

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 209
3241900 & 3241919

BETWEEN	HYO SOOK LEE Applicant (3241900)
AND	YOUNGSOO LEE Applicant (3241919)
AND	MGK HOMES LIMITED First Respondent
AND	MINGON KANG Second Respondent

Member of Authority:	Claire English
Representatives:	Seungmin Kang, counsel for the Applicant Mingon Kang for the Respondents
Investigation Meeting:	15 February 2024 in Tauranga
Submissions received:	1 and 4 March 2024 from Applicant 16 and 27 February 2024 from Respondent
Determination:	12 April 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Hyo Sook Lee worked for MGK Homes Limited (MGK Homes) as a Draftsperson. Mr YoungSoo Lee worked for MGK Homes as a Site Supervisor. Both Mr Lee and Ms Lee were dismissed by way of letter from Mr Mingon (David) Kang, the director of MGK Homes, as of 10 May 2023.

[2] Mr Lee and Ms Lee seek the payment of wage arrears from 9 February 2023 through to 10 May 2023 when their employment ended. In addition, they seek payment

of unpaid holiday pay, penalties, and that Mr Kang be found to be a person involved in a breach of employment standards.

[3] Mr Kang agrees that Ms Lee and Mr Lee were not paid from 9 February through to the ending of their employment on 10 May. He says there was and is a dispute about the sale of property owned by MGK Homes and that the proceeds of sales have not properly been accounted for by Ms Lee and Mr Lee.

[4] Shortly after the investigation meeting was held, MGK Homes was placed into liquidation. As the liquidator did not consent to the continuing of proceedings against the company, the applicants withdrew their personal grievance claims against MKG Homes, but continued their proceedings against Mr Kang personally. This determination resolves all outstanding matters.

The Authority's investigation

[5] For the Authority's investigation written statements were lodged from Mr Lee and Ms Lee. Mr Kang attended the investigation meeting on behalf of MGK Homes but did not provide a written statement. All witnesses answered questions under affirmation from me and the parties' representatives. Closing submissions were provided.

[6] As Mr Lee and Ms Lee worked together and the circumstances surrounding their dismissal and the dispute over the sale of company property stem from the same facts, their claims were heard together. For the avoidance of doubt, although they share the same surname, they are not related.

[7] 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

- [8] The issues requiring investigation and determination were in respect of Ms Lee:
- (a) Is Ms Lee owed unpaid wages and holiday pay, and if so, how much?
 - (b) Should MGK Homes be liable for penalties?

- (c) Was Mr Kang a person involved in a breach, and if so, should he be liable for penalties in his personal capacity?
- (d) Should either party contribute to the costs of representation of the other party.

[9] The issues requiring investigation and determination were in respect of Mr Lee:

- (e) Is Mr Lee owed unpaid wages and holiday pay, and if so, how much?
- (f) Should MGK Homes be liable for penalties?
- (g) Was Mr Kang a person involved in a breach, and if so, should he be liable for penalties in his personal capacity?
- (h) Should either party contribute to the costs of representation of the other party.

Background

[10] Mr Lee and Ms Lee had worked for MGK Homes for some years prior to the events that gave rise to their claim. They reported to Mr Kang, who routinely gave them instructions verbally in person or by phone.

[11] As of 9 February 2023, Mr Lee and Ms Lee stopped receiving salary payments. Mr Kang acknowledges this. He says that the company had run out of funding. He told Mr Lee and Ms Lee that the company had run out of funding, and that he was working hard to get more funding and more work. He asked them both to wait a little and give him time to arrange this, and once this had occurred, their back wages would be paid in full.

[12] Ms Lee accepted this assurance, and said that she had worked hard for Mr Kang for three years, and believed him. Mr Lee also accepted the assurance, and said that he had experienced previous times when the company had difficulty with funding, but Mr Lee had always secured the necessary funding and work to continue, and Mr Lee believed this would happen again.

[13] On around 17 April 2023, Mr Lee and Mr Kang attended a meeting with the funding company for MGK Homes. The meeting did not go well, and the funder indicated that no more money would be forthcoming. Mr Lee mentioned to Mr Kang that as he had been without pay for some weeks, he was struggling to pay school fees for his children.

[14] Mr Kang did two things in response. First, he told Mr Lee that Ms Lee should sell a shipping container owned by MGK Homes to raise funds quickly. He also asked Ms Lee privately if she would lend money to MGK Homes, so that he could pay Mr Lee and he could pay the school fees.

[15] Ms Lee declined to lend either Mr Kang or MGK Homes any money, not least because after some weeks without pay, she had no money to spare.

[16] On 20 April 2023, Mr Kang emailed Ms Lee attaching a letter that he had signed, titled "Giving Notice". It stated that notice of termination of employment was given, and the reason for this was: "a reduction in staff due to the deterioration of the company's management resulting in unpaid wages". In addition, the letter said:

Since the employer is currently unable to pay the employee Hyosook Lee overdue wages and is suffering from worsening management to the extent that all overdue wages cannot be resolved, MGK Homes Ltd. would like to provide an opportunity for the employee to change jobs by giving her a period to leave the company.

Part of the unpaid wages so far are paid by her own sale, giving her the right to dispose of furniture and electronics used in his home by Mignon Kang, managing director of her employer MGK Homes Ltd. The remaining unpaid wages will be paid to Hyo Sook Lee by disposing of some of the company's assets.

[17] Ms Lee was shocked and upset to receive this letter. She said that she believed her employment had been terminated because she had not agreed to lend money as requested.

[18] She called Mr Kang, and explained to him that she believed this was an unjust and unfair dismissal. In response, Mr Kang emailed her a second letter the following day on 21 April 2023, titled "Retract notice". That letter said:

MGK Homes Ltd. retains the employment, but since the company's financial situation is difficult, we ask Hyo Sook Lee to find another job as soon as possible.

MGK Homes Ltd. Will definitely pay your unpaid wages from 10. February, 2023.

[19] At this time, Mr Kang instructed Ms Lee and Mr Lee to sell not just the shipping container, but office furniture, tools, and various items of furniture from Mr Kang's

home, including a bed, sofa, TV, soundbar, dining chairs, and small tables. He asked Mr Lee and Ms Lee to keep a record of what they sold and the price received.

[20] Mr Lee and Ms Lee did so. Mr Lee took responsibility for selling the tools, and Ms Lee took responsibility for selling the furniture. Mr Kang was aware of this and assisted Mr Lee and Ms Lee to move some of the heavy furniture items around his home.

[21] Despite this, on 26 April, MGK emailed both Mr Lee and Ms Lee with letters terminating their employment on two week's notice, stating that the "Relationship End Date" was 10th May 2023. The notices also stated that the reason for giving notice terminating employment was: "Restructuring due to the deterioration of the company's management and bankruptcy crisis." The company has since been placed into liquidation.

[22] Mr Kang accepts that the company, on his direction, ceased paying wages to Mr Lee and to Ms Lee as of 9 February 2022. He also acknowledges that he told Mr Lee and Ms Lee to sell office furniture and other company chattels and some household furniture items, and to keep the funds raised as part payment towards their outstanding wages.

[23] Mr Kang raises concerns that Mr Lee and Ms Lee raised more money than they have stated, because most of the sales were in cash, and have retained some of these funds to their own benefit. When asked to explain why he thought this, Mr Kang explained that he was concerned about the sale price of a television set, which he had purchased some two years ago for (as he recalls) some \$4,000, and which had been sold for around \$1,500. Mr Kang expressed the view that Mr Lee and Ms Lee should have been able to sell this second-hand television set for the same price as he had purchased it two years ago, and therefore he assumed that they must have failed to account for all the funds they had actually received.

[24] Mr Kang was unable to explain his rationale for assuming that used second-hand goods would be able to be re-sold for their original purchase price. He was also unable to explain why he did not instruct Mr Lee and Ms Lee to keep records in a different way, or why he did not set sale prices at the time, even though he was aware of and involved in their actions to the extent that he helped them physically move some of the larger items to facilitate sale and pick-up by the buyers.

Analysis

[25] There is no dispute, and the evidence supports, that both Ms Lee and Mr Lee were not paid wages for 13 weeks from 9 February 2023 through to the end of their employment on 10 May 2023. Accordingly, I find that:

- a. Ms Lee is owed \$16,250 in arrears of wages, being 13 weeks wages¹ based on her salary of \$65,000 per annum.
- b. Mr Lee is owed \$18,874.96 in arrears of wages, being 13 weeks wages² based on his salary of \$75,500 per annum.

[26] There is also no dispute, and the evidence supports, that both Ms Lee and Mr Lee were not paid holiday pay at the ending of their employment. Mr Kang accepts this was not paid. Accordingly, I find that:

- a. Ms Lee is owed \$5,175 gross in final holiday pay being \$3,875 in annual leave entitlements up to 8 February 2023, plus 8% of the \$16,250 in unpaid wages referred to above.
- b. Mr Lee is owed \$9,875.36 in final holiday pay being \$8,365.36 in annual leave entitlements up to 9 February 2023, plus 8% of the \$18,874.96 in unpaid wages referred to above.

[27] Total amounts owing to the applicants are as follows:

- a. To Ms Lee - \$21,425.00 gross.
- b. To Mr Lee - \$28,750.32 gross.

[28] Deductions must be made from these total amounts to account for the money retained by both Ms Lee and Mr Lee on the sale of various items of company property.

[29] Ms Lee's evidence is that she received and retained \$1,775.41 on the understanding that this was to be in part payment of the outstanding wages owed to her by MGK Homes. Ms Lee gave evidence of Mr Kang's instructions to her to sell various items of office furniture, and some of what appeared to be Mr Kang's personal furniture.

¹ The salary of \$65,000/52 is \$1,250 multiplied by 13 weeks.

² The salary of \$75,500/52 is \$1,451.92, multiplied by 13 weeks.

She photographed these items, and advertised and sold them on Facebook Marketplace. She has produced a list of chattels and their sales prices, which were provided first to Mr Kang and later to the Authority.

[30] Mr Kang accepts that he told Ms Lee to sell these items, and to keep the money as part payment towards her unpaid wages. He now says that he does not trust the cash accounting, and that he intended that Ms Lee should have raised more funds, or to put it another way, sold the items for more money.

[31] When directing Ms Lee to sell the items and retain the proceeds, Mr Kang did not tell Ms Lee to sell the items in a certain way, record the sales in a certain way, or achieve particular sales prices for any particular items. Ms Lee says that if Mr Kang had instructed her in advance on these matters, she would have complied, but he did not. She believed at the time that she had been instructed to sell the items quickly, and have the buyers “pick up” so as to avoid any additional sale costs and to clear MGK’s offices promptly.

[32] On balance, I accept Ms Lee’s account of the amount of money she received. She was able to provide photos of the items, which were accepted by Mr Kang as being the items he had authorised her to sell. She was also able to provide some indications of the prices she had advertised the items for, and a spreadsheet which she says she created at the time to record the transactions.

[33] Mr Kang’s concerns about the accuracy of accounting have only been raised by him at a late stage in defence to her claim for the remaining outstanding wages. He was, by his own account, actively instructing Ms Lee at the time and was aware of her advertisements on Facebook Marketplace and that customers were buying items with cash, as on at least one occasion, he was present when Ms Lee conducted a sale. At the time, he raised no concerns about this, and led Ms Lee to believe this practice was acceptable to him. Under these circumstances, I prefer Ms Lee’s evidence, and accept that she received the sum of \$1,775.41 as part payment towards her outstanding wages.

[34] This sum is to be deducted from the amount owing to her by MGK Homes. Accordingly, the total amount owing to Ms Lee once part payments have been accounted for is \$19,649.59.

[35] Mr Lee's evidence is similar. He gives evidence that he received and retained the sum of \$7,849.59 towards his unpaid wages. The difference between the amount received by him and the amount received by Ms Lee is primarily explained because he was tasked by Mr Kang with selling a shipping container and building tools as opposed to office furniture and similar smaller items.

[36] Mr Kang also suggests that Mr Lee did not obtain a sufficient price for the goods he sold. Mr Kang refers in particular to the sale of the television set as discussed above. Mr Kang's concerns about the amount obtained by Mr Lee for the television set have only been raised by him at a late stage in defence to his claim for the remaining outstanding wages. He was, by his own account, actively instructing Mr Lee as well, as on at least one occasion, he was present when Mr Lee needed to move larger furniture items. At the time, he raised no concerns about price, and led Mr Lee to believe the sales were acceptable. Under these circumstances, I prefer Mr Lee's evidence, and accept that he received the sum of \$7,849.59 as part payment towards his outstanding wages.

[37] This sum is to be deducted from the amount owing to Mr Lee by MGK Homes. Accordingly, the total amount owing to Mr Lee once part payments have been accounted for is \$20,.73.

Was Mr Kang A Person Involved in a Breach?

[38] Having found that MKG Homes owes both Mr Lee and Ms Lee arrears of wages and holiday pay, I now need to consider if Mr Kang was a person involved in a breach as defined by s. 142W of the Act. If I find that Mr Kang is a person involved in a breach, I must then consider if he may be made liable for the payment of any wages or other money due to Mr Lee and/or Ms Lee if MGK Homes fails to make payment to them in full in accordance with s. 142Y of the Act.

[39] Section 142W of the Act defines a person involved in a breach. This requires that:

- a. There is a qualifying breach, being a breach of employment standards³;
- b. There is a qualifying person, being an officer of an entity⁴; and

³ See s. 142W(1).

⁴ See s. 142W(2) and (3).

- c. There are qualifying actions by that person, being acts that aided, abetted, counselled, or procured the breach, or being in any way, directly or indirectly, knowingly concerned in, or party to, the breach.⁵

[40] First, I must consider if there was a qualifying breach. In this instance, there has been in respect of both Ms Lee and Mr Lee:

- a. a breach of s. 4 of the Wages Protection Act 1983, which requires that wages be paid in full and on time; and
- b. A breach of s. 27 of the Holidays Act 2003, which requires that any annual leave not taken as at the ending of employment must be paid in the pay that relates to the final period of employment.

[41] Section 5 of the Act defines “employment standards”, and these include the minimum entitlements for payment under the Holidays Act 2003, and the provisions of the Wages Protection Act 1983. Breaches of these two Acts, which have occurred here, are breaches of employment standards. This means there are qualifying breaches.

[42] As the employer is an entity, a person can only be considered a person involved in a breach if they are an officer of the employer. Where the employer is a company, a director of that company is an officer of the company for the purposes of s. 142W. Mr Kang was at all relevant times a director of MGK Homes, therefore he is an officer of the employer. This means he is a qualifying person.

[43] I must then consider if there are qualifying actions by Mr Kang in respect of the failures to pay wages and holiday pay. Mr Kang’s evidence was that he made the decision to stop paying both Mr Lee and Ms Lee, and in fact went further and convinced them both to continue working without pay for a time, on the basis of his promise that they would receive their wages in full at a later stage. In respect of the unpaid holiday pay, he simply said that he had decided not to pay it, as the company had limited money available. The evidence shows that Mr Kang was directly and knowingly responsible for the non-payment of monies owing to Ms Lee and to Mr Lee, and that he persuaded them to continue working on the strength of his promises to them that they would be paid at a later stage. I am satisfied that he has procured the breaches, and/or that he is knowingly concerned in or a party to the breaches, as they occurred by his direction and

⁵ See s. 142W(1)(a), (b), and (c).

as a result of his promises. This means there is qualifying conduct, making Mr Kang a person involved in breaches of employment standards.

[44] I must now consider if orders should be made under s. 142Y of the Act allowing Ms Lee and Mr Lee to recover the wages and other money payable to them from Mr Kang, if MGK Homes does not make payment to them in full.

[45] This may occur if there has been a default in the payment of wages or other money payable to the employee; and the default is due to a breach of employment standards; and the person is a person involved in a breach.

[46] All these things apply in the present case: there has been default in wages due to Ms Lee and Mr Lee⁶; the default is caused by a breach of employment standards namely breach of the Wages Protection Act 1983 and the Holidays Act 2003; and I have determined that Mr Kang is a person involved in a breach.

[47] As all these tests have been met, money owing to an employee may be recovered from Mr Kang personally, if leave for this to occur has been given by the Authority. Bearing in mind that Ms Lee and Mr Lee have been without their wages for a considerable period of time already and Mr Kang's direct and on-going involvement in the situation that leads to MGK Homes' default, I grant such leave as requested by the applicants. In doing so, I note that money may be recovered from Mr Kang personally only to the extent that the employer, MGK Homes Limited, is unable to pay the arrears owing, as required by s. 142Y(2)(b) of the Act.

[48] Both Ms Lee and Mr Lee have sought orders that interest be payable on the monies owing to them in accordance with the Interest on Money Claims Act 2016. I note it was not plead in the Statements of Problem, and MGK Homes has since been placed into liquidation. In the circumstances, I decline to award interest.

Penalties

[49] Both Ms Lee and Mr Lee seek penalties be awarded against Mr Kang personally, on the grounds that he has incited, instigated, aided, or abetted breaches of the applicants' employment agreement by MGK Homes, in accordance with s. 134(2) of the Act. The breach is the failure to pay wages which the applicants' employment

⁶ For the avoidance of doubt, holiday pay is to be treated as wages for this purpose in accordance with s. 86 of the Holidays Act 2003.

agreements entitled them to be paid on a weekly basis. This means there is a breach, and a penalty claim, in respect of both Ms Lee and Mr Lee.

[50] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,⁷ *A Labour Inspector v Prabh*⁸ and *A Labour Inspector v Daleson Investment*.⁹ The considerations in regard to penalties¹⁰ are as follows:

- a. The object of the Act – the failure to pay wages is a failure to pay minimum entitlements, and the applicants have been denied the benefit of their entitlements to both leave and money;
- b. The nature and extent of the breach – the breach continued for some four months before the employment ended and remains unremedied;
- c. Whether the breach was intentional, inadvertent, or negligent – it was knowing, and the applicants were urged to accept the breach by Mr Kang;
- d. The nature and extent of any loss or damage – both applicants have lost money and are still waiting on payment;
- e. Compensation or other steps in mitigation – there was no evidence that any steps have been taken to pay the arrears owing;
- f. The circumstances of the breach, including the applicant’s vulnerability – both the applicants spoke of their trust in Mr Kang as a result of their long-term employment relationship with him, which caused them to believe he would repay them in the future if they agreed to work without wages;
- g. Any similar conduct – although MKG Homes has appeared before the Authority previously, this was a personal grievance claim on different

⁷ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

⁸ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

⁹ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

¹⁰ *Nicholson v Ford*, [2018] NZEmpC 132.

facts to this matter, which I consider to be a neutral factor for the purposes of this penalty consideration;

- h. Deterrence – there is a need for deterrence on a general and specific basis, given the importance of paying wages when due;
- i. Degree of culpability – Mr Kang was directly involved;
- j. Consistency – the present case is at the lower end of the range of previous awards;
- k. Ability to pay – there is no evidence on this point one way or another;
- l. Proportionality – the amounts and duration involved are more than minor.

[51] Taking all the above matters into account, I consider that a penalty against Mr Kang is warranted. He convinced both Ms Lee and Mr Lee to work without pay and to trust that he would pay them for their time later, which promise he has not made good on. As an individual, Mr Kang is liable for a total maximum penalty of \$10,000¹¹ in respect of Ms Lee and \$10,000 in respect of Mr Lee. I consider that a penalty of \$6,000 in respect of each is warranted. Orders are made accordingly.

[52] In addition, Ms Lee and Mr Lee have applied to have any penalty awarded paid to them, on the grounds that it is they who have suffered as a result of the failure to pay, and the resulting liquidation of the company has removed any other recourses for compensation they might have had. I accept that Ms Lee and Mr Lee are directly affected by the breaches with limited other recourse. The penalties will be awarded to them, and orders are made accordingly.

Orders - File 3241900

[53] Ms Hyo Sook Lee is owed the sum of \$19,649.59 gross in unpaid wages and holiday pay by MGK Homes Limited.

[54] Mr Mingon (David) Kang is a person involved in a breach of employment standards as defined in s. 142W of the Employment Relations Act 2000.

¹¹ Section 135(2) of the Act.

[55] To the extent that MGK Homes Limited fails to pay all or part of the sums owing to Ms Hyo Sook Lee set out in this determination, leave is granted for Ms Hyo Sook Lee to recover any unpaid monies from Mr Kang personally.

[56] Mr Kang is ordered to pay to Ms Hyo Sook Lee within 28 days of the date of this determination the sum of \$6,000 without deduction as a penalty for breaching the terms of her employment agreement.

Orders - File 3241919

[57] Mr YoungSoo Lee is owed the sum of \$20,900.73 gross in unpaid wages and holiday pay by MGK Homes Limited.

[58] Mr Mingon (David) Kang is a person involved in a breach of employment standards as defined in s. 142W of the Employment Relations Act 2000.

[59] To the extent that MGK Homes Limited fails to pay all or part of the sums owing to Mr YoungSoo Lee set out in this determination, leave is granted for Mr YoungSoo Lee to recover any unpaid monies from Mr Mingon (David) Kang personally.

[60] Mr Mingon (David) Kang is ordered to pay to Mr YoungSoo Lee within 28 days of the date of this determination the sum of \$6,000 without deduction as a penalty for breaching the terms of his employment agreement.

Costs

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. It is noted that the investigation meeting in this matter took place over 1 day.

[62] If they are not able to do so and an Authority determination on costs is needed the applicants may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Kang would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[63] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹²

Claire English
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1