

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 379  
3257200

BETWEEN	YIU WAN CHARLES LI Applicant
AND	THE CREATIVE NURSERY LIMITED (in liquidation) First Respondent
	WILLIAM FREDERICK MILLER Second Respondent

Member of Authority:	Peter Fuiava
Representatives:	Applicant in person No appearance by the Second Respondent
Investigation Meeting:	14 June 2024 in Auckland and by audio-visual link
Determination:	26 June 2024

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1] Yiu Wan Charles Li has approached the Authority to investigate his claim of unpaid wages by his former employer, The Creative Nursery Limited (CNL or the company). The wage arrears amount to \$8,154.98 and in pursuing the debt, Mr Li has incurred legal expenses of \$2,470.20 plus total disbursements and expenses of \$133.84. The issue requiring investigation and determination is whether Mr Miller, as sole director and shareholder of CNL, should be held personally liable for what is owed.

**How did the Authority investigate?**

[2] Proceedings were commenced by way of statement of problem lodged in the Authority on 13 October 2023. At that time, CNL was the only respondent. William Miller was not joined as a second respondent until after the first of two case management conferences (CMC) held on 4 April 2024.

[3] Following the first CMC, Mr Li confirmed with the Authority his desire to seek leave to have Mr Miller included as a second respondent as a person involved in a breach of default in payment of wages under s 142Y of the Employment Relations Act 2000 (the Act).

[4] CNL was placed into liquidation on 12 April 2024 and I am not aware that the liquidator has granted leave for Mr Li's claim against the company to continue in the Authority.

[5] As for Mr Miller, he is an Australian citizen and resident and under sch 2 cl 4A of the Act, the Authority granted leave for him to be served with a copy of Mr Li's amended statement of problem which included the former director as a second respondent. Mr Li completed the relevant form for service of proceedings outside New Zealand and arranged service on Mr Miller through Australia Post. The documents were delivered on 29 April 2024.

[6] Arrangements were made to schedule a second CMC with the parties. On 30 April 2024, Mr Miller confirmed by email that the suggested date of 31 May at 1 pm was good for him. Although that email confirms Mr Miller's receipt of the amended statement of problem, he failed to attend the teleconference at the appointed time. Two attempts were made by the Authority Officer to contact him, the first at 1.01 pm and the second at 1.21 pm approximately. However, both calls went to voicemail and messages were left for Mr Miller to contact the Authority. While he did email the Authority Officer at 1.15 pm requesting a reschedule of the CMC due to a bad eye infection, the CMC had ended by the time that email was read.

[7] The CMC proceeded in Mr Miller's absence which did not prejudice him because a link would be emailed to him to attend the investigation meeting remotely via audio-visual link (AVL) and he would receive a copy of the Authority's minute which would record what had been discussed during the CMC. If the date of the investigation meeting was not suitable to Mr Miller, it was his responsibility to email the Authority of that which he never did.

### **No appearance at the investigation meeting**

[8] Despite receiving a copy of Mr Li's statement of problem, written synopsis and his lawyer's invoice by email, Mr Miller has not lodged anything in reply with the Authority. The Authority's notice of investigation, a copy of which was sent to Mr Miller on 31 May 2024, expressly records that if he (as respondent) did not attend the investigation meeting, the Authority could, without hearing evidence from him, issue a determination in Mr Li's favour as the applicant.

[9] This is what has occurred here. At the start of the investigation meeting on Friday 14 June 2024 at 10.04 am, there was no appearance by Mr Miller via AVL. In case he was running late or delayed, I granted a brief 10-minute adjournment for him to appear. When the investigation commenced at 10.15 am and ended at 10.30 am, there was still no appearance by him. Consequently, under sch 2 of cl 12 of the Act, the Authority has acted fully in the matter before it as if Mr Miller had attended or been represented at the investigation meeting. As of drafting this determination, he has not made any further contact with the Authority by email.

[10] As permitted by s 174E of 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.

### **What are the relevant facts?**

[11] Mr Li was employed as a senior graphic designer for CNL from 5 July 2021 to 25 August 2023 when his employment ended following his voluntary resignation. Mr Li's individual employment agreement stated that he was to be paid weekly at the rate of \$85,000 per year plus superannuation.

[12] When Mr Li's employment ended with CNL, the company owed him net wages of \$10,193.73. This amount comprised accrued annual holiday pay which under s 27(2) of the Holidays Act 2003 (the HA) the employer is statutorily obliged to pay in the pay that relates to the employee's final period of employment. However, that did not happen for Mr Li who returned CNL's computer equipment shortly after parting ways with the company.

[13] On 19 September 2023, Mr Li came to an arrangement with Mr Miller for his outstanding wages to be paid in five instalments of \$2,038.75 per week. However, the first instalment payment was late and also short of the agreed instalment amount. A copy of Mr Li's personal bank account shows that on 28 September 2023 he received a payment of \$1,943.51 from CNL. On 3 October 2023, a further payment of \$95.24 was made. There have been no further payments ever since and \$8,154.98 remains outstanding.

[14] On 12 March 2024, Mr Li's lawyers sent a final letter of demand to Mr Miller for the unpaid wages and warned him that he could be held personally liable for it. However, in spite of the formal demand, no further payments were made to Mr Li who commenced proceedings in the Authority as a self-represented litigant.

### **How much is claimed to be owing?**

[15] Mr Li claims the following against Mr Miller:

Wages owed	\$8,154.98
Interest on unpaid wages (five percent per annum)	\$407.75
Lawyer's legal fees	\$2,470.20
Postage (serving papers in Australia)	\$62.29
ERA application fee	\$71.55
Loss of opportunities (subjective estimate)	\$4,000
Emotional distress (subjective estimate)	\$3,000
<b>TOTAL ARREARS</b>	<b>\$18,166.77</b>

### **Findings**

[16] While Mr Miller was afforded the opportunity to participate with this process, he has elected not to do so and, consequently, Mr Li's claim has gone unchallenged. However, this does not mean that the entirety of the sums claimed above can be awarded because under s 142Y of the Act, a Labour Inspector or an employee may recover from a person who is not the employer any unpaid wages or other money payable if the default is due to a breach of employment standards, and the person is a person involved within the meaning of s 142W of the Act.

[17] Under s 142W, if the breach is by a company, a person occupying the position of director may be treated as a person involved in a breach of employment standards. As the sole director and shareholder of CNL, Mr Miller satisfies that criterion. I note also that he reached an agreement with Mr Li to pay his wage arrears by instalments, which points to direct and actual knowledge of the default in payment of wages due under the HA and the Wages Protection Act 1983. As a person involved in a breach for failing to pay wages or other money due to an employee, Mr Miller is personally liable for the wage arrears now that his employing company is unable to pay because of its liquidation.

[18] I find Mr Miller personally liable to pay the wages owed to Mr Li of \$8,154.98 which is to be paid no later than Wednesday 24 July 2024. I have not awarded Mr Li's claim for loss of opportunities and emotional distress which I have interpreted as a claim for lost wages and compensation for hurt and humiliation as these personal grievance remedies are not expressly recoverable under s 142Y.

#### **Should interest be awarded?**

[19] The Authority has the power under cl 11 sch 2 of the Act to award interest if it thinks fit to do so. This is an appropriate case for the award of interest as Mr Li has been deprived of the use of his wages since his employment ended on 25 August 2023. Mr Miller is ordered to pay interest on \$8,154.98 from 25 August 2023 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator.<sup>1</sup>

#### **Has Mr Li incurred any reasonable expenses?**

[20] Given the outcome of this investigation in which Mr Li has been successful, it is appropriate that he be reimbursed the filing fee of \$71.55 paid to lodge his statement of problem and the postage fee of \$62.29 to have Mr Miller served in Australia. Total expenses and disbursements of \$133.84 is to be paid no later than 24 July 2024.

#### **What is the outcome?**

[21] **The Authority orders William Frederick Miller to pay Yiu Wan Charles Li the following monies no later than Wednesday 24 July 2024:**

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<sup>1</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator).

- (i) NZD8,154.98 in wage arrears;
- (ii) interest on NZD8,154.98 from 25 August 2023 until the date payment is made in full; and
- (iii) expenses and disbursements of NZD133.84.

[22] In the event that Mr Miller fails to pay any of the monies by the due date, Mr Li may ask the Authority Officer to provide him with a certificate of determination which he may then use to enforce as a judgment debt with the civil, fines, collections unit of the District Court, if required.

### **What about costs?**

[23] The Authority's Practice Direction (effective 1 February 2024) sets out in one document various aspects of its investigatory process including how costs arising from the process are dealt with by the Authority. This is a case where Mr Miller ought to contribute to Mr Li's legal expenses because without the benefit of that legal advice he would not have taken the necessary steps to pursue Mr Miller personally as a person involved in a breach of employment standards under s 142Y of the Act.

[24] The investigation meeting albeit short required two case management conferences to ensure that Mr Miller was served and given an opportunity to participate with this process. Costs follow the event, are generally modest in the Authority, and are intended to be a contribution towards a successful party's actual and reasonable costs. With these well-established principles in mind, **the Authority orders Mr Miller to pay costs of NZD1,000 to Mr Li no later than 24 July 2024.**

Peter Fuiava  
Member of the Employment Relations Authority