

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 483
3290699

BETWEEN	XIA ZHAO Applicant
AND	ZHAI INVESTMENT COMPANY LIMITED First Respondent
	XIN JIN Second Respondent

Member of Authority:	Peter Fuiava
Representatives:	May Moncur, advocate for the Applicant Second Respondent in person
Investigation Meeting:	On the papers
Submissions and information received:	Up to and including 31 July 2024 from the Applicant Up to and including 28 July 2024 from the Respondents
Determination:	15 August 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Xia Zhao seeks a compliance order as a consequence of the respondents' failure to comply with their record of settlement (RoS) signed and entered into under s 149 of the Employment Relations Act 2000 (the Act). The RoS required Zhai Investment Company Limited (the company) and Xin Jin, the company's sole director and shareholder, to pay Ms Zhao a total of \$16,000 in full and final settlement of their employment problem of which \$13,000 was to be paid to Ms Zhao by 23 February 2024 and \$3,000 to her representative, Ms Moncur, within 14 days of receiving her invoice.

[2] However, by 12 April 2024, which was when Ms Zhao lodged her statement of problem with the Authority, she was still owed \$9,000. The respondents deny breaching the RoS on the ground that they had made a subsequent offer to Ms Zhao on

18 March 2024 to pay her a weekly sum of \$50 until the \$9,000 was paid in full. Neither Ms Zhao nor her representative replied to that offer.

[3] The respondents have in their statement in reply made a new offer of \$150 per week starting 18 April 2024 which would see the balance outstanding paid in the next 60 weeks. The statement in reply further records that the company's restaurant business was "unfavourable" which limited its ability to make a one-off payment.

How has the Authority investigated?

[4] On 29 May 2024, a case management conference was held with Ms Moncur and Mr Jin during which, it was discovered that the respondents had made additional payments towards the RoS that Ms Moncur was not aware. Mr Jin emailed the Authority evidence of his company's payments comprising six \$150 payments made between 18 April and 23 May 2024. As a result, the balance of the RoS had reduced to \$7,800.

[5] It was agreed that the Authority would monitor payments for the next two months and determine matters by 26 July 2024. I impressed on the respondents to make best endeavours to reduce the debt, which they have.

[6] The essential issue for the Authority is whether there was a breach of the RoS for which a compliance order under s 137 of the Act should be made and whether penalties and costs should also be awarded as sought.

[7] 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.

There has been a breach of the RoS

[8] The RoS entered into by the parties expressly stated that Ms Zhao was to be paid the sum of \$13,000 by 23 February 2024. However, after that date, \$9,000 of the RoS remained unpaid. There is nothing to indicate that Ms Zhao accepted the respondents' offer of 18 March 2024 to pay the remaining balance by instalment. In

any event, the offer came too late as the due date for full payment had already elapsed. The respondents did breach the RoS.

[9] A compliance order is warranted particularly as record of settlements under s 149 of the Act are the primary mechanism by which most employment relationship problems are resolved every year in New Zealand. It is important that public confidence in such agreements are not undermined and that parties have certainty with which they may structure their affairs around such agreements.

[10] By agreement with the parties, I adjourned matters for two months to monitor the respondents' payments of the remaining balance which now stands at \$6,750. Under s 138(4A) of the Act, the Authority may order payment to an employee by instalments, but only if the financial position of the employer requires it.

[11] I accept that the respondents are not able to pay Ms Zhao what she is owed in one payment. As pleaded in their statement in reply, business conditions for the restaurant have been unfavourable but the respondents are now in a position to pay the entire debt by the end of this year as opposed to an earlier proposal to pay over a 60-week period. Albeit with some reluctance, Ms Zhao has accepted the proposal.

[12] Not all breaches of a RoS will result in a penalty and the present case is such an example. However, this is an appropriate case for the award of interest for Ms Zhao who will have organised her affairs anticipating full payment of the RoS by 23 February 2024.

[13] The Authority has the power under cl 11 sch 2 of the Act to award interest if it thinks fit to do so. The respondents are ordered to pay Ms Zhao interest on \$9,000 to be calculated from 23 February 2024 to 29 May 2024, interest on \$7,800 from 30 May to 25 July 2024, and interest on \$6,750 from 26 July to 26 December 2024 or when full payment is made, whichever is the earliest. Interest is to be calculated using the civil debt interest calculator.¹

¹ www.justice.govt.nz/fines/civil-debt-interest-calculator.

Orders

[14] The Authority orders Zhai Investment Company Limited and Xin Jin to pay Xia Zhao the outstanding balance of the parties' record of settlement dated 19 January 2024. Payment of the outstanding balance is to be made by instalments of \$306 per week starting 1 August 2024 and ending with one final payment of \$324 on 26 December 2024.

[15] The imposition of a compliance order is a serious matter. Should the respondents fail to comply with this order, Ms Zhao is entitled to pursue the breach in the Employment Court which has the powers under s 140(6) of the Act to impose a fine not exceeding \$40,000, order property to be sequestered, or impose a sentence of imprisonment not exceeding three months.

[16] The Authority further orders the respondents to pay Ms Zhao interest as calculated above at [13] which is to be paid no later than 26 December 2024 or when full payment is made, whichever is the earliest.

What about costs?

[17] Ms Zhao is entitled to reasonable expenses for this application which she has had to lodge with the Authority in order to enforce the RoS. The Authority orders that, no later than 21 days from the date of this determination, the respondents are to reimburse Ms Zhao the filing fee of \$71.55 for this application.

[18] While I have determined this employment problem on the papers to keep costs down, as the successful party Ms Zhao is entitled to a reasonable contribution towards her representative's actual and reasonable costs. The Authority awards costs of \$650 which the respondents are ordered to pay no later than 21 days after the date of this determination.

Peter Fuiava
Member of the Employment Relations Authority