Guan was the hands, eyes and ears of the first defendant and drove the breaches. I was not drawn to her evidence as to what she thought she was doing and why. The contemporaneous documentation, and the evidence from the three complainants (which I preferred), told a very different story.

The breaches were serious

[25] In determining whether a breach was serious, the Court may have regard to a range of factors set out in s 142B(4) including the amount of money involved, whether the breach was single-instance or comprised a series of incidents, the period over which the breach occurred, and whether it was intentional or reckless.

[26] Plainly the breaches were serious – they were not one-off, inadvertent or minor. They were deliberate, sustained over relatively lengthy periods of time, and related to a total absence of payment for any work undertaken (as opposed to, for example, an under or partial payment for work performed). A significant amount of money was involved.

[27] While the impact of the breach on the employee affected is not one of the factors set out in s 142B(4), the list is inclusive rather than exclusive. I consider the impact of the breaches is relevant to assessing the degree of seriousness to be attributed to any breach, although the threshold is well and truly overcome in relation to this factor in any event.

[28] The breaches had a debilitating effect on each of the complainants, left them feeling powerless and stressed in circumstances where they were living in an isolated location, away from family and friends, where they spoke little (if any) English, had very limited (if any) knowledge of New Zealand employment laws, and had committed a significant amount of trust in Ms Guan as their employer. That trust was

cynically breached. The reservation they each held about questioning Ms Guan, as a person in authority, held them back from seeking to assert their rights. Ms Guan took full advantage of this power imbalance.

Conclusion: declarations of breach against the company and Ms Guan are appropriate

[29] I have no difficulty concluding that declarations of breach are appropriate against both the first and second defendants.

[30] This was a deliberate attempt by Ms Guan, through her company, to secure the services of vulnerable workers to undertake work at the park without the need to pay them while holding the ¥200,000 bond payments over their heads. Such conduct requires firm denunciation to drive home to Ms Guan that this sort of conduct is unacceptable in New Zealand; to send the same message to other employers who may be considering adopting a similar labour model for cost-cutting purposes; and to reinforce to the complainant employees and others in a similar situation that what was done to them is unlawful and unacceptable, and that the protection of the law is available to them.

[31] The following declarations of breach are made:

(a) The first defendant has breached the minimum entitlement provisions contained in the Minimum Wage Act 1983 by failing to pay minimum wages to the three employees concerned. The first defendant has further breached the minimum entitlements and payment for such entitlements under the Holidays Act 2003 to the three employees concerned for holidays and for holiday pay owing at termination of employment for the entire period of employment.

(b) The second defendant, Ms Guan, is a person involved in the breaches of minimum standards by the first defendant set out in (a) above by procuring, inducing and being knowingly concerned in the breach.

Issue two – Pecuniary penalty orders appropriate?

[32] Once a declaration of breach has been made, the Court may make a pecuniary penalty order against a person in respect of whom the declaration has been made,[2] in this case the first and second defendants. The Labour Inspector seeks penalty orders of $1.44 million against the first defendant and $300,000 against the second defendant.

[33] A cascading approach applies to pecuniary penalty orders. Boiled down, the approach requires the following questions to be asked and answered:

> Step 1 – Was the application brought within time?
>
> Step 2 – If so, has a declaration of breach been made?
>
> Step 3 – If so, is a pecuniary penalty order appropriate?
>
> Step 4 – If so, what is the appropriate quantum of any pecuniary penalty order?
>
> Step 5 – Should the pecuniary penalty order be apportioned?

[34] I deal with each in turn.

Step 1 – Was the application brought within time?

[35] Any application for a pecuniary penalty order must be made within 12 months after the earlier of the date on which the breach first became known to the Labour Inspector, or the date when the breach should reasonably have become known to a Labour Inspector.[3]

[36] The application was advanced in relation to Mr Meng and Ms Xueli Wang within the 12-month timeframe. The application in respect of Ms Min Wang was made outside the 12-month timeframe but this reflected the way in which Ms Min Wang was introduced to the Labour Inspector. I accept that the circumstances were such that the

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2 Section 142E.
3 Section 142I.

Labour Inspector ought not to have reasonably known at that stage that a breach had occurred in respect of Ms Min Wang. It was not until later that the Labour Inspector became concerned, because of information which came to light during the course of the investigative process, that she too may be an employee, and an application was advanced accordingly.

[37] I am satisfied that the Labour Inspector's applications were brought within the statutory timeframe for doing so.

Step 2 – Has a declaration of breach been made?

[38] Section 142E provides that the Court may make a pecuniary penalty order against a person in respect of whom a declaration of breach has been made. That means that a declaration of breach must first have been made. I have made declarations of breach against both defendants. Step 2 is satisfied.

Step 3 – Is it appropriate to make a pecuniary penalty order in the circumstances?

[39] As s 142E makes clear, the Court may (but need not) make a pecuniary penalty order. There will be some cases where a declaration of breach suffices to mark out the conduct in question. This is not one of them.

[40] I have made three separate declarations of breach in respect of each of the defendants. I am satisfied that a pecuniary penalty order is appropriate, including because of the number and nature of breaches against three different complainants which spanned a reasonably lengthy period of time. In other words, it was not a one-off minor breach which might otherwise be adequately addressed by way of declaration only.

Step 4 – Assessing the appropriate level of quantum

[41] Section 142F sets out an inclusive, rather than exclusive, list of relevant matters to which the Court is to have regard in determining the amount of any pecuniary penalty. The relevant matters include the objects of the Act, the nature and extent of

the breach, whether the breach was intentional, inadvertent or negligent, the severity of the breach, ability to pay, and proportionality in terms of overall outcome.

[42] The maximum amount of pecuniary penalty is $100,000 or three times the amount of financial gain made by a body corporate from the breach; $50,000 in the case of an individual.[4]

[43] I deal with each relevant factor in turn.

Objects of the Act

[44] The objects of the Act are set out in s 3. Of particular relevance for present purposes are s 3(ab) (to promote effective enforcement of employment standards) and s 3(a)(ii) (to acknowledge and address the inherent inequality of power in employment relationships). Employment relationships involving migrant workers are often marked by a significant imbalance of power. That is reflected in this case in the high degree of respect and trust each complainant placed in Ms Guan by virtue of her status and the extent to which that respect and trust was then exploited for the defendants' benefit.

[45] The complainants did not have a grasp of basic New Zealand employment law. They spoke English as a second language. They were isolated from family, friends and support networks and were heavily reliant on the first and second defendants, including because of the substantial amount of money each had paid to secure their employment.

[46] Further, each complainant felt indebted to Ms Guan for providing them with work and were reluctant to raise any issues or concerns because of her dominant position of authority. As I have already said, Ms Guan was well aware of the power dynamic and took full advantage of it.

Nature and extent of the breaches

[47] Three types of breach were committed by the first and second defendants:

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4 Section 142G(a) and (b).

(a) breaches of s 6 of the Minimum Wage Act (failure to pay the minimum wage);

(b) breaches of provisions of the Holidays Act (failure to pay annual holiday pay); and

(c) breaches of provisions of the Holidays Act (failure to pay public holiday pay).

[48] There was a series of instances of breach of each of the above provisions spanning the entire period of the three complainants' employment with the first defendant. The second defendant is also liable for these breaches because she was complicit in them, was active in the management of the company, and drove the actions and omissions of the first defendant.[5]

[49] While it would be possible to approach the breaches on an individual basis (namely every instance occurring over time on which the obligation to pay arose and was not met), it is convenient to treat each series of breach as one continuous breach.[6] That is not, however, to lose sight of the multiplicity point or its significance in terms of the nature and scope of the breaches. The practical issue is, however, that accounting for each breach each payday when payment otherwise fell due would lead to a starting point which would then, at some point, need to be deflated.[7]

[50] Approached in this way the breaches committed by the first and second defendants were:

(a) three failures to pay the minimum wage (in respect of each of the three complainants);

(b) three failures to pay annual holiday pay (in respect of each of the three complainants); and

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5 Section 142W.

6 *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12 at [23]–[26].

7 *A Labour Inspector v Parihar t/a Super Liquor Flagstaff and Super Liquor Hillcrest* [2019] NZEmpC 145 at [39]. See also Mark Perkins, Judge of the Employment Court (Burning Issues in Employment Law Forum, Auckland, 19 September 2019).

(c) three failures to pay public holiday pay (in respect of each of the three complainants).

[51] The maximum pecuniary penalty order available in respect of each of the breaches committed by the first defendant is $100,000 or three times the amount of the financial gain made by the first defendant from the breach, whichever is the greater.[8] For the breach of minimum wage in respect of Ms Min Wang, the maximum would be three times the amount of the financial gain, which would be $35,819 x 3 = $107,457. The greater amount is $100,000 in respect of each other breach of which there are a total of eight (two more for Ms Min Wang in respect of annual holiday pay and public holiday pay, and three each for the other two complainants). That leads to a maximum available pecuniary penalty of ($100,000 x 8) + $107,457 = $907,457.

[52] The maximum penalty available in respect of each of the breaches committed by the second defendant is $50,000.[9] Three times that amount (reflecting the three breaches) is $150,000. There are three complainants against whom the breaches were committed by the second defendant. That leads to a total maximum available penalty of $150,000 x 3 = $450,000.

[53] That means that the starting point in relation to the first defendant is $907,457; $450,000 in relation to Ms Guan.

Global penalties?

[54] Globalisation has effectively occurred in respect of the repeated breaches under each of the three heads. While two of the breaches occurred under the Holidays Act, they relate to distinct provisions. I do not consider that further globalisation is necessary or appropriate.[10]

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8 Section 142G(b).
9 Section 142G.
10 See *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514 at [139].

Intentional, inadvertent or negligent?

[55] The breaches were clearly deliberate. They reflected conscious business decisions made and executed by Ms Guan on behalf of the company. These actions included steps taken in China to recruit employees, facilitating their travel to New Zealand and a complete, sustained failure to meet the minimum employment standards once they arrived here. Ms Guan employed others and understood the need to pay wages. She had been an employer in New Zealand since 2014 and maintained wage and time records for other employees at the park (including her husband), which she disclosed to the Labour Inspector on her initial visit.

[56] Ms Guan said that she did not consider that the three complainants could lawfully work in New Zealand on visitor visas and so did not require them to. I accept that she knew they were not entitled to work. I have already concluded that she did require them to work. Her contention otherwise is firmly against the weight of the evidence, including her own communications at the time.

Severity of the breaches

[57] The failure to pay the minimum wage was complete, with no redeeming features. This plainly advantaged the first defendant from a business perspective, and conversely disadvantaged the complainants and other companies paying their employees according to law. The breaches were sustained over a relatively lengthy period of time. The amounts owing to each of the complainants as a result of the breaches were significant, particularly having regard to the complainants' individual circumstances.

[58] The same points apply in respect of the failure to pay holiday pay. It is true, as counsel for the Labour Inspector accepted, that the amounts at issue for public holiday pay for Mr Meng and Ms Xueli Wang were not large in comparison to some other cases. That is because of the number of holidays which fell due during their employment. While not particularly significant in comparison to some other cases, the amounts at issue were no doubt significant to the complainants, including because they came on top of the failure to pay them any wages whatsoever.

[59] The Labour Inspector submits that the severity of the breaches is reinforced by the requirement to pay a bond for securing employment and the subsequent failure to repay it. It is convenient to note at this point that premiums for employment are unlawful in New Zealand, give rise to recovery action and the imposition of penalties under the Act. The Labour Inspector did not seek such orders because of a previous judgment of the Court in *Mehta v Elliott.*[11] That judgment was viewed as preventing recovery action for a bond paid out of the jurisdiction. I am not sure that it is the impediment that the Labour Inspector perceives. The decision was the subject of academic discussion at the time,[12] and may have been affected by subsequent changes to the relevant legislation[13] and a judgment of the Supreme Court.[14]

[60] All of this is, however, for another day – likely before a full Court and against the backdrop of comprehensive legal argument. The point, for present purposes, is that the requirement that each of the complainants pay a bond to secure work for the first defendant, the size of the bond, and the subsequent failure to repay it, are relevant background factors in assessing the severity of the defendants' breaches.

Nature and extent of any loss or damage

[61] The complainants lost the use of the money owed to them at the time they were entitled to receive it.[15] Indeed, they have yet to receive any payment for the work they did. Ms Guan said that she would have been prepared to negotiate with the complainants and make a payment to them, but the involvement of the Labour Inspector (which she plainly regarded as unhelpful) prevented what she referred to as an "agreeable outcome".

[62] I had the advantage of seeing and hearing each of the complainants give evidence as to the impact of the defendants' breaches on them. The nature and extent of their losses were profound. Each was dignified and restrained in the way in which they described the stress and impact of the breaches on them. Each touched on the

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11 *Mehta v Elliot* [2003] 1 ERNZ 451 (EmpC).
12 See Linda Pattullo and Paul Myburgh "The Territorial Scope of New Zealand Employment Law: Quarter-Acre or Global Village?" (2003) 9 NZBLO 281.
13 See Employment Court Amendment Regulations 2004.
14 See *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245.
15 *A Labour Inspector v Daleson Investment Ltd*, above n 6, at [31].

way in which their high hopes for a better life for their family had been bitterly disappointed. They each parted with a significant amount of money to secure employment, were required to work without proper breaks in an isolated location, provided loyal service to their employer despite the way in which their employer treated them over an extended period of time, received no pay, and have never been reimbursed the bond money they paid to secure employment despite promises that they would be.

Steps to mitigate the effect of the breach

[63] I have been unable to identify any steps taken to mitigate the effect of the breaches.

Circumstances of the breach, including any vulnerability

[64] Ms Guan knew that the complainants were on visitor visas and not legally entitled to work. She then used their visa status as a means of explaining that they could not have been employees. I have already indicated that I do not accept this self-serving explanation.

[65] I agree with Judge Perkins' observation in *Prabh* that:[16]

> I do not regard … the employees' attempts to improve their immigration status as in any way absolving the defendants from the appalling way the employees were treated over the entire period of their employment. In some ways, the situation was aggravated in that the defendants took advantage of the employees' vulnerability over immigration status.

[66] The point is that each of the complainants was vulnerable to exploitation because of their desire to improve their children's lives. They saw a move to New Zealand as the means to achieve this end. Their vulnerability became more pronounced while working in an isolated location in a foreign country. The defendants used the complainants' vulnerability to their own commercial advantage.

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16 *Labour Inspector v Prabh Ltd* [2018] NZEmpC 110, (2018) 15 NZELR 117 at [10].

[67] The requirement to pay a bond for securing employment, while made outside of this jurisdiction, is an aggravating factor.

Previous conduct

[68] Neither defendant has previously appeared in the employment institutions in respect of claims involving the Labour Inspectorate, although issues of non-payment of correct holiday pay have arisen. These were resolved through discussion and I do not place any weight on them as an aggravating (or mitigating) factor. The point is neutral.

Deterrence

[69] There is a demonstrable need to bring home to these defendants that their actions were unacceptable. There is also a need to send a clear message to other employers who may be considering cutting corners in respect of minimum employment standards.

Culpability

[70] I have already touched on a number of matters which increase the level of culpability of the defendants. They do not need to be repeated. I do, however, note a further factor which is relevant, namely that the conduct in respect of Ms Min Wang occurred during the Labour Inspector's investigation into the complaint received about Mr Meng and Ms Xueli Wang, and continued after the Labour Inspector had filed proceedings.

Consistency

[71] Each case needs to be assessed on its own facts. There is, however, a need for a degree of consistency across like cases. In *Preet* pecuniary penalties and ordinary penalties were imposed, totalling $100,000.[17] There was no differentiation between the two. This case involves pecuniary penalties only.

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[17] *Borsboom v Preet PVT Ltd*, above n 10, at [199].

[72] In *Labour Inspector v Victoria 88 Ltd t/a Watershed Bar and Restaurant* the Court imposed pecuniary penalties of $10,000 against the employer together with a banning order.[18] There was no issue between the parties as to the appropriate level of penalties, which had been jointly recommended to the Court. As Ms Denmead pointed out, the business was closing down and the banning order was unlikely, in those circumstances, to have any material impact.

[73] The Labour Inspector referred to two Authority determinations in which penalties had been imposed in respect of migrant workers. In *A Labour Inspector v Pegasus Energy Ltd* ordinary penalties of $120,000 were awarded;[19] in *A Labour Inspector v Xu t/a Golden Spring Takeaway* ordinary penalties of $30,000 were ordered against a sole trader.[20] These amounts, however, were not made under Part 9A which is reserved for serious breaches and over which the Court, not the Authority, has sole jurisdiction.

[74] Very recently, the Court awarded pecuniary and ordinary penalties totalling $200,000 against both partners in a partnership.[21] Judge Perkins noted that employers can expect to see penalties increase gradually over time to ensure that the purpose of deterrence is met.[22]

[75] The short point is that there has been an insufficient number of cases involving pecuniary penalties to draw any particularly useful threads together in terms of consistency, although some general guidance can be taken from the quantum of penalties imposed to date.

Ability to pay

[76] I did not understand either the first or second defendants to be in straitened financial circumstances. Ms Guan made it clear, for example, that if ordered to

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18 *Labour Inspector v Victoria 88 Ltd t/a Watershed Bar and Restaurant* [2018] NZEmpC 26, (2018) 15 NZELR 906.
19 *A Labour Inspector v Pegasus Energy Ltd* [2018] NZERA Wellington 26.
20 *A Labour Inspector v Xu t/a Golden Spring Takeaway* [2019] NZERA 22.
21 *A Labour Inspector v Parihar*, above n 7.
22 At [47].

reimburse unpaid wages and holiday pay, together with the bond money paid by each of the defendants, she would be in a position to do so.

[77] In *Prabh* a 20 per cent reduction was made by the Court on the basis of ability to pay. This was in circumstances where the employer's financial statements showed it to be in a "difficult financial position."[23]

[78] While meeting the orders I am making against the first defendant and Ms Guan may not be easy, I am not satisfied, on the material before the Court, that a reduction on the basis of ability to pay is required.[24]

Proportionality of outcome

[79] I start with the basic principle that pecuniary penalties should not be reduced so as to create perverse incentives for employers, thereby inadvertently encouraging non-compliance as a business risk worth taking. Such an outcome would seriously undermine Parliament's intent in enacting the pecuniary penalty provisions, and the integrity of the protections against incursion into minimum employment entitlements.

[80] The Labour Inspector accepts that proportionality must be applied to reflect the amount originally at issue and the fact that the defendants are closely related. I do not consider it appropriate to approach proportionality in an overly mechanical way, for example as a percentage figure or a ratio. That would focus the inquiry on the amount of the default rather than the defaulting behaviour. There is a need for a more balanced approach. In the present case the non-payments amount to approximately $80,000. The defendants are, effectively, hand-in-glove. Penalties imposed on one will almost certainly impact on the other. I also have regard, when considering this final stage of the quantum-setting process, to the suite of orders I am making. In doing so I am, however, mindful that they are each directed at different ends - the compensatory parts of the orders I am making are essentially directed at restoring the three complainants; the banning orders are primarily directed at protecting the public. The penalty orders are, by comparison, punitive.

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23 *Labour Inspector v Prabh Ltd*, above n 16, at [64] and [68].

24 See, for example, *A Labour Inspector v Parihar*, above n 7, at [47]. No question arose as to the employer's ability to pay; no reduction was made on the basis of financial hardship.

[81] Standing back, I assess an appropriate total figure against the first defendant is $300,000; $150,000 against the second defendant.

Step 5 – Should the pecuniary penalty order be apportioned?

[82] The Court may apportion any pecuniary penalties awarded by ordering payment of a part or whole of the amount to those affected by the breaches.[25] In exercising its discretion, the Court will be guided by the particular facts of the case, the sort of apportionment allocated in analogous situations, and what the overall interests of justice require.

[83] The reality is that there is significant public interest in cases such as this. Requiring part or full payment to the Crown is a means of reflecting that. It reflects too the fact that business practices such as those employed by the defendants in this case are a cost to the Revenue. However, cases involving the imposition of a pecuniary penalty will almost always involve an impact on the employees involved and others (such as dependants). The nature and extent of that impact will inform whether an apportionment is appropriate and, if so, what proportion of the total amount it should be. In this particular case there is an additional factor which I consider relevant to the apportionment exercise, namely the bond payment. I return to this issue below.

[84] I have taken the emotional losses to each of the complainants into account in making the compensatory orders I have made.[26] It is not appropriate to account twice for those losses by reflecting them in the quantum of apportionment of the pecuniary penalty orders I am making. If I had not made compensation orders reflecting such non-pecuniary losses, I would have done so.

[85] There is, however, the factor of the bond payments of ¥200,000 made by each complainant at Ms Guan's behest on behalf of the company. It would not be appropriate to make separate orders for the repayment of the bond money to each of the complainants (even if I was otherwise satisfied that there was a legal basis for

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25 See s 136(2) which applies via s 142A. See *Labour Inspector v Victoria 88 t/a Watershed Bar and Restaurant*, above n 18, at [54]–[57]; *Labour Inspector v Prabh Ltd*, above n 16, at [79]–[80].

26 See below at [96]-[97].

doing so, despite *Mehta*),[27] because no such orders have been sought by the Labour Inspector.

[86] However, I consider it appropriate to exercise the Court's broader jurisdiction under s 189 of the Act to reflect these amounts. That provision confers jurisdiction on the Court to make orders it considers just in equity and good conscience, provided that it is not inconsistent with any provision of the Act to do so. I do not consider that approaching the issue of an appropriate apportionment under s 136 to reflect the amount paid by each complainant by way of bond, is inconsistent with that provision. Indeed, I am satisfied that it is wholly consistent with equity and good conscience to do so. I understood Ms Denmead to accept this.

[87] In the circumstances, it is appropriate that the apportionment of the pecuniary penalties I am awarding reflect the bond payments, the loss of the money in the intervening period, and the impact on the complainants' dependants. I make the following pecuniary penalty orders:

(a) The first defendant is to pay to the Registrar of the Employment Court, Auckland, the sum of $300,000 by way of pecuniary penalty orders within 28 days of the date of this judgment.

(b) The second defendant is to pay to the Registrar of the Employment Court, Auckland, the sum of $150,000 by way of pecuniary penalty orders within 28 days of the date of this judgment.

(c) If either defendant fails to make the due payment within this timeframe, the Court's orders will become immediately enforceable as a debt to the Crown (s 142H).

[88] From the total amount of pecuniary penalties of $450,000, there will be a payment to each employee in the sum of $100,000. The Registrar is to consult with the Labour Inspector as to how this payment will be made. The balance of $150,000 will be paid to the Crown.

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[27] *Mehta v Elliot*, above n 11.

Issue three – Compensation orders appropriate?

[89] The Court may make compensation orders where a declaration of breach has been made and the Court is satisfied that the employee concerned has suffered, or is likely to suffer, loss or damage because of the breach. The Act specifically provides that the Court may make more than one order in relation to the same breach.[28] In the present case the Labour Inspector seeks three orders – pecuniary penalty orders, compensation orders and banning orders.

[90] Section 142L (terms of compensation orders) provides that 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 [s 142J]." Section 142J provides that 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.

[91] The first point is that compensation orders do not appear to be limited to pecuniary loss. If they were intended to be restricted in this way, it is likely that Parliament would have made that clear. Rather, s 142J(2) provides that if the compensation order is for "wages or other money payable", it should firstly be against the employer. The reference to "wages or other money payable" only appears in this subsection, suggesting that the "loss or damage because of the breach" referred to in s 142L(1) encompasses something more. I conclude that the Court can have regard to any non-pecuniary loss and damage, provided it is causally linked to the breach, when setting an appropriate compensatory sum under s 142L(1). It follows that the non-pecuniary losses suffered by each of the complainants in terms of humiliation, loss of dignity and injury to feelings as a result of the first defendant's breaches are relevant.

[92] I return to the issue of non-pecuniary loss below. I first deal with pecuniary loss via unpaid wages and holiday pay. The Labour Inspector prepared a range of calculations based on different hours of work for each of the complainants. Ms Guan

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[28] Section 142T.

accepted that if the complainants were found to be employees, wages and holiday pay were owing and I did not understand her to have any difficulties with the calculations that Ms MacRury had made in respect of Mr Meng and Ms Xueli Wang. She did not accept the calculations in relation to Ms Min Wang. I have already set out my findings in relation to the hours that were, more likely than not, worked by her.

[93] I am satisfied that Ms MacRury's calculations in respect of Mr Meng and Ms Xueli Wang are appropriately adopted for the purposes of assessing pecuniary losses. I am satisfied that the revised calculations prepared by Ms MacRury in relation to Ms Min Wang's hours of work, adjusted to reflect the four hours a day worked during the period her wrist was sore, are appropriately adopted.

[94] I have found it helpful to have regard to the case law developed under s 123(1)(c)(i) of the Act in considering the non-pecuniary aspects of the compensation payable under s 142L. While the quantification process is an inexact science, there is an obvious need to avoid any duplication with the other heads of award (including pecuniary penalties).

[95] Ms Xueli Wang described feeling as though she would die if she did not leave New Zealand, and the great spiritual and physical pressure she was under while working at the park. She was not eating well and had to take medication to sleep. She was very scared. Ms Xueli Wang had to tell her daughter that she would now need to depend on herself. That was clearly a very painful thing for Ms Wang to have to say. She summarised the situation by saying that it "was just like a nightmare" and she "wanted to die." Mr Meng said that he felt he was in "a prison". He only left the park a few times while he was working there, and said he was only allowed out once on his own. He described the impact on his spirit and his family, and said: "I was very regret and feel very hated and it feels that I was cheated by someone, by Guan Shenshen." Ms Min Wang described persistently crying and feeling wretched about the situation she had found herself in with her young daughter.

[96] I would place the level of loss and damage comfortably in the top band in terms of the compensatory bands previously identified by the Court as helpful.[29] I consider

[29] *Richora Group Ltd v Cheng* [2018] NZEmpC 113, (2018) 15 NZELR 996 at [65].

compensation of $50,000 for non-pecuniary losses to be well within the range in respect of each of the complainants.

[97] The following compensation orders are made against the first defendant:

(a) Mr Meng is to be paid by way of compensation order the (rounded) sum of $69,500 comprising unpaid wages, holiday pay and compensation for non-pecuniary loss.

(b) Ms Xueli Wang is to be paid by way of compensation order the (rounded) sum of $69,000 comprising unpaid wages, holiday pay and compensation for non-pecuniary loss.

(c) Ms Min Wang is to be paid by way of compensation order the (rounded) sum of $91,850 comprising unpaid wages, holiday pay and compensation for non-pecuniary loss.

(d) The sums referred to in [97](a)–(c) inclusive are to be paid to the Labour Inspector on behalf of the three complainants within 28 days of the date of this judgment.

(e) 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.

Issue four – Are banning orders appropriate?

[98] The Labour Inspector seeks a banning order against each defendant for a period of three to five years. Ms Guan says that this would have a negative impact on her ability to run a second business, although did not provide any evidence as to why this might be so.

[99] The circumstances in which the Court might consider a banning order appropriate were recently traversed by Judge Perkins in *Labour Inspector v Prabh Ltd*. He observed that:[30]

> [73] A banning order is a particularly draconian measure. It was introduced into the Act as part of a suite of remedies to advance the objects of providing additional enforcement measures to promote the more effective enforcement of employment standards. This in turn provides protection to employees from abuses by unscrupulous employers not willing to comply with civilised and humane standards of employment.
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> …
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> [75] There will be cases where the actions of the employer against its employees are so heinous and persistent that a banning order should be made on the first occasion that the breaches of standards are prosecuted. An example of this might be where a large number of vulnerable employees housed and employed in slave-like conditions are involved. Generally, however, a banning order is more likely to be imposed in prosecution of an employer for subsequent breaches of standards where it is clear the imposition of a penalty alone on the first occasion has not acted as a sufficient deterrence. Nevertheless, each case must be considered on a case by case basis and with regard to the principles and purposes enunciated at the time of the introduction of the provisions in the Act inserted with effect from 1 April 2016.

[100] *Prabh* involved circumstances where the employer and its officers, the second and third defendants, had not previously come before the Court. Steps had been taken to remedy the default and the financial position of the company was dire, although it was able to continue to operate. The Court had regard to the potential impact of a banning order on other employees and their dependants, while noting that, in a more serious case, it might well be that the employer being unable to continue in business is a desirable outcome. I respectfully agree with that observation.

[101] An earlier decision of the Employment Court compared banning orders with similar provisions under the Companies Act 1993 and the Financial Markets Conduct Act 2013,[31] a comparison considered to be appropriate because it was made by the relevant Minister during the passage of the Bill.[32] Prohibition orders under the Companies Act were described by the High Court in this way:[33]

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30 *Labour Inspector v Prabh*, above n 16.

31 *Labour Inspector v Victoria 88 Ltd t/a Watershed Bar and Restaurant*, above n 18, at [33]–[35].

32 See Office of the Minister of Workplace Relations and Safety "Strengthening enforcement of employment standards" (undated) at 30. See also MBIE "Employment Standard Bill: Departmental Report to the Transport and Industrial Relations Committee" (3 December 2015) at 45.

33 *Davidson v Registrar of Companies* [2011] 1 NZLR 542 (HC) at [91] (footnotes omitted) (emphasis added).

> *Prohibition is aimed* not at remedying wrongs done to shareholders and creditors of the insolvent company but *at protecting the public from unscrupulous or incompetent directors in future, deterring others, and setting appropriate standards of behaviour*. At the same time, any given director or manager inevitably experiences prohibition as a punishment; it is an adverse consequence of an inquiry into his or her involvement in an insolvent company.

[102] While the present case bears some similarity to the circumstances in *Prabh*, I consider that a banning order is appropriate. That is primarily because I have no confidence that Ms Guan would not repeat the cynical behaviour which has brought her before the Court. She did not express any remorse or insight, despite the overwhelming evidence presented. The likelihood of repetition and the severity of the conduct mean that an order is necessary for the protection of future employees and the broader public.

[103] It is true that neither defendant has come before the employment institutions on similar matters before. I take into account too the fact that the financial orders I am imposing are not insignificant and will undoubtedly reinforce the perils of non-compliance. I also have regard to what Ms Guan says will be the impact of a banning order on her, although the details were sparse. Nonetheless, the egregious circumstances of this case, the contumelious way in which the complainants were dealt with over an extended period of time, the lack of insight, and the need for a strong message to be sent about this sort of conduct, weigh firmly in favour of a banning order against both defendants.

[104] The Court may impose a banning order for a period of up to 10 years.[34] I consider that a banning order of 18 months will suffice to meet the underlying objectives of the legislation in this particular case.

[105] A banning order of 18 months' duration is accordingly imposed on each defendant. The terms of the banning orders are:

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[34] Section 142O.

(a) The first defendant is prohibited from entering into an employment agreement as an employer for a period of 18 months from 28 days from the date of this judgment.

(b) The second defendant is prohibited from entering into an employment agreement as an employer for a period of 18 months from 28 days from the date of this judgment, from being an officer of an employer and from being involved in the hiring or employment of employees.

(c) Leave may be obtained from the Court by either defendant to do something prohibited by the terms of this order, pursuant to s 142N(2).

(d) These orders are to be notified to the Chief Executive of the Ministry of Business, Innovation and Employment, and by notice in the Gazette, pursuant to s 142Q.

Banning order post-script

[106] There should be no room for doubt that if one or other or both of the defendants come before the Authority or the Court again on related matters, a lengthier banning order is a likely prospect. I also draw the defendants' attention to s 142R, which provides that it is an offence to breach a banning order imposed by the Court, carrying with it a maximum fine of $200,000 and a term of imprisonment not exceeding three years.

Issue five – Interest payable on amounts owed?

[107] The Labour Inspector claims interest. I agree that interest is appropriately ordered on each of the amounts ordered against the defendants, other than the pecuniary penalty orders. Interest is to be calculated applying the Money Claims Act 2016.[35] I reserve leave to the parties to apply for further orders if the appropriate sum cannot be agreed.

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[35] Which applies to proceedings filed after 1 January 2018, as these were.

Issue six – Where should costs lie?

[108] The Labour Inspector seeks a contribution to her costs. If costs cannot be agreed I will receive memoranda, with the Labour Inspector filing and serving any application together with supporting material within 40 working days (having regard to the holiday period), the defendants within a further 20 working days, and anything in reply within five working days.

Summary of orders

[109] The first defendant has breached the minimum entitlement provisions contained in the Minimum Wage Act 1983 by failing to pay minimum wages to the three employees concerned. The first defendant has further breached the minimum entitlements and payment for such entitlements under the Holidays Act 2003 for the three employees concerned for holidays and for holiday pay owing at termination of employment for the entire period of employment.

[110] The second defendant, Ms Guan, is a person involved in the breaches of minimum standards by the first defendant.

[111] Declarations of breach are made against both the first and second defendants.

[112] Pecuniary penalties in the sum of $300,000 (at [87](a)) are ordered against the first defendant; pecuniary penalties of $150,000 (at [87](b)) are ordered against the second defendant. These sums are to be paid to the Registrar of the Employment Court, Auckland, within 28 days of the date of this judgment. From the total amount of pecuniary penalties of $450,000, there will be a payment to each employee in the sum of $100,000. The Registrar will consult with the Labour Inspector as to how this payment will be made. The balance of $150,000 will be paid to the Crown.

[113] 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 in [97](a)–(c) are to be paid to the Labour Inspector within 28 days of the date of this judgment.

[114] A banning order is made against each defendant for a period of 18 months commencing 28 days from the date of this judgment on the terms set out at [105] above.

[115] Interest is to be paid on the amounts referred to at [107] above, calculated in accordance with the methodology set out therein.

[116] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 3 pm on 11 December 2019