

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 492
3279179

BETWEEN

ZHIKUN CHEN
First Applicant

JIAJUN CHEN
Second Applicant

SHINING CONTRACTOR
LIMITED
First Respondent

ZHIQIANG (JASON)
HUANG
Second Respondent

Member of Authority: Marija Urlich

Representatives: Zong-Pei Zhao, counsel for the Applicants
Zhiqiang (Jason) Huang for the Respondents

Investigation Meeting: On the papers

Determination: 16 August 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination issued on 24 June 2024 the Authority made a compliance order requiring Shining Contractor Limited (SCL) and Zhiqiang (Jason) Huang to pay Zhikun Chen and Jiajun Chen \$49,000 within a specified timeframe.¹ The determination reserved claims for penalties, interest and costs to allow SCL and Mr Huang more time to provide information relevant to the determination of those remaining issues.² They have not provided further information within the timeframe set

¹ *Chen & Chen v Shining Contractor Limited & Huang* [2024] NZERA 372.

² Above at [21] – [22].

or subsequently. I am satisfied a fair opportunity has been provided to them to provide information.³

[2] 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 information received.

Issues

[3] The issues requiring investigation and determination are whether:

- (i) a penalty is ordered and a portion of which awarded to Zhikun Chen and Jiajun Chen;
- (ii) an order for interest should be made; and
- (iii) an award of costs should be made.

Penalty

[4] Section 149(4) of the Act enables a party to seek the imposition of a penalty in respect of any established breach of a corresponding settlement agreement. The imposition of a penalty is discretionary and is generally imposed for the purpose of punishment as well as discouragement of others. A single breach of a settlement agreement by an individual may attract a penalty of up to \$10,000 and for a company a penalty not exceeding \$20,000 may be awarded for a solitary breach.⁴

[5] Messrs Chen say penalties should be imposed against SCL and Mr Huang individually and for each failure to make payments under the payment schedule in the record of settlement. They say any penalties awarded or a portion thereof should be paid to them given SCL and Mr Huang's breaches of the record of settlement undermines the integrity and security of s 149 settlement agreements which are intended to give parties certainty and finality, that they (SCL and Mr Huang) are solely responsible for the knowing and ongoing breaches of the record of settlement, the nature

³ For completeness directions concerning the provision of an overseas address for service for Mr Huang have been made by the Authority and information has been provided by the lawyers who acted for SCL and Mr Huang.

⁴ Employment Relations Act 2000, section 135(2)(a) and (b).

and the extent of the loss and damage suffered by them and the benefit to SCL and Mr Huang in retaining the settlement monies over an extended period.

[6] The parties' record of settlement contained a payment schedule for ten payments. SCL and Mr Huang failed to meet any of the payment times provided in the schedule – they have each breached the record of settlement ten times. Given the breaches are of the same type within the context of obligations contained in a single record of settlement document it is appropriate to globalise them to one each for SCL and Mr Huang.

[7] The level of penalty is determined by an assessment of the factors set out in s 133A of the Act alongside judgments of the Employment Court.⁵ As a matter of public policy, in this case penalties against both SCL and Mr Huang are necessary to uphold the integrity of the full, final, binding and enforceable agreements allowed under s 149 of the Act. They are jointly and severally liable for those settlement sums and the failure to meet obligations freely entered are their individual failures.

[8] The record of settlement records SCL and Mr Huang understood the binding and enforceable nature of the record of settlement, and they must be taken to have been aware of their obligations under the record of settlement. They have made and/or facilitated payments under the record of settlement totaling \$51,000 and represented to Messrs Chen that the overdue payments which now total \$49,000 would be made, including in the statement in reply dated 12 March 2024. The promised payments have not occurred without explanation. There is no basis on which to reasonably conclude that SCL's and Mr Huang's breaches of the record of settlement were inadvertent, minor or technical. Given the ongoing and compounding nature of the breaches and the significant sums involved, the breaches are grave and the level of penalty should fairly reflect the gravity of the breaches.

[9] Messrs Chen have been put to considerable inconvenience and used significant resources to enforce the record settlement. They have suffered as a consequence of not receiving the settlement sums including experiencing stress and financial distress as a consequence of the breaches. As migrants they are in a recognised category of

⁵ For example, *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

vulnerable workers. This vulnerability was known or very likely to have been known to SCL and Mr Huang.

[10] A search of the relevant databases has not revealed previous proceedings for similar breaches involving SCL or Mr Huang.

[11] Taking all the factors into account SCL is liable for a penalty of \$6,000 and Mr Huang is liable for a penalty of \$4,000, which is within the range of penalties currently imposed for failure to pay monies due under a record of settlement and is proportionate to the seriousness of the globalised breach and harm caused.

[12] In the circumstances of this matter it is just for the total penalty sum (\$10,000) to be paid to Messrs Chen by SCL and Mr Huang in equal portion.

Interest

[13] Messrs Chen seek interest on the outstanding amounts due under the parties' record of settlement in two tranches – the first is the quantified interest up to date of investigation meeting and the second is the calculation of interest beyond the date of the investigation meeting until paid in full. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. Their entitlement to the outstanding settlement sums has been established as has the dates on when that entitlement arose being the dates contained in the payment schedule of the record of settlement.

[14] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[15] Messrs Chen have provided interest calculations from the date payments were due under the payment schedule up to 20 June 2024, the day before the investigation meeting held on 21 June 2024. They have used the civil debt interest calculator to calculate total interest of \$703.55 in that period as follows:⁶

⁶ N1 at [13] and [16] sets out the payment schedule and when payments were made.

- (i) \$32.46 being interest calculated on the September 2023 instalment between the date due and 20 June 2024;
- (ii) \$15.20 being interest calculated on the October 2023 instalment between the date due and 20 June 2024;
- (iii) \$18.34 being interest calculated on the November 2023 instalment between the date due and 20 June 2024;
- (iv) \$8.57 being interest calculated on the December 2023 instalment between the date due and 20 June 2024;
- (v) \$139.87 being interest calculated on the January 2024 instalment between the date due and 20 June 2024;
- (vi) \$187.19 being interest calculated on the February 2024 instalment between the date due and 20 June 2024;
- (vii) \$144.12 being interest calculated on the March 2024 instalment between the date due and 20 June 2024;
- (viii) \$97.94 being interest calculated on the April 2024 instalment between the date due and 20 June 2024;
- (ix) \$53.30 being interest calculated on the May 2024 instalment between the date due and 20 June 2024; and
- (x) \$6.56 being interest calculated on the June 2024 instalment between the date due and 20 June 2024;

[16] The above interest calculations are accepted and become the order of the Authority. SCL and Mr Huang are jointly and severally liable to pay interest of \$703.55.

[17] SCL and Mr Huang are also required, jointly and severally to calculate and pay to Messrs Chen interest on the sum of \$49,000 for which a compliance order was made on 24 June 2024 from that date until the amount is paid in full.

[18] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.

Summary of orders

[19] The Authority orders as follows:

- (i) Within 14 days of the date of this determination Shining Contractor Limited and Zhiqiang (Jason) Huang are ordered to make the following payments for the benefit of Zhikun Chen and Jiajun Chen:
 - a. pay a penalty to Zhikun Chen and Jiajun Chen as provided in [11] above; and
 - b. calculate and pay interest as provided at [16] and [17] above.

Costs of representation and reimbursement of filing fee

[20] Messrs Chen have incurred costs of professional representation. Those costs total \$11,363.73 and do not include costs incurred in respect of the investigation meeting held on 21 June 2024 which took approximately half a day of investigation meeting time. There are factors which warrant a significant increase in the usual tariff including the protracted steps Messrs Chen have been required to take to enforce the record of settlement necessary in part given the complexity of the payment schedule contained therein which drew out the settlement payments over a nine-month period and the efficiency achieved by their claims being brought together.

[21] A fair and reasonable contribution to the costs of professional representation Messrs Chen have incurred in enforcing the record of settlement is \$6,000 and they are entitled to recover the filing fee of \$71.56 incurred in lodging this application.

[22] Shining Contractor Limited and Zhiqiang (Jason) Huang are jointly and severally liable to pay Zhikun Chen and Jiajun Chen \$6,000 in costs plus the filing fee of \$71.56 within 14 days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority