STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
FIRST DACIA CORPORATION T/A ROMANIAN GARDEN RESTAURANT,	:	
Petitioner,	:	DOCKET NO. PR 18-038
To Review Under Section 101 of the Labor Law: An Order to Comply with Articles 5 and 19 of the Labor Law, dated June 6, 2018,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Herrick, Feinstein, LLP, New York (*Avery S. Mehlman* of counsel), for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Kevin E. Jones* of counsel), for respondent.

WITNESSES

Gabriella Bancescu for petitioner.

Senior Labor Standards Investigator Jose Medina and Margareta Radovanovic, for respondent.

WHEREAS:

Petitioner First Dacia Corporation T/A Romanian Garden Restaurant (hereinafter "First Dacia") filed a petition in this matter on July 25, 2018 and an amended petition on August 7, 2018, pursuant to Labor Law § 101, seeking review of an order issued against it by respondent Commissioner of Labor on June 6, 2018. Respondent filed her answer to the petition on October 16, 2018.

Upon notice to the parties a hearing was held in this matter on January 16, 2019, in New York, New York before Gloribelle J. Perez, Member of the Board, and the designated hearing

officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues. The parties requested an opportunity to submit post-hearing briefs, which was permitted by the hearing officer. Neither party submitted a post-hearing brief.

The order to comply with Article 19 (hereinafter "minimum wage order") under review directs compliance with Article 19 and payment to respondent for unpaid wages to Margareta Radovanovic in the amount of $83,406.83 for the time period from June 24, 2013 to March 2, 2016, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $30,053.88, liquidated damages in the amount of $83,406.83, assesses a 100% civil penalty in the amount of $83,406.83. The order further assesses separate civil penalties, each in the amount of $800.00, for violations of Article 5 of the Labor Law, Section 162; and Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) §§ 146-2.1, 146-2.2, 146-2.3, and 146-2.5. The total amount due in the order is $284,274.37.

The order to comply was issued against Sorin Cucu Bodnariu, Sr. AKA Sorin Cucu Bodnariu and First Dacia Corporation T/A Romanian Garden Restaurant. Only First Dacia is a petitioner in this matter, there is no individual petitioner. Petitioner alleges that the order is invalid and unreasonable because First Dacia has a new owner, Gabriella Bancescu, who was not the owner of First Dacia during the relevant period and, thus, the petition asserts, she should not be held liable for the unpaid wages and penalties.

SUMMARY OF EVIDENCE

Testimony of Gabriella Banecescu

Gabriella Banecescu (hereinafter "Banecescu") is sole shareholder of corporate petitioner in this matter, First Dacia Corporation, which owns a restaurant known as Romanian Garden Restaurant, located in Sunnyside, Queens, New York. Banecescu purchased First Dacia from the prior sole shareholder, Soren Cucu-Bodnariu (hereinafter "Cucu-Bodnariu"). A copy of the check used to purchase the business indicates that the purchase took place on September 19, 2017. Banecescu intended to operate the restaurant under a new corporation called Romanian Garden Café, Inc., which she registered with the Department of State. An online filing receipt shows this incorporation took place on August 25, 2017. However, the landlord of the property where the restaurant is located did not want to change the lease to reflect a new corporate tenant unless Banecescu could provide a guarantor for the lease and an additional security deposit, which Banecescu did not want to do. Thus, under the advice of an attorney, Banecescu continued the operation of the subject restaurant under First Dacia as the corporate owner.

The restaurant had been closed for several months when Banecescu purchased it. Cucu-Bodnariu did not tell Banecescu that the Department of Labor had commenced an investigation against First Dacia for Labor Law violations. Banecescu testified that she first learned of the wage claim and the Department of Labor investigation when a copy of the order to comply arrived at the restaurant in the mail in June 2018.

Upon taking over ownership of the restaurant, Banecescu hired new employees, none of whom had worked at the restaurant when it was owned by Cucu-Bodnariu. The claimant did not work for Banecescu, though Banecescu knew who she was. Banecescu renovated and changed the interior of the restaurant, including purchasing new equipment, appliances, dishes, glassware and cutlery. Banecescu also redesigned the menu even though the restaurant name remained the same. Banecescu opened the restaurant about six weeks after she purchased it.

Testimony of Senior Labor Standards Investigator Jose Medina

Jose Medina (hereinafter "Medina") is a Senior Labor Standards Investigator at the Department of Labor. Medina was the investigator assigned to investigate this matter. Medina could not recall most details of his investigation without looking at the respondent's documents that were admitted into evidence on consent. Medina visited the restaurant on October 11, 2016. Medina testified that he recommended 100% liquidated damages because that is standard and that the civil penalty in an order to comply is anywhere between 100% and 200%. Medina did not testify as to the percentage civil penalty that was issued in this matter or what factors were considered to determine how much to assess in civil penalties.

Through Medina, respondent introduced into evidence documentation from the investigative file in this matter. This included a final letter to the former owner of the business dated March 10, 2017 summarizing the claim. A letter from the respondent to the Cucu-Bodnariu's attorney, as well as an email from the Cucu-Bodnariu's attorney to respondent further indicate that attempts were made to resolve the matter in the following months. According to an email to Cucu-Bodnariu's attorney dated August 4, 2017, no resolution could be reached. Medina confirmed that a judgment had recently been entered against Cucu-Bodnariu personally based on the order to comply. Petitioner's attorney made inquiry during the hearing as to whether respondent had relevant information about Cucu-Bodnariu for collections purposes.

Testimony of Margareta Radovanovic

Margareta Radovanovic (hereinafter "Radovanovic") testified that she worked at the subject restaurant from 2005 until 2016, six days per week from 11:00 a.m. until 11:00 p.m. as a cook. She had keys to the restaurant, as did another cook, and she opened the restaurant at 11:00 a.m. and closed it at 11:00 p.m. or sometimes later on weekends. Radovanovic was paid a weekly salary in cash and she did not sign in or sign out or write down the hours that she worked. Because Radovanovic was paid a weekly salary in cash, the hours that she worked did not matter with respect to her pay. Radovanovic testified that the information in her claim form that states that she was paid $475.00 per week was correct.

Radovanovic knew Banecescu but never worked for her and testified ". . . I don't know why [Banecescu] is here . . .I don't know why she's here, because she doesn't have any responsibility."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules of Procedure and Practice (Board Rules) (12 NYCRR) § 65.39.

Petitioner's burden of proof in this matter is to establish, by a preponderance of the evidence, that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Angello v National. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [Oct. 11, 2011]). For the reasons stated below, we find that petitioner failed to meet its burden of proof to show that the order to comply is invalid or unreasonable.

First Dacia Corporation is Liable as an Employer

There is no dispute that Banecescu was not the employer during the relevant period and she is not named in the order to comply, nor is she a petitioner in this matter. The dispute is over whether First Dacia was an employer during the relevant period, when it was not owned by Banecescu, but who was the sole shareholder at the time that the order to comply was issued. We find that it was.

"Employer" as used in Labor Law Article 19 means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). Petitioner does not dispute that First Dacia was the corporate owner of the subject restaurant during the relevant time but asserts that because Banecescu, the current sole shareholder of First Dacia, was not the shareholder of First Dacia during the relevant period and because the restaurant changed with respect to the interiors, menu and employees, First Dacia with its current sole shareholder should not be held liable as the employer during the relevant time. We are not compelled by petitioner's argument. While it is unfortunate that petitioner was advised to maintain the same corporation to own and operate the subject restaurant and that she was unaware of the pending wage claim when she purchased First Dacia, this does not relieve First Dacia from its liabilities under the Labor Law. Because there was no dissolution of First Dacia and, instead, Banecescu became the sole shareholder of First Dacia, which remained the corporate owner of the restaurant, the corporate liability remains with First Dacia.

We find First Dacia failed to meet its burden to prove that it was not Radovanovic's employer during the relevant period. No valid basis has been put forth by petitioner to find that First Dacia was not Radovanovic's employer during the relevant period and otherwise liable as the employer. As such, the Board affirms the respondent's finding that First Dacia was an employer.

Petitioner's Failure to Maintain Payroll Records

Article 19 of the Labor Law requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 661). The records must show for each employee, among other things, the number of hours worked daily and weekly,

the amount of gross wages, deductions from gross wages, and allowances, if any (*id.*; Department of Labor Regulations [12 NYCRR] § 142-2.1 [a]). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]; Department of Labor Regulations [12 NYCRR] § 142-2.1 [e]). In the absence of required payroll records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even if results may be merely approximate (*Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901, 901-902 [2d Dept 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dept 1989]).

Petitioner did not offer the legally required records of the days and hours that Radovanovic worked, and the wages paid to her either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner's determination that petitioner failed to maintain legally required payroll records was reasonable and valid.

The Minimum Wage Order is Affirmed

Based on the record before us, we find that petitioner did not meet its burden to show that it was not liable as the employer nor did it maintain legally required records of hours worked and wages paid to Radovanovic. Petitioner did not introduce any evidence challenging the wages in the order. The issue is thereby waived pursuant to Labor Law § 101 (2). As such, we affirm the minimum wage order.

The Interest is Affirmed

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum." Here, petitioner did not offer any evidence to challenge the imposition of interest. The issue is thereby waived pursuant to Labor Law § 101 (2). As such, we affirm the interest in the minimum wage order.

Liquidated Damages Assessed in the Minimum Wage Order Are Affirmed

The minimum wage order assessed liquidated damages in the amount of 100% of the wages owed. Labor Law § 218 provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Petitioner offered no evidence that the corporation had a good faith basis to believe the underpayment was in compliance with the law. We therefore affirm the imposition of 100% liquidated damages in the minimum wage order.

The Civil Penalty is Revoked

The wage order includes a 100% civil penalty. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 19 of the Labor Law, respondent shall give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements."

Petitioner purchased the business after the investigation concluded. The order to comply was issued on June 6, 2018, after the sale had taken place, against both the corporation and the former owner as an individual. Banecescu testified that she only learned about the unpaid wages when she received a copy of the order to comply in the mail. Radovanovic testified that she did not know why the current owner was being held liable. The former owner has not appealed and is not entitled to any relief granted through these proceedings. Respondent is already undertaking collections efforts against the former owner. The statutory factors used to assess the civil penalty may have been applicable against the corporation and the prior owner at the time of the investigation, but there was insufficient proof that the factors enumerated in the statute should still be applied under the current ownership (*Matter of David Poperham and G.T.S. Thai Inc. [T/A Planet Thailand]*, Docket No. PR 13-153, at p. 11 [February 5, 2016]). Under these unique circumstances, where the current sole shareholder of the liable corporation had no relationship to the business at the time when the violations took place and did not take part in the underlying investigation, we revoke the 100% civil penalty as it pertains to the petitioner.

The Civil Penalties for Article 5 and 19 Violations are Revoked

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed $1,000.00 for a first violation. In this case, respondent assessed separate civil penalties, each in the amount of $800.00, for violations of Article 5 of the Labor Law, Section 162; and Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) §§ 146-2.1, 146-2.2, 146-2.3, and 146-2.5. For the reasons stated above, we also revoke the Article 5 and Article 19 civil penalties that were assessed in the order as they pertain to the petitioner because there was insufficient proof that the factors enumerated in the statute should still be applied under the current ownership (*Matter of David Poperham and G.T.S. Thai Inc. [T/A Planet Thailand]*, Docket No. PR 13-153, at p. 11).

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NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order, interest and liquidated damages are affirmed;

2. The civil penalty in the minimum wage order is revoked as against the petitioner;

3. The Article 5 and 19 civil penalties are revoked as against the petitioner;

4. The petitioner for review be, and the same hereby is, denied in part and granted in part.

Dated and signed by the Members
of the Industrial Board of Appeals
on January 29, 2020.

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
New York, New York

Najah Farley, Member
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