IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 194
3068213

	BETWEEN	YERAN CHOI Applicant
	AND	ELEV 8 GLOBAL LIMITED First Respondent
	AND	VICTORIA JEON Second Respondent

Member of Authority:	Michael Loftus
Representatives:	Applicant in person Seungmin Kang, counsel, and Victoria Jeon, for the Respondents
Investigation Meeting:	By telephone conference on 18 February 2020 and 20 March 2020 and on the papers up to and including 13 May 2020
Date of Determination:	14 May 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Yeran Choi, seeks an order the respondents comply with the provisions of a mediated settlement the parties concluded on 25 June 2019. The settlement was signed by a mediator in accordance with s 149 of the Employment Relations Act 2000 (the Act).

[2] The settlement identified the employer as *ELEV 8 GLOBAL LIMITED Victoria Jeon* but responsibility for payment was assigned to the Company alone. Victoria Jeon is Elev8's sole director and shareholder.

[3] The respondents, represented by Ms Jeon, accept the settlement has not been honoured but claim neither is capable of paying due to financial pressures.

Discussion

[4] As already said the parties attended mediation on 25 June 2019. It ended with a Record of Settlement which required Elev8 pay Ms Choi a total of $7,000. $4,000 of that was recompense of wages from which PAYE could be deducted and the remaining $3,000 compensation pursuant to s 123(1)(c)(i). The compensatory payment was to be made by 23 July 2019 and the wages in two instalments; 23 August and 23 September 2019.

[5] Ms Choi says she then received a text from Ms Jeon on 21 July advising payment would be postponed for an unknown period as Elev8 could not afford it. That led to initiation of these proceedings. Since then the final date for payment has passed with nothing being paid.

[6] Elev8, in its statement in reply, tried to revisit the substantive issues but also repeated the claim the company was in a dire financial state. Ms Choi's answer to that is it is because Ms Jeon is continuously moving money around and the accounts bear no resemblance to reality.

[7] Two telephone conferences were held during which Ms Jeon again confirmed the settlement has not been honoured. She also accepted she was precluded from revisiting the situation which led to the settlement with the issue now being limited to Elev8's ability to pay and whether or not liability could pass to her should Elev8 fail to pay.

[8] Discussion also revolved around the fact that as this was a compliance application, and given the assertion Elev8 was incapable of paying, there was a possibility I might amend the effect of the settlement to the extent I could order payment via instalments.[1] That said, it was emphasised and accepted, the onus was on Elev8 to establish its financial position required instalment payments.

[9] There is then the issue of what would happen if Elev8 failed to pay with Ms Jeon making admissions which made it clear liability, for the wages at least, could pass to her pursuant to ss 142W and 142Y of the Act. She is a person involved given

she was the sole director and accepts she is the personification of the company and its decisions.[2] That led to discussion about her financial state and an assertion her personal situation would also require instalment payments.

[10] Having noted that, I also comment the question is actually wider. It is whether the whole debt could pass.

[11] As the debt is acknowledged, and the onus of establishing a requirement for instalment payments falls on the respondent(s), it was agreed the remaining issues could be determined on the papers.

[12] The parties agreed the following timetable. The respondents would produce evidence supporting the need for instalment payments by 17 April 2020. Ms Choi would have till 24 April to reply with Elev8 having till 1 May 2020 for any final comment.

[13] Neither Elev8 nor Ms Jeon complied with the agreed timetable and nothing was heard prior to 1 May. Notwithstanding that the respondents were given a further opportunity to provide belated input. It was then Counsel was instructed and this led to the provision of Elev8's latest accounts for the year ending 31 March 2020 and its bank statement for the period 3 April 2019 to 28 Feb 2020. There is nothing for Ms Jeon personally.

[14] Having viewed the documents, and given the conclusions I have reached as a result, I have chosen not to seek Ms Choi's comments, especially as she has already questioned the additional delay generated by my having given the respondents a final chance to provide something.

[15] On their face the accounts suggest the company is in a dire position and, using the words of counsel, *... clearly shows the financial difficulties the respondent is in, and therefore justifies instalment payments*.

[16] The position shown by the accounts is best summarised by quoting from Mr Kang's email. He says the accounts show:

> The company's performances in 2019 and 2020 were in deficit at $64,537.00 and $44,129.00, respectively; and

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[1] Section 138(4A) of the Employment Relations Act 2000
[2] Sections 142W(3)(a) and 142W(1)(a) of the Employment Relations Act 2000

> The total equity of the company (assets less liabilities) in 2019 and 2020 were in deficit at $85,266.00 and $129,395.00.

[17] I am left wondering why one would operate a small business that, according to the accounts, appears insolvent. In the year to 31 March 2020 it produced a deficit which exceeded its sales revenue by 160% and its total income by over 140%. Comparable figures for the preceding year were even worse and its deficit now exceeds four years revenue.

[18] I would also have to question why an owner would, again according to the accounts, continue to contribute sums which again exceed revenue by a considerable margin.

[19] The answer perhaps lies in the bank statements which provide significant insight into what is occurring and to some extent appear to confirm Ms Choi's accusation the company's situation is a result of Ms Jeon using it as a money go round.

[20] On one hand there is significant evidence Elev8's account is being used to cover private purchases. There are numerous spends at supermarkets, takeaways and café's along with other establishments such petrol stations, a Mitre10 (more than once) and a gardening business. Indeed such purchases for the month of February 2020 are double what the accounts say were the domestically (New Zealand) incurred cost of sales for the entire financial year. April 2019 was even greater. I have not calculated the rest.

[21] More importantly there a number of transactions whereby funds were moved to and from, in recent times predominantly to, another business whose current director is a Michelle Jeon and of which Victoria Jeon is a past director and shareholder. In the statements last three months over $6,000, or nearly enough to pay Mr Choi, was transferred to this business though a bit over $2,000 came back. I also note that according to the Companies Register that business also uses Elev8 as a trading name and its address for service remains the same as the first respondent's (which is also the first respondent's trading site). Furthermore I note that according to one business directory its annual revenue exceeds $3,000,000 putting it in a different league from the first respondent.[3]

[3] Dun&Bradstreet

[22] There are then numerous transfers both to and from other accounts. It is clear money is regularly moved around which leaves me far from convinced I have a full picture of the situation. These factors leave me unconvinced the situation is as dire as is being claimed, especially as the bank statement and the numerous transfers confirm Elev8 can readily access money to fund outgoings it wishes to cover. In any event I have to comment I find it improper funds be used for private purchases or be transferred to what is clearly an allied business when money, including wages, remains owing to a past employee.

[23] Given the points above I conclude Elev8 has failed to convince me instalment payments are required as it is must do. The same applies to Ms Jeon given no evidence of impecuniosity whatsoever. Indeed I would have to suggest that if the accounts give an accurate portrayal then Ms Jeon has a propensity for sinking funds into what is, on paper, an insolvent company which suggests she is more than capable of paying that portion of the debt that may be transferred to her pursuant to ss 142W and 142Y.

[24] As a result there will be an order Elev8 pay in full as it was the party cited as responsible in the settlement. Given Ms Jeon's various concessions there will also be an order that should Elev8 fail to comply liability for the wage component will pass to her personally.

[25] That leaves the question of whether or not responsibility for the compensatory sum will also pass. On one hand Ms Jeon was cited as the employer in the settlements intituling and there is, in that respect, no differentiation between her and the company.

[26] On the other this is a compliance action where the Authority's power is limited to ordering compliance with the terms of settlement. They expressly state payment shall be made by Elev8 and notwithstanding the intituling there is nothing that states Ms Jeon is responsible. That means liability can only pass under some other statutory scheme and the only pertinent one is that provided by ss 142W and 142Y. Transfer of liability under those provisions is limited to wages and does not extend to the compensatory sum.

Conclusion

[27] Given the above I order the first respondent, Elev 8 Global Limited, comply with the terms of the s149 settlement the parties concluded on 25 June 2019 and pay

Yeran Choi the sum of $7,000.00 (seven thousand dollars). PAYE may be deducted from $4,000 of that but must be forwarded to the Inland Revenue Department.

[28] The above payment is to be made to Ms Choi no later than 4.00pm on Thursday 28 May 2019.

[29] Should Elev8 fail to make the above payment Ms Jeon is to pay Ms Choi the wage component of $4,000 (four thousand dollars) gross no later than 4.00pm on Thursday 4 June 2020.

[30] In closing I caution the respondents that failure to comply with the above orders may result in further consequences. Should such a failure be pursued in the Employment Court[4] they potentially include the imposition of fines, the sequestration of property and/or imprisonment in Ms Jeon's case. Conversely a certificate of determination may be obtained and the matter pursued in the District Court which might ultimately lead to liquidation of the company and/or bankruptcy for Ms Jeon.[5]

[31] Costs are limited to the Authority's filing fee as Ms Choi was self-represented. I therefore order the first respondent, Elev 8 Global Limited, pay Mr Choi a further $71.56 (seventy one dollars and fifty six cents) being reimbursement of the filing fee.

Michael Loftus
Member of the Employment Relations Authority

[4] Sections 139 and 140 of the Employment Relations Act 2000
[5] *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmpC41 at [42] and *Broeks v Ross* EmpC Auckland AC36A/09, 11 November 2009 at [5]