

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 72
3186739

BETWEEN	SHELLEY ARMSTRONG Applicant
AND	MTS ENERGY LIMITED First Respondent
AND	TINGSONG QUI also known as TIM QUI Second Respondent

Member of Authority:	Peter Fuiava
Representatives:	Mark Nutsford, advocate for the Applicant No appearance by the Respondents
Investigation Meeting:	On the papers
Determination:	16 February 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Shelly Armstrong claims that MTS Energy Limited (MTS or the company) has failed to honour the terms and conditions of a record of settlement (RoS) which she entered into with the company on 8 July 2022. The RoS was subsequently certified by a Ministry of Business, Innovation and Employment (MBIE) mediator on 12 July 2022.

[2] The RoS called for MTS to pay \$12,500 to Ms Armstrong in 10 instalment payments of \$1,250 with the first payment being made on 20 July 2022. Subsequent instalment payments were to be made on the 20th day of each month until payment of the entire sum was completed. The RoS also recorded that MTS would make a contribution to legal costs in the sum of \$4,500 plus GST (\$5,175) which was to be paid directly to Ms Armstrong's representative. This amount became payable on invoice which was presented to the company on 12 July 2022.

[3] Apart from one instalment payment of \$1,250 to Ms Armstrong on 20 July 2022, no other payments have been made by MTS whose sole director is Tinsong (Tim) Qui. Clause six of the RoS states that, in the event of a default by the company of its payments, Mr Qui agreed to be co-joined in the matter and accept personal liability for any outstanding balance.

The Authority's investigation

[4] In investigating this employment relationship problem, two case management conferences have been held both of which were attended by Ms Armstrong's representative Mr Nutsford. There has been no appearance by MTS or Mr Qui. During the first case management conference on 13 December 2022, I advised Mr Nutsford that the Statement of Problem (SOP) needed to be re-served on MTS because it had not been sent to its address for service which is different to its registered office address on the Companies Office register. The SOP was reserved on the company on 16 December 2022.

[5] During the first case management conference, I directed Ms Armstrong to lodge a written statement with the Authority on 19 December which she did. On 23 December, a second case management conference was convened which Mr Nutsford also attended. There was no appearance by MTS or Mr Qui. The Authority Officer left a voicemail message on Mr Qui's mobile phone to let him know that the case management conference would continue in his absence. During the second case management conference, I directed the respondents to lodge and serve a reply statement to Ms Armstrong's brief of evidence which was to be filed no later than 4 pm Thursday 19 January 2023. If nothing was filed, the parties were advised that the matter would be determined on the papers having regard to all the information and evidence available at the time of drafting the determination.

[6] A copy of the Authority's minutes of 15 and 23 December 2022, the SOP, and Ms Armstrong's witness statement were couriered to MTS and Mr Qui's respective addresses for their information. No response from either respondent was provided. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination are:

- (a) Has the RoS been breached?
- (b) If so, should a compliance order be made?
- (c) In addition to any compliance order, what remedies, expenses and costs should be awarded?

The RoS has been breached

[8] Neither MTS nor Mr Qui have engaged with this investigation. I am satisfied that they are well aware of the present proceedings and that they have been given a fair and reasonable opportunity to respond. The Authority has the power to proceed if any party fails to attend.¹

[9] Ms Armstrong's witness statement to the Authority sets out the relevant facts. She says that on 15 November 2021 she was unexpectedly and unjustifiably dismissed from her employment as assistant manager by MTS which at the time traded as Palmers Albany. Ms Armstrong commenced proceedings in the Authority on 16 December. There was little engagement by the company and its sole director Mr Qui which resulted in the matter being set down for an investigation meeting

[10] As directed by the investigating Authority Member, Ms Armstrong lodged her witness statement for the investigation meeting however a settlement agreement was subsequently reached whereby Mr Qui agreed to pay her compensation of \$12,500 and legal fees of \$4,500 plus GST.

[11] As Mr Qui was reluctant to pay the full amount in one lump sum, Ms Armstrong agreed to a series of instalment payments instead as described above. She received her first and only instalment payment from Mr Qui on \$1,250 on 22 July 2022. The second instalment payment of \$1,250 fell due on 23 August but was never paid. Under clause five of the RoS Mr Qui agreed that, in the event payments were not made on or by the due date, the balance of the amount remaining would become immediately due and payable. Mr Qui further agreed (at clause six of the RoS) that in the event of a default,

¹ Employment Relations Act 2000, Schedule 2, clause 12.

he would be co-joined to the matter and accept personal liability for any outstanding balance.

[12] Ms Armstrong says that it has been over a year since she was unjustifiably dismissed from a job that she had been doing for nine years. She further says that she is no closer to reaching a resolution and while she had some hope once the RoS was signed, she now has a hard time believing that she will ever see the remaining balance of what is owed to her. In seeking to enforce the RoS in the Authority, Ms Armstrong says she has paid a filing fee of \$71.56 and incurred additional legal costs of \$750 plus GST.

Conclusion

[13] Having regard to the SOP and Ms Armstrong's witness statement both of which have gone unchallenged, I find multiple and sustained breaches of the RoS by MTS Energy Limited and Tingsong (Tim) Qui.

Should a compliance order be made?

[14] In light of the evidence and information before me, and there being nothing provided by MTS and Mr Qui to the contrary, I am satisfied that a compliance order should be made Ms Armstrong's favour. The respondents' default of the RoS has a two-fold effect. First, the balance remaining of \$11,250 in compensation and \$4,500 plus GST (\$5,175) in legal fees become due and payable without delay. Second, by his own admission, Mr Qui has assumed personal liability for the entire amount.

[15] However, there is one difficulty with the RoS which concerns the wording of clause eight which states:

The Employer will make a contribution to the employee's legal costs in the sum of \$4,500 plus GST (\$5.175). *This will be paid directly to the Employee's representative* upon presentation of a GST tax invoice for the agreed amount. (emphasis added)

[16] The difficulty is not that no invoice was provided because one was issued to Mr Qui on 12 July 2022. The difficulty lies in the RoS requiring payment of a mediated settlement directly to Ms Armstrong's representative which is contrary to section 150A of the Act. The section relevantly states:

150A Payment on resolution of problem

(1) Any payment by one party to another, required by any agreed terms of settlement under section 149(3) or decision under section 150(3), must be paid directly to the other party and not to a representative of that party, and the party receiving the payment may not receive, or agree to receive, payment in any other manner.

...

(3) Subsection (1) does not—

- (a) apply if the party to whom the payment is required to be made is receiving or has received legal aid under the Legal Services Act 2000 for any matter related to the employment relationship problem giving rise to the mediation; or
- (b) prevent a payment being made to the other party's solicitor.

[17] Section 150A provides that any payment by one party to another made pursuant to an agreed term of settlement must be paid directly to the other party, and not to a representative, unless the party receiving payment is receiving legal aid, or the party is being represented by a solicitor. If none of the exceptions in subsection 150A(3) apply, and none do in this case, payment for resolution of an employment problem must be paid directly to the party and not their representative.

[18] I accept that Ms Armstrong has put her affairs in order having relied on clause eight of her settlement agreement. To remedy the mischief identified, acknowledging also the effluxion of time since the RoS was certified (some seven months), and exercising the Authority's equity and good conscience jurisdiction, any legal costs awarded to Ms Armstrong's representative under the RoS must instead be paid to her directly.² It would then be a private matter between Ms Armstrong and her representative to resolve the issue of legal fees.

Conclusion

[19] The respondents have failed to pay Ms Armstrong in accordance with a certified RoS. This amount comprises a compensation and legal fees component which for the reasons given, must both be paid to Ms Armstrong directly.

² Employment Relations Act 2000, s 157(3).

What remedies are to be awarded?

[20] I find MTS and Mr Qui to have breached their respective obligations under the RoS and are jointly and severally liable as a result. The Authority orders MTS Energy Limited and Tingsong (Tim) Qui to pay Shelley Armstrong \$16,425 immediately and without delay.

Filing fee

[21] MTS Energy Limited and Mr Qui are ordered to reimburse Ms Armstrong the filing fee of \$71.56 which is to be paid no later than 4 pm Friday 3 March 2023.

[22] Interest and penalties have not been sought from the Authority.

Costs

[23] In her witness statement to the Authority, Ms Armstrong states that she has incurred additional legal costs of \$750 plus GST to enforce the RoS. Costs follow the event and the Authority's tariff-based system as a starting point for awarding costs are well known. I consider a quarter of the first-day tariff to be appropriate in this case. Costs of \$1,125 are accordingly awarded to Ms Armstrong.

[24] MTS Energy Limited and Mr Qui are ordered to pay Ms Armstrong the sum of \$1,125 towards her legal costs pursuant to clause 15 of Schedule 2 of the Act no later than 4 pm Friday 3 March 2023.

Peter Fuiava
Member of the Employment Relations Authority