

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 700
3255179

BETWEEN YU WANG
Applicant

AND KIHINI KITCHENS LIMITED
First Respondent

AND LIN ZHU
Second Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
No appearance by the First and Second Respondents

Investigation Meeting: 23 November 2023 at Auckland

Date of Determination: 23 November 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The parties

[1] The Applicant, Ms Yu Wang, was employed by the First Respondent, Kihini Kitchens Limited. The Second Respondent, Mr Lin Zhu, is one of the First Respondent's two directors. He also holds 65 out of 100 of the First Respondent's shares.

Substantive determination

[2] In a substantive determination dated 1 September 2023 the Authority ordered the First Respondent to pay Ms Wang by 15 September 2023:¹

¹ Wang v Kihini Kitchens Limited [2023] NZERA 494.

- (a) \$23,466.38 gross wage arrears;
- (b) Interest on \$23,466.38 gross to run from 10 October 2022 until that full amount has been repaid to her, to be calculated using the civil debt calculator on the Ministry of Justice website; and
- (c) \$71.55 to reimburse her filing fee.

Service of the substantive determination

[3] The Authority's substantive determination was served on the First Respondent at its registered address for service as recorded on the Companies Register, by a process server from The Investigators New Zealand Limited ("the Investigators").

[4] The process server reported to the Authority that he taped the determination to the front door of the registered address for service, as the premises were vacant. Photos of that were provided to the Authority to establish that service of the substantive determination had occurred at 12.05pm on 4 September 2023 at the First Respondent's registered address for service.

Ms Wang's claims

[5] Ms Wang emailed Mr Zhu on 1 and 23 September 2023 asking the First Respondent to pay her the money she had been awarded. No response was received. No money has been paid.

[6] Ms Wang has sought a compliance order compelling the First Respondent to pay her the money she had been awarded by the Authority or alternatively, if it was unable to pay her, an order that Mr Zhu personally pay her the money she has been awarded.

The Authority's investigation

Statement of Problem

[7] Ms Wang lodged a Statement of Problem ("SoP") with the Authority on 4 October 2023 that sought recovery of the money she had been awarded by the Authority.

[8] The Authority was unable to prove service of the SoP on the Respondents by track and trace courier, because there was no-one present who could sign to record receipt of the service documents and the courier would not tape the documents to the door of the vacant premises.

Directions of the Authority

[9] Directions of the Authority (“DoA”) were issued on 19 October 2023 that, due to service problems, ordered substituted service could occur on Mr Zhu at the First Respondent’s registered address for service because he was a director of the company.

Service of SoP

[10] A process server from the Investigators was instructed by the Authority to ensure service of the SoP and DoA (together referred to in this determination as “*the first service documents*”) occurred on both Respondents at the First Respondent’s registered address for service.

[11] At 12.34pm on 19 October 2023 a process server served the first service documents on both Respondents at the First Respondent’s registered address for service, as recorded on the Companies Register, in accordance with the order for substituted service.

[12] The registered address for service was an office that was closed, and which had also been vacated. The process server therefore taped two envelopes containing the first service documents (one addressed to each of the Respondents) to the door of the First Respondent’s registered address for service. The Authority was provided with photos of that.

[13] A further copy of the first service documents was sent by track and trace courier to the Second Respondent at the address he had recorded on the Companies Register for himself as a director of the First Respondent. The first service documents were delivered by track and trace courier to the letterbox for the Second Respondent’s Birkenhead address at 8.44am on 20 October 2023.

No Statement in Reply

[14] The Statement in Reply (“SiR”) for both Respondents was due on 2 November 2023. No SiR has been lodged. Neither Respondent has communicated with the Authority. No leave application was made by either Respondent to lodge a SiR out of time.

Non-engagement of Respondents

[15] The DoA dated 19 October 2023 and the DoA dated 3 November 2023 both recorded the Authority’s preference to hear from all parties before it issued a substantive determination in this matter. However, the Authority also recorded that the Respondents’ failure to engage in

the investigation process would not stop the Authority's investigation from proceeding, or a substantive determination from being issued.

[16] Both DoAs also specifically recorded that if the Respondents did not seek leave to file a SiR out of time, or they failed to provide copies of relevant documents, then the Authority would determine the substantive claims and costs, based on the evidence it had available to it.

Service of Notice of IM on the Respondents

[17] The DoA dated 3 November 2023 and the Notice of Investigation Meeting ("Notice of IM") were served on the Respondents, along with a further copy of the Statement of Problem (together referred to in this determination as "*the second service documents*"), at the First Respondent's registered address for service by a process server at 11.29am on 3 November 2023.

[18] No-one was present, as the First Respondent's office was still vacant. The second service documents for both Respondents were taped in two separate envelopes by a process server from the Investigators to the door of the registered address for service of the First Respondent. A photo of that was provided to the Authority.

[19] A copy of the second service documents was also sent by track and trace courier to the Second Respondent at the Birkenhead address he has recorded on the Companies Register. It was delivered into the letterbox by at that address the courier at 7.59am on 6 November 2023 and a photo was provided to the Authority by the courier.

[20] The Authority was therefore satisfied that both Respondents had been served with a copy of the SoP, the DoAs dated 19 October and 3 November 2023 and the Notice of IM.

Investigation meeting

[21] An in-person investigation meeting was held in Auckland on 23 November 2023. The Authority was assisted by a Mandarin interpreter.

[22] The start time of the investigation meeting was delayed by 15 minutes to give the Respondents extra time to turn up in case they were experiencing traffic or parking problems. However, neither of the Respondents attended the Authority's investigation meeting or contacted the Authority.

Breach of employment standards established

[23] The Authority in its substantive determination dated 1 September 2023 found that the failure of the First Respondent to pay Ms Wang her wages was a breach of employment standards, as defined by s 5 of the Act.²

[24] The Authority gave a preliminary indication in the DoA dated 19 October 2023 that, based on the available information at that time, it considered Mr Zhu could be required to personally pay Ms Wang her wage arrears if the First Respondent was unable to.

[25] Mr Zhu was therefore put on notice that he was potentially at risk of personal liability for paying the money Ms Wang was owed by the First Respondent, if it was unable to pay her.

The issues

[26] The following issues are to be determined:

- (a) Has the Applicant been paid the money she was awarded by the Authority?
- (b) If not, should a compliance order be made by the Authority?
- (c) Should the Authority order Mr Zhu to personally pay some or all of the money Ms Wang has been awarded?
- (d) What costs and disbursements should be awarded?

Has the Applicant been paid the money she was awarded by the Authority?

[27] Ms Wang gave evidence under affirmation to the Authority that she had not been paid any of the money she had been awarded in the substantive determination. Her evidence has been accepted, as it was uncontested.

Should a compliance order be made by the Authority?

[28] The Authority's orders in the substantive determination have not been complied with by the First Respondent. The failure of the Respondents to engage with Ms Wang, or the Authority, strongly suggest that Ms Wang will not voluntarily be paid the money she is owed.

[29] The First Respondent is still registered on the Companies Register, although its removal is pending. The Authority has no evidence about the First Respondent's financial situation such

² Above n1, at [51] and [52].

as its assets or ability to pay Ms Wang the money she is owed. The available evidence indicates the First Respondent is no longer operating and has no business premises or staff.

[30] Given the absence of evidence about the First Respondent's ability to pay Ms Wang the money she is owed, it is necessary and appropriate to order Mr Zhu, as one of the First Respondent's directors, within 14 days of the date of this determination to take the necessary steps (as a director) to ensure the First Respondent complies with the Authority's substantive determination dated 1 September 2023.

[31] This compliance order therefore requires Mr Zhu within 14 days to:

- (a) Either facilitate the payment by the First Respondent to Ms Wang of the money she was awarded in paragraph [73] of the substantive determination.³
- (b) Or provide evidence that the First Respondent is unable to pay the wage arrears and other money it has been ordered to pay Ms Wang.

Should the Authority order Mr Zhu to personally pay some or all of the money Ms Wang has been awarded?

Lin Zhu is a person involved in a breach of employment standards

[32] In the substantive determination the Authority held that Mr Zhu was a person involved in the breaches of employment standards that had occurred, as he met the definition in s 142W of the Act.⁴

[33] Mr Zhu was the person who was directly and deliberately personally involved in all of the breaches of employment standards that occurred. All of Ms Wang's dealings were with Mr Zhu. He was the one responsible for ensuring the First Respondent paid her wages. He was the person who offered her employment with the First Respondent her and he negotiated with her about her remuneration.

[34] Ms Wang raised the breaches of employment standards with Mr Zhu and he was the person who induced her to keep working without being paid, based on promises she would soon be paid in full.

³ Above n1.

⁴ Supra, at [54] to [63].

[35] Mr Zhu also admitted to Ms Wang that the First Respondent owed her the wage arrears she has been awarded. In order to induce her to keep working without having been paid, Mr Zhu told Ms Wang he would personally pay her wage arrears if the First Respondent could not. Mr Zhu was also the person who signed the letters to Ms Wang, recording her outstanding wage arrears and other entitlements.

Relevant sections in the Act

[36] Section 142Y of the Employment Relations Act 2000 (“the Act”) allows an employee to recover wages or other money they are owed by their employer from ‘a person involved in a breach of employment standards’ in some limited circumstances.

[37] Section 142Y of the Act provides that an employee may recover wages or other money payable by an employer from a person who is not the employer in certain circumstances. These include where there has been a default in the payment of wages or other money payable; the default is due to a breach of employment standards; and the person the employee is seeking to recover the wages or other money from personally is a person involved in a breach of employment standards within the meaning of s 142W(1) of the Act.

[38] The Authority in the substantive determination held that all of the factors required by s 142Y(1) of the Act had been met.⁵

[39] Section 142Y(2) of the Act provides that Ms Wang can recover her wage arrears from Mr Zhu personally, as ‘a person involved in a breach of employment standards’ with the Authority’s leave (which was granted in the substantive determination) to the extent that the First Respondent is unable to pay her the money she is owed.⁶

Evidence of the First Respondent’s ability to pay Ms Wang

[40] The currently available evidence indicates that the First Respondent may be unable to pay Ms Wang the money she is owed. It is no longer in business. Its showroom is closed, and it does not have any employees.

[41] It has vacated its registered address for service and has not updated the Companies Register with a new address. It has not lodged its annual returns. The Companies Registrar has

⁵ Above n1, at [67].

⁶ Above n1, at [47].

advertised the removal of the First Respondent from the Companies Register for failure to file an annual return.

[42] Ms Wang has repeatedly asked to be paid the money she is owed by the First Respondent but has had no response to her requests for payment. The First Respondent has not engaged with Ms Wang or the Authority at all.

Order that Mr Zhu personally pay the money owed

[43] The Authority has in the first instance issued a compliance order that requires Mr Zhu to take steps, in his capacity as a director, to ensure the First Respondent pays Ms Wang the money she is owed, within 14 days of the date of this determination or if it is unable to pay her, he must provide proof of that.

[44] However, it is also appropriate for the Authority to make an alternative order that will enable Ms Wang to be paid the wage arrears and other money she is owed by Mr Zhu personally, to the extent that the First Response is unable to pay her.

[45] Accordingly, if the First Respondent is unable to pay Ms Wang the money, she is owed within 14 days of the date of this determination, then Mr Zhu is ordered to personally pay Ms Wang in full the wage arrears and other money she was awarded in the substantive determination.

[46] This payment by Mr Zhu personally to Ms Wang must occur within 28 days of the date of this determination and it must include all interest awarded in paragraph [73](b) of the substantive determination up to and including the date of payment.

[47] The Authority is satisfied that it was necessary and appropriate for Mr Zhu to be ordered to personally pay Ms Wang the money she is owed by the First Respondent to the extent it is unable to pay her, because the money she was awarded in the substantive determination involved wage arrears and other money (such as interest and the Authority filing fee) which arose from breaches of employment standards that Mr Zhu was personally involved in.

Outcome

[48] Mr Zhu is ordered within 14 days of the date of this determination to:

- (a) Take the necessary steps to ensure the First Respondent complies with the Authority's substantive determination by paying Ms Wang the money she has been awarded;
- (b) Or alternatively, if the First Respondent is unable to pay Ms Wang the money she is owed then, Mr Zhu must provide the Authority with evidence of its inability to pay.

[49] If the First Respondent is unable to comply with this compliance order because it is unable to pay Ms Wang the money she was awarded in the substantive determination, then within 28 days of the date of this determination Mr Zhu must personally pay Ms Wang the money she was awarded in the substantive determination to the extent that the First Respondent is unable to pay her.

Warning about breaches of this compliance order

[50] If the Respondents fail to comply with this compliance order, Ms Wang may apply under s 138(6) of the Act to the Employment Court for an exercise of its powers under s 140(6) of the Act.

[51] The Employment Court's powers under s 140(6) of the Act include power to order (among other things) imprisonment for a period not exceeding three months, a fine up to a maximum of \$40,000 be imposed or order that property be sequestered.

[52] Any breach of the compliance order made in this determination must therefore be pursued by Ms Wang in the Employment Court.

What costs and disbursements should be awarded?

[53] Ms Wang is the successful party. She was self-represented, so there is no issue as to costs. However, as the successful party she is entitled to have her filing fee of \$71.56 reimbursed by the respondents.

[54] Accordingly, within 28 days of the date of this determination both Respondents are jointly and severally liable for reimbursing Ms Wang \$71.56 for her filing fee.

Orders

[55] Within 14 days of the date of this determination Mr Lin Zhu is ordered to take all necessary steps as a director of Kihini Kitchens Limited to ensure it has complied with

paragraph [73] of the Authority's determination dated 1 September 2023 by arranging for Ms Wang to be paid:⁷

- (a) \$23,466.38 gross wage arrears;
- (b) Interest under the Interest on Money Claims Act 2016 on the amount of \$23,466.38 gross, which is to run from 10 October 2022 until that full amount has been repaid to her. Interest is to be calculated using the civil debt calculator on the Ministry of Justice website; and
- (c) \$71.55 for her filing fee in the substantive matter.

[56] If within 14 days of the date of this determination Kihini Kitchens Limited is unable to pay Ms Wang the money she was awarded by the Authority, then within 28 days of the date of this determination Mr Zhu is ordered to personally pay Ms Wang the money she was awarded by the Authority in paragraph [73] of the substantive determination dated 1 September 2023.

[57] Kihini Kitchen Limited and Mr Zhu are ordered on a joint and several liability basis, to reimburse Ms Wang \$71.56 for her filing fee in this compliance order application. This reimbursement must occur within 28 days of the date of this determination.

[58] Substituted service of a copy of this determination may occur on Mr Zhu at Kihini Kitchens Limited's registered address for service. A further copy will be sent by track and trace courier to the address Mr Zhu has listed on the Companies Register.

Rachel Larmer
Member of the Employment Relations Authority

⁷ Above n1, at [73].