

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 477
3266341

BETWEEN

DAHUI CHEN
Applicant

AND

ECO-SMART GROUP
LIMITED
Respondent

Member of Authority: Shane Kinley

Representatives: Ronald Jones, advocate for the Applicant
Trent Bowler, counsel for the Respondent

Investigation Meeting: On the papers

Determination: 08 August 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dahui Chen claims Eco-Smart Group Limited (ESGL) has failed to honour the terms and conditions of a record of settlement (RoS) under s 149 of the Employment Relations Act 2000 (the Act) which she entered into with ESGL on 15 September 2023. The RoS was certified by a Ministry of Business, Innovation and Employment mediator on 19 September 2023.

[2] The RoS required, inter alia, ESGL pay Ms Chen \$12,500 gross for outstanding commission payments and \$2,876.94 (gross) for outstanding holiday pay entitlements. These amounts were to be paid by weekly instalments commencing 20 September 2023 and were to be fully paid within 60 days or sooner. Ms Chen said ESGL had paid \$6,000 only and sought payment of the outstanding amount, costs associated with her application to the Authority and compensation.

The Authority's investigation

[3] In investigating this employment relationship problem, a case management conference was held on 5 April 2024, which was attended by Ms Chen's advocate and counsel for ESGL.

[4] Counsel for ESGL acknowledged during a case management conference the amounts due under the RoS have not been paid in full and made comments about the reasons why payment has not been made in full by ESGL. Counsel for ESGL also made comments about the reasons why ESGL had not lodged and served a statement in reply. By agreement, I granted leave for ESGL to lodge and serve a statement in reply by 19 April 2024.

[5] I directed this matter to be determined on the papers without the need for an in-person investigation meeting. For the Authority's investigation a statement of problem was received from Ms Chen and a written witness statement in affidavit form was lodged from Ms Chen, with a supporting affidavit from another person.

[6] No submissions were received from ESGL. ESGL did not lodge a statement in reply, despite multiple follow-up queries from an Authority Officer and advice from counsel for ESGL on 22 July 2024 he "should have [ESGL's] response within the next day or two".

[7] I provided ESGL with a final opportunity to engage with this matter on 22 July 2024, by lodging any application for leave to reply or respond to this matter, along with a statement in reply and any evidence relevant to this matter by 29 July 2024. ESGL were again advised I may proceed to determine this matter based on Ms Chen's evidence and submissions on her behalf.

[8] I am satisfied ESGL is aware of the present proceedings and it has been given a fair and reasonable opportunity to respond. The Authority has the power to proceed if any party fails to attend.¹

[9] 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.

¹ Employment Relations Act 2000, Schedule 2, clause 12.

The issues

[10] The issues requiring investigation and determination were:

- (a) whether ESGL has breached clause 2 of its RoS with Ms Chen by failing to pay her money owing under the RoS (this breach having been conceded to have occurred by counsel for ESGL)?
- (b) whether a compliance order under s 137 of the Act should be made requiring ESGL to pay Ms Chen the unpaid amount and if so by what date?
- (c) whether ESGL should pay Ms Chen any compensation for the late payment of amounts owing under the RoS (and if this claim is being advanced further what jurisdiction I have to consider it)?
- (d) whether ESGL should contribute to Ms Chen's costs including disbursements associated with this matter?

The RoS has been breached

[11] Ms Chen's statement of problem and affidavit evidence set out the relevant facts. On 19 September 2023 Ms Chen and ESGL entered a RoS, as described in [2]. While Ms Chen provided bank records showing payments totalling \$6,000 (gross) were made to her, she says payment of the remaining \$9,376.94 (gross) has not occurred.

[12] As noted in paragraph [4], counsel for ESGL acknowledged during a case management conference the amounts due under the RoS have not been paid in full. No further comment or explanation for this has been provided by ESGL. I am satisfied the amount of \$9,376.94 (gross) is due and find there have been multiple and sustained breaches of the RoS by ESGL, given the ROS required weekly payments.

A compliance order is appropriate

[13] In light of the evidence and information before me, and there being nothing provided by ESGL to the contrary, I am satisfied a compliance order should be made in Ms Chen's favour.

No order for compensation is made

[14] Ms Chen's statement of problem sought "compensation for the stress caused during the whole process chasing for my commission". At the case management conference I indicated her advocate would need to provide submissions identifying what jurisdiction I had to consider this claim. No such submissions were received.

[15] I do not consider I have the jurisdiction to make an order for compensation in relation to non-compliance with a RoS. No orders are made.

Compliance Order

[16] I find ESGL has failed to pay to Ms Chen the amount of ordered by the Authority. It is just in the circumstances for an order to be made requiring ESGL to comply with the obligations it committed to under RoS.

[17] I order Eco-Smart Group Limited to pay Dahui Chen the amount of \$9,376.94 (gross) no later than 28 days after the date of service of this Compliance Order.

[18] There are very serious consequences where there is a failure to comply with a compliance order. The Authority has the ability to extend the time specified to obey the compliance order on the application of the person required to obey the order in s 138(3) of the Act. If such extension application was to be made within the time for compliance of 28 days, clear documentary information about ESGL's financial position would be required to be provided to the Authority and Ms Chen.

Costs

[19] Ms Chen sought costs in these proceedings however no submissions were received of the amount of costs she has incurred and her affidavit did not address this point.

[20] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[21] If the parties are unable to resolve costs and an Authority determination on costs is needed Ms Chen may lodge and then should serve a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum ESGL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[22] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.²

Effect of further non-compliance

[23] ESGL are advised if it does not observe or comply with a compliance order the Employment Court may do one or more of the following pursuant to s 140 (6) of the Act: ...

(d) order that the person in default be fined a sum not exceeding \$40,000;

(e) order that the property of the person in default be sequestered.

Shane Kinley
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1