

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 556
3166841

BETWEEN JING GAO
 Applicant

AND BEST CHOICE LIMITED t/a
 HEALTHWAY
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Gerardus Elwell, counsel for the Applicant
 No appearance by the Respondent

Investigation Meeting: 21 October 2022

Determination: 28 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Jing Gao, is seeking compliance and a penalty against the Respondent, Best Choice Limited t/a Healthway (Best Choice), on the basis that it has failed to fully adhere to the terms of a settlement agreement reached between the parties.

[2] Best Choice did not file a Statement in Reply.

The Authority's Investigation

[3] Ms Gao attended the investigation meeting and gave oral evidence. She was accompanied by her husband and her representatives.

[4] Best Choice did not attend that investigation meeting, despite having been served with the Notice of Investigation by courier on 7 October 2022.

Failure of Respondent to attend or be represented

[5] Best Choice did not attend and was not represented at the Investigation Meeting.

[6] For the reasons set out above I am satisfied that Best Choice had notice of the application and the date of the Investigation Meeting. Best Choice has not shown good cause for its failure to attend or to be represented.

[7] I have therefore proceeded pursuant to clause 12 Schedule 2 of the Employment Relations Act 2000 to act as fully as if Best Choice had attended or been represented.

Issues

[8] The issue for determination is whether or not Best Choice failed to comply with the Record of Settlement (the Agreement) reached by the parties.

Relevant Background

[9] Ms Gao was employed by Best Choice for approximately 7 years between May 2014 and March 2021 during which time she claimed she was not paid fully in respect of wages and holiday pay entitlements.

[10] On 21 April 2021 Ms Gao raised a personal grievance and wage arrears claim with Best Choice. The sum claimed in respect of wage arrears and holiday pay was \$19,950.00.

[11] A lawyer acting for Ms Gao drafted a proposed record of settlement which Ms Gao discussed with Ms Jingli Dong, sole Director and Shareholder of Best Choice.

[12] Ms Gao said Ms Dong took the drafted Agreement to discuss with her lawyer and returned it to Ms Gao on 24 April 2021. Ms Dong had signed the Agreement. Ms Gao also signed the Agreement, and it was sent to a mediator employed by the Ministry of Business, Innovation and Employment.

[13] Ms Gao's evidence was that the mediator had tried to contact Ms Dong to facilitate recording the Agreement between the parties as an agreement in accordance with s149 of the Employment Relations Act 2000, however this was unsuccessful.

[14] The Agreement contained the following clauses:

Payment

2.1 The Employer will, without admission of liability, pay into the Employee's nominated bank account \$19,950 (gross) in unpaid wages and holiday pay.

2.2 The Employer will, without admission of liability, pay into the Employee's nominated bank account \$10,000 without deduction, pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000. This payment will be received into the Employee's bank nominated bank account in instalments as per the payment plan set out at Schedule 1 to the Agreement.

[15] Schedule 1 set out payments to be made according to dates between 22 April 2021 and 31 July 2021.

[16] The Agreement also set out at clause 2.5 that:

This Agreement is in full and final settlement of all past and present claims the Parties have against the other arising from the employment relationship, and all agreements (excluding the Agreement) between the parties.

[17] Best Choice subsequent to the signing of the Agreement by the parties made payments in 7 instalments to Ms Gao totalling \$12,000 in the period 9 February 2021 to 24 August 2021.

Was the Agreement reached by accord and satisfaction?

[18] Employment disputes are not uncommonly resolved by means of confidential settlement agreements between the parties which are then sent to be signed and certified by a mediator pursuant to s 149 of the Employment Relations Act 2000 (the Act).

[19] In this case Ms Gao's evidence was that a basis for the Agreement had been reached between the parties, and the Mediation Services of MBIE had been approached to record and certify the Agreement recording the parties agreement to resolve the issue of the wages and holiday pay entitlements owed to her.

[20] The Agreement also recorded Best Choice's agreement that a payment would be made to Ms Gao pursuant to a 123(1)(c)(i) of the Act to compensate her in respect of hurt, humiliation and injury to feelings.

[21] The Agreement dated 17 April 2021 and signed by both parties on 24 April 2021 had been sent to a mediator for certification, however Ms Dong had not been responsive to the mediator and the Agreement had not subsequently been signed or certified by a mediator.

[22] In *Cabletalk Astute Network Services Limited v Cunningham*¹ Judge Shaw set out the classic definition of accord and satisfaction, defined in the case of *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd*² as:

Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of valuable consideration, not being the actual performance of the obligation itself.

[23] Chief Judge Colgan in *Graham v Crestline Pty Limited*³ explained that⁴

whether accord and satisfaction has been made is a question of fact requiring a finding of a meeting of the parties' minds or that one of them must act in such a way as to induce the other to think that money (or other consideration) is taken in satisfaction of the claim.

[24] In this case, at the point of the termination of her employment with Choice Foods in March 2021 Ms Gao says she was owed outstanding wages and holiday pay in the sum of \$19,950.00 by Choice Foods.

[25] Whilst the Agreement was not certified by a mediator, I note that Best Choice's sole Director and Shareholder, Ms Dong, had signed the Agreement after stating to Ms Gao that she was taking legal advice in respect of it, and Ms Gao also signed it. In accordance with the terms of the Agreement, Best Choice made a first payment of \$1,270.58 on 9 February 2021.

[26] Further part payments have also been made by Best Choice, totalling the sum of \$12,000 being received by Ms Gao .

[27] I find that the Agreement represents a meeting of minds. Ms Gao would receive 'valuable consideration' because she would receive the outstanding wage, holiday and compensation payments due to her.

[28] For Best Choice under the terms of the Agreement it avoided the possibility of Ms Gao taking further action to recover the outstanding sums of outstanding wages and holiday pay entitlements. As such the valuable consideration gained by Ms Gao constituted 'the purchase of a release from an obligation' by Best Choice. This was set out in the Agreement at clause 2.5 which stated that it was in: "full and final settlement of all past and present claims" between them.

[29] I find that there would be, and indeed was, a real benefit to both parties in entering into the Agreement.

¹ [2004] 1 ERNZ 506

² [1933] 2 KB 616, at 643-644

³ [2006] ERNZ 848

⁴ *Ibid* at para [49]

[30] In accordance with the terms of the Agreement I find that Best Choice affirmed the terms of it by making the first payment and the subsequent part-payments.

[31] I determine that there was accord and satisfaction such that the Agreement is binding on the parties.

Should a Compliance Order be made?

[32] The Agreement refers to payment of the sums of outstanding wages, holiday pay and compensation. I find that the payment have not been made in full, with Best Choice still owing Ms Gao the sum of \$17,950.00 (gross) in respect of unpaid wages and holiday pay.

[33] From the evidence available to the Authority, I am satisfied that Best Choice has failed to comply with clauses 2.1 and 2.2 of the Agreement.

[34] In order to effect compliance with the Agreement, I therefore order Best Choice to pay Ms Gao, no later than 14 days from the date of this determination, the remaining balance of monies in the sum of \$7,950.00 (gross) in respect of unpaid wages & holiday entitlement and \$10,000 compensation in respect of entitlement under s 123(1)(c) A pursuant to s 137(1)(b) and (3) of the Act.

Interest

[35] The Authority may order interest to be paid in any matter involving the recovery of any money pursuant to clause 11 of Schedule 2 to the Act. I consider it appropriate to order interest in this matter.

[36] I order that Best Choice pay Ms Gao interest on the sum of \$17,950.00 from the date of this determination to the date of payment using the Ministry of Justice civil debt interest calculator to calculate interest.

Should a Penalty be ordered?

[37] A penalty can be ordered in respect of an agreed terms of settlement which have been breached pursuant to s 149 (4) of the Act. However to come within s 149 of the Act, the agreed terms of settlement to which s 149(3) of the Act applies must be signed and certified by the mediator as: “the person empowered to do so”.

[38] As set out in s 149 (1)(a) and (b) of the Act, the ‘person empowered to do so’ is a mediator as the person employed or engaged and holding a general authority to do so by the chief executive of MBIE.

[39] In this case, the Agreement has not been signed by the person empowered to do so, and therefore no penalty can be ordered pursuant to s.149 (4) of the Act.

[40] Mr Elwell on behalf of Ms Gao is seeking that a penalty be awarded against Best Choice in respect of the breaches of minimum employment standards pursuant to the Holidays Act 2003 and the Wages Protection Act 1989, namely arrears of wages and non-payment of holiday pay.

[41] Penalties for breaches of various sections of the Holidays Act 2003 and the Wages Protection Act 1989 (the Acts) render a company liable to penalties up to a maximum amount of \$20,000.00 per penalty.

[42] In deciding whether to impose a penalty and if I decide to, deciding how much that penalty should be, I need to have regard to the factors in s 133A of the Act and the approach as set out by the Employment Court in *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.⁵

[43] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[44] One of the objects of the Acts is to promote the effective enforcement of employment standards. Failure to fulfil these requirements represents a failure to maintain minimum employment standards, and deprived Ms Gao of wages and holiday pay due to her. Despite the agreement to meet the minimum standard payments due to her in the Agreement, these payments in respect of unpaid wages and holiday pay are still outstanding and owing to Ms Gao.

[45] Compliance has been ordered. The purpose of penalties is to deter, not to compensate. The penalties imposed are to bring home to Best Choice the importance of maintain the employment standards in New Zealand which should be well known to all employers given the length of time they have been in place.

[46] **I order Best Choice to pay a penalty in the amount of \$500.00 to the Authority for transfer to a Crown Bank Account.**

⁵ *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*. [2016] NZEmpC 143

Filing Fee

[47] **Best Choice is also ordered to pay Ms Gao the filing fee of \$71.56 within 14 days of the date of this Determination.**

Costs

[48] Ms Gao is entitled to costs in respect of her application for compliance.

[49] This matter took approximately one hour of an investigation meeting and I consider costs in the sum of \$1,000 are appropriate.

[50] **Accordingly Best Choice is ordered to pay Ms Gao the sum of \$1,000 towards her legal costs, pursuant to clause 15 of Schedule 2 of the Act.**

**Eleanor Robinson
Member of the Employment Relations Authority**