

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 277
3267399

BETWEEN	XUAN ZHOU Applicant
AND	SUT KING LIMITED First Respondent
AND	YULING WANG Second Respondent

Member of Authority:	Rachel Larmer
Representatives:	May Moncur, advocate for the Applicant No appearance by the Respondents
Investigation Meeting:	10 May 2024 in Auckland
Oral Determination:	10 May 2024
Written Record Issued:	10 May 2024

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 1 June 2023 the Authority issued a consent determination involving these parties.¹

[2] The two respondents were jointly and severally ordered to pay Ms Zhou the money they had agreed to pay her in a Settlement Agreement, namely:

- (a) \$15,000.00 on or before 30th June 2023;
- (b) \$15,000.00 on or before 28th July 2023; and

¹ *Zhou v Sut King Limited and Wang* [2023] NZERA 286.

(c) \$11,500 (being \$10,000 plus GST) towards her legal costs.

[3] None of this money has been paid by either respondent. Both respondents have failed to engage with Ms Zhou and her advocate regarding payment to her of the money she is owed.

[4] Ms Zhou sought:

(a) Compliance orders be made against each respondent, to compel them to comply with the Authority's consent determination;

(b) Penalties be imposed on each respondent for breaching the consent determination and their obligations under the Settlement Agreement;

(c) Costs and disbursements for this application.

[5] Neither respondent replied to Ms Zhou's claims.

The Authority's investigation

Substituted service

[6] Ms Zhou is a low wage migrant employee who cannot afford to incur the costs of engaging a process service to find Mr Wang at his home address, particularly when he is deliberately avoiding service.

[7] The Authority therefore made an order for substituted service in the Directions of the Authority dated 27 February 2024 that provided for substituted service to occur on Yuling Wang at Sut King Limited's registered address for service.

[8] Up until 23 December 2023 Yuling Wang was a shareholder in Sut King Limited. He also manages the business Sut King Limited which runs under the trading name "Sakura Massage and Acupuncture", which is located in the Base Parade, Northgate, Hamilton.

Service on both respondents

[9] The Authority sent both respondents a copy of the statement of problem (SoP) via track and trace courier to the first respondent's registered address for service on 21 December 2023. Delivery was signed for by "Leesa Yun" on 27 December 2023. This delivery was then returned to the Authority on 5 January 2024.

[10] The Authority asked Ms Moncur for updated contact details for the respondents. In response she said she would arrange for service of the SoP on behalf of the applicant.

[11] Ms Moncur sent the SoP by track and trace courier to the first and second respondents at the first respondent's registered address for service, as recorded on the Companies Register. This was signed for by the second respondent "Yuling Wang" at 12.53pm on 2 February 2024.

[12] Ms Moncur also sent copies of the SoP to the first respondent's Sakura massage business premises in:

- (a) The Base in Hamilton, for which delivery was signed for by "Leo Leo" at 1.40pm on 1 February 2024; and
- (b) Sylvia Park in Mt Wellington Auckland, for which delivery was signed for by "J Jing" at 9.15am on 2 February 2024.

[13] The Authority issued directions dated 27 February 2024, that included an order authorising that substituted service could occur on Yuling Wang at the first respondent's registered address for service.

[14] The Directions of the Authority (DoA) and the Notice of Investigation Meeting (Notice of IM) which was set down on 10 May 2024 were served by track and trace courier on both respondents at the first respondent's registered address for service.

[15] Once again the second respondent (the signature said "Y Wang") signed to acknowledge receipt of the DoA and Notice of IM at 12.34pm on 29 February 2024. After delivery Mr Wang again returned the DoA and Notice of IM to the Authority.

[16] Ms Zhou's witness statement was attempted to be served on the respondents at the first respondent's registered address for service by track and trace courier at 2.57pm on 8 April 2024. The intended recipient at that address told the courier driver that they refused to accept the two packages (one package being for each respondent).

[17] Attempted delivery of an amended Notice of IM (which changed the start time of the investigation meeting on 10 May 2024 from 10am to 11am) occurred on both respondents at the first respondent's registered address for service on 28 March 2024. Receipt of the packages (one for each respondent) was refused by an unidentified person at that address.

[18] The applicant's witness statement and the Amended Notice of IM was served on both respondents at the first respondent's registered address for service at 7.23am on 12 April 2024. The courier provided the Authority with photo proof of delivery.

[19] The Authority was therefore satisfied that the following documents, which are together referred to as "the service documents", have all been served on both respondents:

- (a) The SoP;
- (b) The Directions of the Authority (DoA) dated 27 February 2024;
- (c) The Notice of Investigation Meeting on 10 May 2024;
- (d) A copy of Ms Zhou's witness statement and supporting documents;
- (e) An Amended Notice of Investigation Meeting, in which the start time of the investigation meeting on 10 May 2024 had been changed from 10 am to 11am.

Non-engagement by respondents

[20] The respondents have been put on notice of Mr Zhou's claims and have been given an opportunity to respond to them.

[21] The respondents have elected not to engage in these proceedings. They did not lodge a Statement in Reply (SiR) within 14 days of service of the Statement of Problem (SoP). They did not seek leave to lodge a SiR out of time. They have not engaged with the Authority about these proceedings.

Investigation meeting

[22] The respondents have not participated in the Authority's investigation at all. They did not attend the investigation meeting, even though they were offered the option of attending remotely and had been provided with AVL information that would have enabled them to have done so, had they wanted to be heard by the Authority.

[23] The Authority keep the AVL link the respondents had been given open for the duration of the investigation meeting. It also started the investigation meeting fifteen minutes late to give the respondents extra time to turn up in person.

[24] The Authority was assisted during the investigation meeting by a Mandarin interpreter. Ms Zhou and her advocate attended the investigation meeting in person. The Authority questioned Ms Zhou about her evidence under affirmation.

Issues

[25] The following issues are to be determined:

- (a) Have one or both respondents paid Ms Zhou any of the money they were ordered to pay her in the consent determination?
- (b) If not, should compliance orders be issued against one or both respondents?
- (c) Should penalties be imposed on one or both respondents?
- (d) What costs and disbursements should be awarded?

Have the respondents paid the applicant any of the money they were ordered to pay her?

[26] The Authority ordered that the respondents are jointly and severally liable to meet the obligations in paragraphs [5] and [6] of the consent determination, by paying Ms Zhou the money she is owed under clauses [4] and [5] of the Settlement Agreement.

[27] This obligation meant that if one respondent has not paid, or is unable to pay her, then Ms Zhou can legally compel the other respondent to pay her the full amount.²

[28] The consent determination made the terms the parties had reached in the Settlement Agreement dated 31 May 2023 final, binding and enforceable orders of the Authority.³ Accordingly, the respondents were jointly and severally ordered to pay Ms Zhou:

- (a) \$15,000 on or before 30 June 2023;
- (b) \$15,000 on or before 28 July 2023;
- (c) \$11,500 towards her legal costs by 28 July 2023, upon production of a GST receipt.

² Above n1, at [6].

³ Above n1, at [5].

[29] None of these payments were made. No arrangements have been made to pay Ms Zhou any of the money she is owed.

[30] Ms Zhou has sent WeChat messages to the respondents asking to be paid the money she is owed. Her advocate, Ms May Moncur, made a number of phone calls to each respondent. She also sent them emails and a letter of demand, without success.

[31] Although Mr Wang claimed in an email to Ms Moncur dated 1 July 2023 that Ms Zhou had been paid, that was untrue. No payment had been made and no proof of payment has been provided by either respondent. These emails were produced to the Authority during the investigation meeting and were translated for the Authority by the interpreter.

[32] Ms Zhou produced a copy of:

- (a) Her advocate's GST invoice dated 23 June 2023 for \$11,500 (being \$10,000 plus GST of \$1,500) that her advocate had issued the respondents for the applicant's legal costs; and
- (b) The letter of demand she had sent the respondents on 3 July 2023 for the full amount she was owed.

[33] Neither respondent replied to these communications by paying the money owed.

[34] Ms Zhou gave her evidence under affirmation. She told the Authority that she had not been paid any of the money the respondents had been ordered to pay her. Her evidence was uncontested and has been accepted by the Authority.

Should compliance orders be issued against one or both respondents?

[35] Ms Zhou has not been paid any of the money she is owed. No attempt to pay her has occurred. Both respondents have ignored Ms Zhou's demands to be paid. They have also failed to engage with the applicant, her advocate and the Authority about this matter.

[36] It is unlikely that Ms Zhou will be paid anything unless compliance orders are issued against both respondents. Compliance orders are therefore appropriate and necessary.

[37] The respondents are ordered to comply with paragraphs [5] and [6] of the Authority's consent determination dated 1 June 2023, by paying Ms Zhou a total of \$41,500 within 28 days of the date of this determination.⁴

Should penalties be imposed on the respondents?

[38] A penalty is not available under the Act for a breach of the consent determination or Settlement Agreement, which was made after the employment had ended.

What costs and disbursements should be awarded?

[39] This matter involved a half-day investigation meeting, so the notional starting point for assessing costs is \$2,250, being half of the notional daily tariff for a one-day investigation meeting which is currently \$4,500.

[40] There are no factors that should result in the notional starting tariff being adjusted.

[41] Accordingly, the respondents are ordered on a joint and several liability basis, to contribute \$2,250 towards Ms Zhou's actual legal costs and to reimburse her \$71.55 for the filing fee in this matter.

Orders

[42] Within 28 days of the date of this determination, both respondents are ordered on a joint and several liability basis, to pay Ms Zhou \$43,821.55 consisting of:

- (a) \$41,500 being the money they were ordered to pay her in the consent determination;⁵
- (b) \$2,250 towards her actual legal costs in this matter; and
- (c) \$71.55 to reimburse her filing fee.

Consequences of breaching the Authority's compliance order

[43] If the respondents, who are jointly and severally liable for the \$43,821.55 Ms Zhou is owed, fail to pay her within 28 days of the date of this determination, then

⁴ Above n1.

⁵ Above n1, at [5] and [6].

she may apply to the Employment Court under s 139 of the Act to prevent continuing breaches of this compliance order.

[44] In which case, the Court may elect to exercise its powers under s 140 of the Act to (among other things):

- (a) Order imprisonment of the person in default for not more than three months;
- (b) Impose a fine not exceeding \$40,000 on the person in default; or
- (c) Order that the property of the person in default be sequestered.

Service of this compliance order determination

[45] The Authority orders that substituted service of a copy of this determination is to occur on Yuling Wang at Sut King Limited's registered address for service, as recorded on the Companies Register as at 10 May 2024. This is the same address that Mr Wang has recorded for himself on the Companies Register in his capacity as the sole director of Totoro King Limited, which also has that same address recorded on the Companies Register as its registered address for service.

Rachel Larmer
Member of the Employment Relations Authority