IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2016] NZEmpC 167
EMPC 114/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Plaintiff
AND	TECH 5 RECRUITMENT LIMITED Defendant

EMPC 132/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND BETWEEN	TECH 5 RECRUITMENT LIMITED Plaintiff
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

Hearing:	13 July 2016 (Heard at Wellington)
Court:	Chief Judge GL Colgan Judge ME Perkins Judge KG Smith
Appearances:	G Kelly, counsel for Labour Inspector S Dyhrberg and J Boyle, counsel for Tech 5 Recruitment Ltd
Judgment:	16 December 2016

JUDGMENT OF THE FULL COURT

Introduction

[1] Rebuilding work following the devastating Canterbury earthquakes in 2010 and 2011 created a demand for qualified trades-people that was partly filled by overseas recruitment. This proceeding is about whether the recruitment of carpenters from the Republic of the Philippines (the Philippines) by Tech 5 Recruitment Limited (Tech 5) breached s 12A(1) of the Wages Protection Act 1983 (the Act) by seeking or receiving a premium in relation to employment.

[2] The distinction between what is an illegitimate premium that may not be recovered from an employee, and a genuine recruitment cost that may be recovered, is largely bereft of developed case law. For that reason a full Court was appointed by Chief Judge Colgan pursuant to s 209 of the Employment Relations Act 2000. A priority hearing was accorded to this proceeding because Tech 5's recruitment of other trades-people from overseas had been put at risk as a result of this case. We also understand there may be similar cases currently before the Employment Relations Authority (the Authority) that would benefit from guidance.

[3] In the Authority the Labour Inspector sought a determination that the Wages Protection Act had been breached and a penalty. While the Labour Inspector seeks declarations that a breach occurred no penalty is now sought. Tech 5 disputed breaching the Act, asserting that it had not sought, or received, a premium.

[4] Central to both challenges was Tech 5's recovery of trade testing costs from the carpenters it recruited from the Philippines.

Background

[5] The trial was conducted relying on an agreed statement of facts supplemented by evidence from Tech 5. Tech 5's business is labour on-hire. This is a business arrangement whereby Tech 5 recruits and itself employs trades-people, but contracts with builders, contractors or sub-contractors, to use the services of its employees. In 2013 Tech 5 saw an opportunity to provide qualified trades-people for the Christchurch rebuild and began a recruitment process to employ qualified carpenters from the Philippines who were to be employed by it to work in the city. Recruitment

took place in the Philippines using a selection process developed by Tech 5 to enable it to be satisfied that carpenters who were to be offered employment had appropriate skills or experience. In 2013, 25 carpenters were recruited from the Philippines.

[6] While the recruitment process took place in the Philippines, no issues arise about the application of New Zealand employment law or the jurisdiction of the Court. Those points were not taken by either the Labour Inspector or Tech 5 and, in any event, each of Tech 5's employees signed an employment agreement on arrival in New Zealand.

The employment agreement

[7] Once the employment selection process was completed in the Philippines, each successful candidate was offered an individual employment agreement. That agreement was essentially generic, with some bespoke terms and conditions to meet the circumstances of each individual. Each carpenter was provided with a letter headed "Confirmation of Fixed Term Employment" which, together with a document described as Tech 5's "Standard Terms of Employment", comprised the employment agreement. Each agreement was for a fixed term of three years, from October 2013 to October 2016. Although the precise starting dates for each employee varied, they were all employed between 10 June 2013 and 14 October 2013.

[8] Three addenda were attached to the letter provided to each carpenter. Addendum 1, labelled "Philippines Relocation and Prepaid Expenses Agreement for Carpenters", contained the passages that have caused this litigation. In material parts that addendum reads:

> 1. … It is also providing a salary advance of $300.00 upon arriving in New Zealand.
>
> The above is considered a remuneration advance on the related Employee's income derived from future hours worked by the Employee for Tech 5 when under contract to it. Tech 5 shall pay (at its cost) costs associated with recruitment, immigration (except specialist medical appointments) and training.
>
> 2. Recruitment of employees from the Philippines involves a significant investment on the part of Tech 5 and includes direct costs such as testing, medicals, mandatory insurance, immigration fees,

agency fees and flights. There are also significant indirect costs such as the recruitment team travel, accommodation, purchase of staff accommodation, training, site staff support, amongst many others.

3. This investment is made on the basis that the employee completes their three year fixed term engagement with Tech 5 Recruitment Ltd.

Terms

4. The Employee has been offered and accepted a three year fixed term contract with Tech 5. This agreement forms part of that contract.

5. The Employee undertakes to remain in Tech 5's continuous service for a minimum period of 3 years.

6. If the Employee does not complete the 3 year term with Tech 5, the Employee agrees that Tech 5 will be entitled to recover costs associated with his recruitment, immigration, relocation and training. The cost = USD10729.25 to Tech 5.

7. In the event that the Employee's contract is terminated (including termination by the Employee) for any reason (other than by reason of termination by Tech 5 caused by lack of available work) before the expiry of the minimum period of three years' continuous service, the Employee also undertakes to repay NZD6,650.00 being relocation costs, salary advance and related tooling and clothing expenses incurred by Tech 5.

8.

Schedule of Relocation Costs and Employee Expenses: *The following schedule details costs and expenses that Tech 5 has incurred on behalf of the Employee that are required to be repaid by the Employee.*
Flight from Manila to Christchurch
Accommodation up front being rent for the first 2 weeks
Cost of Medical required by Embassy of New Zealand
Mandatory Insurance Coverage for 3 years
Immigration New Zealand Medical Test
Visa Processing Fee
Trade Testing
Site Safe Testing
*Tech 5 Branded clothing Kit and Tool Kit** **Please see Addendum 2 and 3 (which form part of this agreement) for details*
Total Relocation Costs and Employee Expenses = $6,650.00

9. The employee consents to repayment of the above costs incurred by Tech 5 by deduction of the above sum being $6,650.00 from their remuneration in weekly instalments of NZ$125.00 per week until the above amount and any other outstanding amount is paid in full.

10. If there is any outstanding amount due and owing to Tech 5, the Employee agrees to pay this amount prior to his final day of engagement. If any outstanding amount is not paid, the Employee

> understands that Tech 5 will be entitled to recover such amount as a debt owed by Contractor.

[9] All of the employees, except one, entered into an employment agreement containing this addendum.[1] Initially the repayment of the $6,650 referred to in cls 7 and 8 was deducted from each employee's wages at the rate of $125 per week. In June 2014, Tech 5 voluntarily reduced the amount to be recovered from $6,650 to $5,619. A further reduction to $5,499 followed. The rate of recovery from each employee's wages was also reduced to $100 per week. Those reductions followed an audit by the Labour Inspector and a review of Tech 5's standard-form employment agreement. As a result of those reductions, two carpenters received a refund because they had paid more than $5,619 towards the costs referred to in the addendum.

[10] With effect from September 2014, new individual employment agreements were offered by Tech 5 to its employees and prospective employees. This new version of that agreement was subjected to extensive review and comment from the Ministry of Business, Innovation and Employment (including Immigration New Zealand) and did not contain provisions such as those in cls 6 and 7 of Addendum 1. From September 2014 the employment agreements have recorded the reimbursement payable to Tech 5 employees as $5,499.

Relocation costs and employee expenses

Preliminary

[11] Before considering whether these employment agreements contained a premium, or whether Tech 5 was seeking one, a preliminary comment is necessary about a tension in the wording of cls 6, 7 and 8 in Addendum 1 that was not satisfactorily explained by Tech 5. Clause 6 refers to Tech 5 being entitled to recover costs associated with each employee's recruitment, immigration, relocation and training with the cost said to be US$10,729.25. Clause 7 refers to relocation costs, a salary advance, tooling and clothing expenses of NZ$6,650. Clause 8 is a schedule of costs and expenses required to be paid by the employee described as "Schedule of Relocation Costs and Employment Expenses", including flights, accommodation, insurance, medical testing, site safe testing and trade testing.

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[1] One carpenter had an agreement to repay $5,150 rather than $6,650.

[12] The relationship between the amounts referred to in each clause was not explained in the employment agreement and some overlap between them is apparent. The explanation given by Mr Wyatt, Tech 5's Chief Executive, was that the company was attempting to draw to the attention of its recruits the significant cost being incurred in ascertaining their suitability for work, securing employment, and arranging for transport to New Zealand. However, we were told that Tech 5 did not regard the amounts in cls 6 and 7 as cumulative and it had not sought or received US$10,729.25 from any employee.

[13] Finally, although Tech 5 has regularly deducted money from the wages for each of its carpenters to satisfy the repayment obligations in cls 7 and 8, it has not sought repayment, or further repayment, from any employee who left its employment before the end of the three-year fixed term. However, Tech 5 accepted that over the course of three years of employment each employee would eventually pay the company those relocation costs and employee expenses.

The recruitment process and trade testing

[14] Mr Bothma, a director of Tech 5, described this recruitment process as navigating "uncharted waters", with his company facing the complexities of employing staff and dealing with two separate Government entities, one in the Philippines and one in New Zealand: Philippines Overseas Employment Administration and Immigration New Zealand.

[15] Tech 5 engaged two companies based in the Philippines to assist in finding carpenters: EDI Staffbuilders and PNI International. Both companies are recognised officially by the Philippines Overseas Employment Administration. Both companies advised Tech 5 that it was standard practice in the Philippines to carry out trade testing of candidates for employment and for those tests to be paid for by those candidates.

[16] EDI Staffbuilders and PNI International helped create a long list of job candidates. Eventually, through a process of trade testing devised by Tech 5, that list was reduced to the 25 carpenters who were offered, and accepted, employment. Mr Bothma explained the necessity for this trade testing. He said that in the

Philippines the quality of candidates' skills and experience varies significantly. Based on his company's experience, he said approximately 20 per cent of candidates fraudulently overstated their practical, theoretical or global experience. Tech 5 concluded it was not able to rely on the authenticity or quality of qualifications submitted by job candidates, and it was therefore necessary to satisfy itself about each person's skills and experience before offering jobs. That conclusion led to Tech 5 establishing its own trade testing process.

[17] Mr Bothma said this testing was unusual and unique when it came to recruiting trades-people from the Philippines. He acknowledged this testing is not undertaken by Tech 5 when it recruits trades-people in New Zealand with New Zealand qualifications, or from other western countries.

[18] There were two parts to this trade testing. Part one was an interview followed by the first trade test. Candidates were assessed for their proficiency in English, followed by an introductory practical assessment of their skills. The process was structured. Tech 5 flew a director and a site manager, or qualified builder, to Manila to conduct this part of the test**.** The job candidate's English language skills were checked by asking for simple tasks to be undertaken such as selecting a named tool from among other tools on a work bench. That elementary task was followed by a test with a skill saw. Plain English was used to convey instructions. Each instruction was repeated. The candidate then completed a rip cut, plunge cut, rafter cut and other carpentry-related cuts with a skill saw to demonstrate he could use it safely.

[19] About half of those who completed this part of the test were invited to participate in part two. Part two involved an assessment by a New Zealand licensed building practitioner engaged by Tech 5, who was flown to Manila to conduct it. The builder practitioner outlined a work plan to the candidates. The work plan was displayed on a wall and on work benches. A time limit was imposed for the task to ascertain each candidate's ability to work safely under pressure. In the example given to the Court the task was to build a saw horse.

[20] Once the task was completed the builder, and a Tech 5 director, checked the work to ascertain if it had been performed as required by the work plan, the angles were correct and that the combination of cuts for the legs of the saw horse were correct. A mark was assigned to the work. That mark determined whether the candidate was offered a job in New Zealand. Mr Bothma said that approximately 50 per cent of the candidates who participated in the second part of this testing passed.

[21] Two rounds of trade testing were conducted in April 2013 and July and August 2013 respectively. Once the group of successful candidates was established, they were offered a job in Christchurch, completed a medical test and applied for work visas. Prior to the candidates departing from the Philippines they attended an induction about what to expect while working in New Zealand including information about wages, budgeting, taxation, banking, accommodation, travel and deductions from their pay. Those deductions included costs allocated for the trade testing.

Trade testing cost breakdown

[22] While not itemised in cl 8 of Addendum 1, or elsewhere in the employment agreement, the costs of the trade testing included flights between New Zealand and the Philippines for the Tech 5 directors and staff who participated, the salaries of the Tech 5 employees who conducted the testing, the costs of a licensed building practitioner including his flights, accommodation costs, and the cost of the trade centre facility used to conduct the tests. For the first round of tests, in April 2013, the cost to Tech 5 was approximately $42,461.16 broken down in the following way:

a) 98 applicants were tested for the basic test at an estimated cost per person of $142.49.

b) 50 applicants were tested twice and the cost of their second test per person was approximately $427.45.

[23] The 25 successful carpenters were informed that the trade testing costs payable by them would be $586. The way that amount was calculated, according to Mr Wyatt, was that of the costs of $42,461.16, Tech 5 passed on only $14,650 (the

calculation is $14,650 ÷ 25 = $586). The remaining cost, of $27,811.16, was absorbed by Tech 5. In other words, the 25 successful candidates were not required to bear the full costs of trade testing by including the costs of testing the unsuccessful candidates. Mr Wyatt acknowledged that, while the amount of $586 was considered to be accurate, it was an estimated amount, because the costs were incurred on a global base and a more specific itemisation was problematic.

The Authority's determination

[24] Both the Labour Inspector and Tech 5 challenged the Authority's determination.[2] The Labour Inspector challenged the determination recorded at "A", that Tech 5 had not sought a premium. That paragraph reads:

> Clauses 6 and 7 of Addendum 1 which are bond clauses do not amount to the seeking of a premium for the purpose of s 12A of the Wages Protection Act 1983 [WPA] because there was no evidence of an attempt by Tech 5 Recruitment Limited to enforce the clauses and/or no evidence that any payment was received in reliance on the clauses.

[25] The Authority used as an example of this non-enforcement the fact that there was no evidence of an attempt to enforce the "bond clauses" through a debt collection agency.[3]

[26] That analysis led the Authority to conclude:[4]

> I find that the prohibition against seeking a premium in respect of the employment of a person for the purposes of s 12A of the WPA requires a step to be taken to seek a premium beyond simply having a clause in the employment agreement. There was no evidence to support such a step was taken by Tech 5 to seek a premium from its employees. I do not find for the above reasons there is a breach of s 12A(1) … in respect of the bonds in clauses 6 and 7 of Addendum 1.

[27] Tech 5 has challenged the determination that deductions from wages for trade testing were premiums, summarised by the Authority under "B", which reads:

> The payments received by Tech 5 Recruitment Limited by way of deductions from the employees' wages for trade testing (testing centre and

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2 *A Labour Inspector of the Ministry of Business Innovation and Employment v Tech 5 Recruitment Ltd* [2016] NZERA Christchurch 51.
3 At [55].
4 At [58].

> accommodation and salary costs for skills testers) were premiums under s 12A of the Wages Protection Act 1983.

[28] The challenge also puts in issue the following paragraph of the determination which reads:[5]

> Payment for the trade testing, which included a component of accommodation and salary for the skills testers as well as the test centre cost, was a payment demanded of the 25 employees for their employment agreement with Tech 5. These costs were business costs and were not accounted for on the true cost individually for trade testing for each employee. Applying the definition in *Sears* of a premium I find payment for trade testing which included the testing centre, accommodation and salary for that period was consideration paid by the employees for an employment agreement with Tech 5 in breach of s 12A(1) of the WPA.

[29] Tech 5 seeks a declaration that the Authority erred in reaching these conclusions.

The issues

[30] These challenges raise three issues:

1. What is a premium within the meaning of s 12A of the Act?
2. Is recovery from the employees of the cost of trade testing in Addendum 1, a premium?
3. If recovery of the costs of trade testing is a premium was it sought or received by Tech 5 within the meaning of s 12A of the Act?

What is a premium within the meaning of s 12A of the Act?

[31] Section 12A of the Act reads:

> **12A No premium to be charged for employment**
>
> (1) No employer or person engaged on behalf of the employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

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5 At [74].

> (2) Where an employer receives any amount of money in contravention of subsection (1), whether by way of deduction from wages or otherwise, then, irrespective of any penalty to which the employer thereby becomes liable, the person by whom the money was paid or, as the case may be, from whose wages it was deducted, may recover that amount from the employer as a debt due to the person; and civil proceedings for the recovery of the amount may be instituted in the Employment Relations Authority by the person or, notwithstanding any disability to which the person is subject, by a Labour Inspector designated under section 223 of the Employment Relations Act 2000 on behalf of the person.
>
> (3) Any such proceedings instituted by any Labour Inspector may be continued or conducted by the same or any other Labour Inspector.

[32] The Act does not define "premium" or otherwise describe what is meant by it and there is a paucity of court decisions about its meaning. Ms Dyhrberg, counsel for Tech 5, referred to *Sears v Attorney-General* to capture the concept of a premium.[6] In *Sears* the issue was whether deductions from the employees' salary, to satisfy the employer's contribution to the employees' superannuation, constituted a premium. In a brief description of premium the Court said:[7]

> In the normal understanding of the term a premium imports some consideration paid or demanded as a price of a contract.

[33] In reaching that conclusion the Court did not refer to any authority to support that proposition, although it did draw on a reference to a premium for the grant of a lease as being a common example of what is meant by that word in a similar context. This Court's judgment in *Sears* was overturned on appeal but not on this point.

[34] Developing that proposition from *Sears*, Ms Dyhrberg moved on to discuss consideration. She referred to *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*[8] and *Attorney-General for England and Wales v R*, describing consideration as:[9]

> An act of forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

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6 *Sears v Attorney-General* [1994] 2 ERNZ 39 (EmpC).
7 At 30.
8 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL) at 855.
9 *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) at [39] per Tipping J.

[35] Ms Dyhrberg also referred to the classic example of a premium illustrated by this Court's decision in *Tan v Yang.*[10] In *Tan* the parents of an aspiring immigrant to New Zealand agreed to pay money to a potential employer in exchange for him offering their daughter a job and, therefore, satisfying her immigration requirements. Unequivocally that payment was consideration for the job and the transaction breached s 12A of the Act.

[36] We were also invited to accept as persuasive a determination of the Authority in *Zonneveld v Maudaara Ltd* where it said:[11]

> … 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.

[37] The thrust of these submissions was that, when viewed overall, a transaction had to be seen as attempting to extract a payment for the job before it could be impugned as a premium. It follows that passing on trade testing costs should not be seen as seeking or receiving a premium; there was no element of consideration for the job offered to these carpenters by paying for trade testing. Rather, Ms Dyhrberg submitted, the addendum created legitimate bonds to meet some of the costs of recruitment and relocation. The result of that analysis is that it was reasonable for Tech 5 to expect repayment and no breach of s 12A had occurred.

[38] Aside from *Sears*, the only other case in which the Court examined s 12A in detail was *Mehta v Elliott (Labour Inspector).*[12] That case was primarily about the Court's jurisdiction and the possible extraterritorial application of the Act, because the allegation that an unlawful premium had been paid for work involved a transaction that took place and was concluded in India. However, the Court did consider the circumstances in which s 12A was inserted into the Act and discussed the historical context of the development of a prohibition on seeking or receiving premiums for work.

[39] In *Mehta* the discussion of the enactment of s 12A begins as follows:

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10 *Tan v Yang* [2014] NZEmpC 65, [2014] ERNZ 733.
11 *Zonneveld v Maudaara Ltd* [2015] NZERA Christchurch 99 at [32].
12 *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451 (EmpC).

> [45] Apparently curiously, s 12A(2) Wages Protection 1983 was inserted into that pre-existing statute by s 62(2) Health and Safety in Employment Act 1992. Clause 55 of the Health and Safety in Employment Bill which became s 62, dealing with consequential amendments, appeals, revocations, and savings of the Acts to be consolidated, made no reference to what was to become s 12A Wages Protection Act. A report by the Department of Labour to the Labour Select Committee considering the Bill advised that the Factories and Commercial Premises Act 1981, one of the statutes to be repealed, contained at s 17 a prohibition upon premiums for employment in "undertakings" as the premises covered by the 1981 Act were then described. So although premiums for employment did not relate to the general objective of the Health and Safety in Employment Act 1992, it was recommended to Parliament that the prohibition on premiums in certain work situations be preserved. The consequence of the general words of s 12A was that formerly limited prohibitions upon the payment of premiums were expanded to include all employment situations.

[40] *Mehta* noted that the Act is part of the minimum code of employment protections governing employment in New Zealand,[13] and that arrangements caught by s 12A do not require the existence or performance of an employment agreement.[14] In an examination of the impact of s 12A, the Court noted:[15]

> Section 12A does not only impose restrictions upon persons seeking the payment of a premium for employment. Its countervailing purpose is to provide a benefit to vulnerable potential employees to relieve them of the pressures of such demands. Section 12A acts both as a prohibition upon persons connected with (or being) a prospective employer and for the benefit of a prospective employee.

[41] As part of the Court's analysis, an historical review of early 20th century legislation tracing references to prohibited premiums was undertaken in *Mehta.* The Court noted the reference to that prohibition in the Factories Act 1901, which had repealed the Factories Act 1894, and a similar provision dealing with shops and office legislation contained in s 7 of the Shops and Offices Act 1904. Successor legislation dealing with shops and offices continued to have those sorts of provisions. However, this early legislation, in common with the current Act, did not attempt to define the meaning of "premium" to describe the prohibited behaviour. Aside from a general desire to protect vulnerable employees from potential exploitation, the full ambit of the word "premium", and the nature and type of transactions to which it applies, has been left unsaid.

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13 At [40].
14 At [51].
15 At [52].

[42] The word "premium" has appeared in several other early New Zealand statutes dealing with employment law, including the Wages Protection Act 1899, and the Employment of Boys or Girls without Payment Prevention Act 1899.

[43] The preamble to the Wages Protection Act 1899 reads:

> Whereas there has lately grown up amongst certain employers a practice of taking out accident insurance policies, to insure their workmen against accident and themselves against liability under the Employers' Liability Acts, and of compelling or inducing their workmen to contribute, as premium for such insurance, sums at a rate proportionate to their wages: And whereas such practice is oppressive, and it is expedient to prevent the same: And whereas it is also expedient to make other provisions for the protection of wages …

[44] The prohibition on demanding premiums in that 1899 Act had the obvious purpose of preventing an insurance-related cost of business being passed on to the employee. Whether "premium" was used because the subject was an insurance cost is unclear, but the purpose of this prohibition was to protect the income of employees from being eroded by an employer passing on its costs of business.

[45] The Employment of Boys or Girls without Payment Prevention Act 1899 also refers to a premium. The relevant sections read:

> 7(1) No premium shall be paid by any such boy or girl to, or be accepted by, any factory-occupier for employment in any factory or workroom, whether such premium is paid by the boy or girl employed or by some other person; and if any factory-occupier is guilty of any breach of the provisions of this section he shall be liable to a penalty not exceeding ten pounds.
>
> (2) In any case when any such premium has been paid as a foresaid, or where the factory-occupier has made any deduction from wages, or received from the boy or girl, or from any person on behalf of the boy or girl, any sum in respect of such premium or employment, then irrespective of any penalty to which he thereby becomes liable, the amount so paid, deducted, or received may be recovered from the factory-occupier in civil proceedings instituted by any Inspector of Factories in the name and on behalf of the boy or girl concerned.

[46] Neither of those statutes defined "premium" although they both contain prohibitions on seeking or receiving a premium subsequently repeated in the Wages Protection Act.

[47] As has already been noted, the Factories Act 1901 contained a similar prohibition on premiums as did the Shops and Offices Act 1904. In the debate leading to the passage of the Shops and Offices Act 1904, the Labour Bills Committee Report of the Shops and Offices Bill 1903 recorded evidence of situations where payment was anticipated by employers for entering into an apprenticeship. The debate was about the appropriateness of an employer being paid to ensure that apprentices secured positions. Much the same was said in the Committee Report to the House of Representatives about the Factories Bill 1901, leading to the Factories Act that year, where evidence was given on behalf of the Federated Council of New Zealand Builders and Contractors Association of Christchurch about taking premiums. The evidence from that Association was that its members could not afford to take on boys as apprentices and to pay men to teach them the trade. It was argued that allowing a builder to take a premium might allow the employment of a boy to learn that trade by off-setting the associated cost. That argument was obviously unsuccessful.

[48] These statutes were complemented by the Truck Act 1871, which did not deal with premiums but did prohibit paying wages in goods; payment had to be in money. These statutes containing a prohibition on premiums for work, and the discussion that surrounded the introduction of them, indicate an intention to prevent exploitation of vulnerable employees, or potential employees. However, while the language used has always been quite broad, those statutes only shed a dim light on the meaning of "premium" in s 12A.

Scheme and purpose

[49] We have also considered the scheme and purpose of the Wages Protection Act. Section 5(1) of the Interpretation Act 1999 requires the meaning of an enactment to be ascertained from its text and in the light of its purpose. It is permissible, in ascertaining the meaning of an Act, to consider the indications provided in the enactment.[16] Examples are preambles, the analysis, a table of

[16] Interpretation Act 1999, s 5(2).

contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples as explanatory material and the organisation and format of the enactment.[17]

[50] The Wages Protection Act does not contain a statement of its object or its purpose as more modern statutes tend to. Nor is it divided into parts from which it may be possible to derive any assistance in interpreting s 12A. However, clearly the Act was designed to provide broad protection to an employee from overbearing conduct undermining that employee's financial independence from his or her employer. For example, s 4 requires an employer to pay wages that are due in their entirety without deduction, unless the employee consents in writing, or following a written request, or as otherwise required by law. Unreasonable deductions are not allowed;[18] wages must be paid in money only unless there is specific written consent or agreement to pay in a different way such as by a cheque or bank deposit,[19] and an employer may not impose any requirement on the employee about the place or manner in which wages are spent.[20] Section 12A is an obvious complement to those sections because it is part of a suite of provisions designed to prevent exploitation of vulnerable employees or potential employees.

Dictionary definitions

[51] Next we considered whether assistance in defining "premium" in s 12A is assisted by dictionary definitions. The Oxford English Dictionary[21] gives the following definitions of premium:

> **A**. *n*.
> **1**.
> **a**. A reward given for a specific act or as an incentive; a prize.
> …
> **2**. The amount payable for an insurance policy; …
> …
> **3**. A sum additional to interest, price, wages or other fixed remuneration; any amount paid above the usual or nominal price; a sum added to an ordinary price or charge.
> …
> **4**. A charge made for changing one currency into another of greater value; the excess value of one currency over another; …

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17 Section 5(3).
18 Wages Protection Act 1983, s 5A.
19 Sections 8 and 9.
20 Section 12.
21 *OED* Online (Oxford University Press, Nov 2016, online ed) www.oed.com.

> …
> **5**. A fee paid for instruction in a profession or trade. Now chiefly *hist*. …
> …

[52] The Concise Oxford English Dictionary defines premium as:[22]

> **premium** *n.* **1** an amount paid for a contract of insurance. **2** a sum added to an ordinary price, charge, or other payment. [*as modifier*] (of a commodity) superior and more expensive. **3** something given as a reward or incentive. …

[53] Other dictionaries give similar definitions. Those definitions suggest that "premium" is an elastic word capable of referring to consideration provided for a contract (such as for insurance) while being broad enough to cover a reward and an enhanced payment reflective of higher quality or value. That elasticity is consistent with "premium" in s 12A being used as a compendium to apply to straightforward cases of payment being sought or received to purchase a job, or to more subtle or ingenious arrangements.

Assessment of "premium"

[54] Used in the context of s 12A we consider "premium" naturally captures paying to acquire a job (that is, consideration over and above the wage paid for the work performed in the wage/work bargain) as described in *Sears* and illustrated in *Tan*; specifically where a price is paid either by an employee, or potential employee, or is paid on that person's behalf to secure employment. However, we consider "premium" extends beyond those situations to apply to an employer recouping, or attempting to recoup, recruitment-related costs or other expenses that would ordinarily be borne by an employer. Given the ingenuity with which agreements can be drafted each case will be fact-specific. However, the feature that stands out in this case is the lack of any benefit to the employee in meeting the trade testing costs, other than getting the job. An inference arising strongly from cls 7 and 8 of the addendum is that obtaining the job was conditional on agreeing to pay these costs.

[55] The sole purpose of the trade testing undertaken by Tech 5 was to enable it to be satisfied that the carpenters presenting themselves as candidates for employment possessed the skills and experience required by Tech 5. It considered that step was

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[22] Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictio*nary (11th ed revised, Oxford University Press, Oxford, 2006) at 1133.

necessary because it did not wish to place reliance on any certificates or other evidence of trade skills and experience tendered by the job candidates. In a real sense the benefit of this trade testing flowed one way: to Tech 5. The candidates did not obtain any benefit from paying those testing costs, other than by being given job offers. The carpenters had no choice but to accept that cost and to pay it. Instructively, Tech 5 did not take the same approach to recruitment within New Zealand. It follows that Tech 5 would ordinarily have borne these recruitment costs, sometimes referred to as "search costs", had the candidates not been in the Philippines.

[56] We consider the word "premium" in s 12A covers this situation and applies to the trade testing costs in cl 8 of Addendum 1.

[57] Having made those observations about trade testing, we accept that there may be arrangements between employers and employees that allow reimbursement for appropriate costs incurred, such as for advancing the purchase price of tools that would eventually be owned by the carpenters, and their airfares to New Zealand. In some trades, including carpentry, it is the custom for the tradesperson to own and use his or her tools. We see no difficulty in an employer agreeing to meet the initial cost of purchasing tools ordinarily owned and supplied by an employee tradesperson and being repaid over time. The same applies to airfares. However, that may be different if the employer sought to gain a profit from such a transaction or sought to pass on costs the employer is required to bear by law.[23] For completeness, we should add that in this case the issue was confined to trade testing. We have not been asked to consider any of the other costs itemised in Addendum 1.

Training bond

[58] Ms Dyhrberg submitted that this case is analogous to cases involving training-related bonds where the employees agree to work for a stated time and, in exchange, the employer funds training for a qualification or perhaps meets other costs like relocation expenses.

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[23] See for example Health and Safety at Work (General Risk and Workplace Management) Regulations 2016, regs 15 – 20.

[59] We do not consider the obligation to repay the trade testing cost arises from a bond, and therefore is outside of the ambit of s 12A of the Act. We consider a bond will usually have mutual benefit as a feature. The employer would obtain a benefit from work in exchange for the support provided. There would need to be a proper connection between the job and the reason for the bond if s 12A is not to bite. A bond where the employer paid for the employee to complete a recognised course of training, leading to a qualification for the employee and to a better qualified employee for the employer, would be a legitimate bond. Provided the duration of the bond is reasonable, and the other features of it are in proportion to the commitment made by the employee, we doubt a premium would be created in the sense prohibited by the Wages Protection Act. A payment which just allowed the intending employee to be considered for employment would not be a bond and would be an unlawful premium.

Is recovery from the employees of the cost of trade testing in Addendum 1 a premium?

[60] This issue has largely been addressed by our foregoing discussion. Ms Dyhrberg submitted that cls 6 and 7 do not contain a premium because they are not "a price in exchange for an employment agreement being entered into or indeed being continued". Ms Dyhrberg submitted those clauses created a discretionary bond not a premium. It follows that Tech 5 had an option of attempting to recover costs from a departing employee before the expiry of the three-year term by enforcing that bond.

[61] Ms Dyhrberg drew on passages in cls 6 and 7 to emphasise what she referred to as the discretionary nature of this bond. In cl 6 the words emphasised were "Tech 5 will be entitled to recover costs…" while cl 7 uses the words "… the Employee also undertakes to repay…".

[62] We do not agree that these clauses can be read in that way. Mr Wyatt's evidence was that the clauses were intended to impress on these employees that Tech 5 had made a substantial financial commitment to bring them to New Zealand and, therefore, they were required to adhere to the terms of the agreement which ran for the duration of their immigration visas. Payments were actually made by the

employees in reduction of these amounts in cls 7 and 8. While Tech 5 might regard the decision to enforce these payments as discretionary, that is not consistent with the language used or how they were applied in practice.

[63] As we have already noted, no benefit accrued to Tech 5's carpenters by agreeing to pay for these trade testing costs. At best, agreeing to pay for trade testing ensured an offer of employment would be made to them. On that basis, trade testing falls within the concept of a premium in the sense used in *Sears*, but it also falls within the wider sense we have discussed. There was no benefit to these carpenters beyond the ability to be selected for employment.

[64] The trade testing cost component of Addendum 1 is a premium within the meaning of s 12A of the Act.

If the recovery of the costs of trade testing is a premium, was it sought or received by Tech 5 within the meaning of s 12A of the Act?

[65] The Authority concluded that Tech 5 was required to take some recovery-related step before it could be said to have sought or received a premium.

[66] We do not agree with that conclusion. In answer to questions from the Court Mr Wyatt accepted that each of the carpenters had deductions taken from his pay. Those deductions were to reimburse Tech 5 for all of the costs referred to in cls 7 and 8, including trade testing.

[67] Tech 5 received all of the money it anticipated to recover for these costs. The mechanism used to do so was cl 9 authorising deductions to be made. Tech 5 drafted these agreements and designed them to achieve a recovery.

[68] In our view, it would be artificial to say that Tech 5 was not "seeking" a premium within the meaning of s 12A, merely because it did not take enforcement steps. It did not need to. By including the clauses in Addendum 1, Tech 5 "sought" a premium. It had deliberately drafted employment agreements authorising deductions from wages to achieve the required recovery. Given the way in which the Act is written, ensuring protection for employees from exploitative behaviour, we

consider it is appropriate to hold that "seeking" a premium includes not only a situation where a potential employer asks for a premium, but where the employment agreement contains an obligation to pay and a mechanism to ensure that the obligation is satisfied. In this case, Tech 5 informed the successful carpenters in the Philippines that they would be required to meet costs, including trade testing costs, as part of the information conveyed to them at the induction process prior to departing for New Zealand. While not addressed in submissions for the Labour Inspector, we conclude that this advice qualified as "seeking a premium", but we are also satisfied that the act of Tech 5 presenting its form of agreement and entering into that agreement containing a mechanism to recoup the trade testing costs by deduction, falls within the meaning of s 12A. Furthermore, it is apparent that Tech 5 received a premium within the meaning of that section as well.

Conclusion

[69] The Labour Inspector sought as relief the following remedies:

> A. The plaintiff seeks a declaration that including clauses in employment agreements requiring payment for matters that would amount to *receiving* a premium if paid may also amount to *seeking* a premium under s 12A(1) of the Wages Protection Act 1983.
>
> B. The plaintiff seeks an order determining that the defendant has breached s 12A(1) of the Wages Protection Act [1983] by entering into an agreement with the employees that included paragraphs 6 and 7 of addendum 1.

[70] We accept and declare that Tech 5 did seek and receive, unlawfully, a premium by including the recovery of trade testing in the costs in cls 6 and 7 of Addendum 1, in breach of s 12A of the Act. It follows that Tech 5's challenge is unsuccessful.[24]

[71] The Labour Inspector having been successful, the determination of the Authority is set aside pursuant to s 183(2) of the Employment Relations Act 2000 and this judgment stands in its place.

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[24] EMPC 132/2016.

[72] Costs are reserved. If they are not agreed between the parties, the Labour Inspector may file a memorandum relating to costs by 31 January 2017 and Tech 5 may have until 15 February 2017 to respond.

K G Smith
Judge
(for the full Court)

Judgment signed at 8.35 am on 16 December 2016