

The investigation meeting

[2] Mr Ji failed to attend the investigation meeting on Monday 18 March 2019 despite a Notice of direction requiring his attendance. The investigation meeting was adjourned until today so that Mr Ji could attend to give evidence.

[3] Mr Ji and his daughter and representative, Ms Chrissie Ji attended the investigation meeting today to give evidence as did Mr Feng Ji one of the Directors of the company.

[4] Each of the witnesses giving evidence before the Authority swore on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[5] An interpreter fluent in the Mandarin language attended the investigation meeting to assist the Authority.

[6] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence; relevant facts and legal issues are set out along with the Authority's conclusions.

Employment relationship problem

[7] On 24 December 2018, the settlement agreement was signed under s.149 of the Employment Relations Act 2000 (the Act). The applicant Mr Ji, and the respondent company were parties to the settlement. The settlement was signed by Mr Ji and by Mr Hongli Luo, one of three directors of the company.

[8] The settlement was signed by a mediator employed by the Ministry of Business, Innovation and Employment (MBIE).

Issue

[9] The issue brought to the Authority by Mr Ji relates to non-payment by the company of his "legal cost".

[10] The settlement agreement states:

4. J and P Trade Limited shall pay the legal cost of \$2084.06 inclusive of GST within 7 days upon receiving invoice from Chrissie Ji.

[9] The settlement was certified under s.149 of the Employment Relations Act 2000 (the Act) by the mediator. That certification confirmed that, before signing the agreement, the parties were advised and accepted they understood the effect of s.149(3) of the Act which states that the agreed terms of settlement:

- (a) Is final and binding of and enforceable; and
- (b) Could not be cancelled; and
- (c) Could not be brought before the Authority or the Court for review or appeal, except for the purposes of enforcing those terms.

[11] On 16 January 2019, an application for a compliance order was filed in the Authority by Mr Ji claiming that despite requests, the company had failed to comply with the terms of settlement and pay him the legal cost owing under the settlement. Mr Ji seeks a penalty in respect of the alleged breach and costs.

[12] The company has filed a statement in reply. Mr Sun for the company says Mr Ji filed a “false invoice”. The invoice was from Mr Ji’s daughter, Ms Ji who is not a lawyer and therefore not able to issue an invoice for legal fees. Therefore the company says the legal cost is not payable.

Issue

The issue is whether by refusing to pay Ms Ji’s invoice the company has breached the terms of the settlement agreement.

[13] I am satisfied that the company breached the terms of the settlement agreement entered into.

[14] The company agreed to pay Mr Ji’s legal cost upon receipt of an invoice from Ms Ji. This is recorded in the settlement agreement. Ms Ji issued an invoice in accordance with the settlement agreement. The invoice was for her services representing Mr Ji. Ms Ji is not a lawyer.

[15] The company argues that because Ms Ji is not a lawyer she cannot issue an invoice and expect payment under the settlement agreement. The company claims Ms Ji issued a “false invoice”. Therefore, it is not obliged to pay it and has not breached the settlement agreement.

Representation of parties in the Employment jurisdiction

[16] Ms Ji is a business consultant, not a lawyer. Ms Ji is self-employed, GST registered and provides business consultancy services. She represented Mr Ji with the employment issues he had with the company and assisted with the conclusion of a settlement agreement between Mr Ji and the company which was certified by an MBIE mediator.

Representation in the Employment Relations Authority and in the Employment Court

[17] Schedule 2, clause 2 of the Act states that a party or person involved in a matter before the Authority may appear personally, be represented by an officer or member of a union, or by an agent or by a barrister or solicitor.

[18] A similar provision is found in Schedule 3, clause 2 of the Act in respect of those appearing in the Employment Court.

Power to award costs

[19] The Authority's power to award costs against a party is set out in clause 15 of schedule 2 of the which provides as follows:

15. Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such a manner as it thinks reasonable.

[20] A similar provision is contained in clause 19 of schedule 3 of the Act in respect of costs in the Employment Court.

[21] A party who is represented, not necessarily by a lawyer, may seek to recover costs from an opposing party. This, in my view, is the context in which costs were agreed to at mediation by the parties.

[22] Ms Ji represented a party, albeit her father, in the employment jurisdiction. Under the settlement agreement Mr Ji's costs of representation were agreed to be paid by the company. Ms Ji was Mr Ji's representative.

[23] I do not accept that the word “legal” in the settlement agreement constrains costs to legal costs in a jurisdiction in which parties are able to represent themselves or are able to be represented by a union or agent. This would be an overly technical interpretation, in my view.

[24] Mr Feng Ji accepted that he had dealings with Ms Ji and not a lawyer in respect of the employment relationship problem brought by Mr Ji and which resulted in the parties attending mediation.

[25] If the company did not want to pay Mr Ji’s costs, that clause should not have been included in the settlement agreement. The intent was to cover Mr Ji’s costs. The company breached clause 4 of the settlement agreement.

Order

[26] I therefore make an order that within seven (7) days of the date of this determination, the company is to pay Mr Ji the sum of \$2084.06 costs in accordance with clause 4 of the settlement agreement. This sum is to be paid by the company directly into Mr Ji’s bank account, details of which have been provided.

Penalty

[27] Section 149(4) provides that a person who breaches an agreed term of settlement is liable to imposition of a penalty. Section 135(2)(b) provides that a company in breach is liable to a penalty up to \$20,000.

[28] Section 133A sets out a number of factors which the Authority must have regard to in determining an appropriate penalty. This provision essentially confirms earlier case law.¹ The factors are:

- (a) the nature and extent of the breach or involvement in the breach;
- (b) whether the breach was intentional, inadvertent or negligent;
- (c) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach;

¹ *Boorsboom v Preet Pvt Limited* [2016] NZempC 143 at [141] – [148].

- (d) whether the person in breach or the person involved in the breach is paid an amount of compensation, reparation or restitution or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- (e) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;
- (f) whether the person in breach, or involved in the breach, has previously been found to have engaged in similar conduct.

[29] The company breached the settlement because it considered an invoice should have been for a “legal cost”. Mr Feng Ji expected an invoice from a lawyer. However, the settlement agreement stated that the legal cost would be paid upon receipt of an invoice from Ms Ji. Because the invoice received was not a “legal cost”, Mr Feng decided the company would not pay it.

[30] I am satisfied that there are some mitigating features. The company immediately paid all other sums to Mr Ji under the settlement agreement and complied with its other terms. The company took the incorrect view it was entitled to receive an invoice for legal costs from Ms Ji, not an invoice for costs.

[31] I do not consider it appropriate for a penalty to be imposed for this breach.

Costs

[32] Mr Ji did not attend the investigation meeting on Monday 18 March 2019 which meant that the investigation meeting had to be delayed. Another investigation meeting was held today to determine the issue between the parties. I consider that in the circumstances costs should lie where they fall. I am not prepared to make an order as to costs other than to order that the company reimburse Mr Ji the sum of \$71.56 being the filing fee incurred by him in seeking a compliance order.

[33] The sum of \$71.56 is to be paid by the company directly into Mr Ji’s bank account, details of which have been provided. The payment is to be made within seven (7) days of the date of this determination.

Certificate of determination

[34] I direct that pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, Mr Ji be provided with a certificate of determination, sealed with

the seal of the Authority, recording respectively that the J and P Trade Limited is ordered within seven (7) days of this determination to pay Mr Ji the sum of \$2084.06, plus the sum of \$71.56 being the filing fee.

Anna Fitzgibbon
Member of the Employment Relations Authority