

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 70
3072833

BETWEEN	JINQI GE Applicant
AND	ZIMING LI Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
No appearance by Respondent

Investigation Meeting: On the papers

Determination: 18 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Jinqi Ge was employed by Renaissance Assets Management Limited (in liquidation) (RAM).

[2] Mr Ziming (Eric) Li is the sole director and shareholder of RAM.

[3] Mr Ge asked the Authority to impose a compliance order and interest on Mr Li for the money Mr Ge was awarded in previous Authority proceedings in which RAM was a party.

[4] Mr Ge asked the Authority to make Mr Li personally liable under s 142W of the Employment Relations Act 2000 (the Act), as a 'person involved in breaches of employment standards', for RAM's default in paying wages or other money to Mr Ge.

No statement in reply

[5] Mr Ge's statement of problem was served on Mr Li by a process server at 6.39pm on 7 January 2020 at 1-Q George St, Newmarket, Auckland.

[6] Mr Li has not filed a statement in reply. Nor has he applied for leave to file a statement in reply out of time.

Previous Authority determinations

[7] Mr Ge was the successful party in Authority proceedings AEA-3001407 that named RAM as the only respondent. Mr Li was a witness in those proceedings but he was not named personally as a respondent party.

[8] The Authority issued three determinations in the RAM proceedings:

- (a) Substantive determination;¹
- (b) Penalty determination;² and
- (c) Costs determination.³

[9] RAM has not paid any of the money that it was ordered to pay Mr Ge in any of these determinations. Mr Ge now seeks to recover the money he is owed by RAM from Mr Li personally.

Investigation of Mr Ge's claims in this matter

[10] This investigation has been conducted on the papers.

[11] As the Presiding Member in the RAM proceedings I have had regard to the sworn/affirmed evidence given by Mr Ge, Mr Li and other witnesses in person during the previous investigation meeting for that (RAM) matter that occurred on 8, 9, 10 and 28 May 2018 in Auckland.

[12] That evidence in the RAM investigation was tested by questioning of witnesses, and was the subject of submissions by the parties, before the Authority made factual findings regarding the credibility of Mr Ge and Mr Li.

¹ [2018] NZERA 272.

² [2018] NZERA 304.

³ [2019] NZERA 17.

[13] There is no need to hear that same evidence again, because the Authority has already recorded findings that are relevant to the determination of this matter.

[14] The Authority has relied on the information and findings set out in paragraphs [20]-[29], [37] – [63] of its substantive determination in the RAM proceedings.⁴

[15] In particular, the Authority has relied on its finding in paragraph [63] of the RAM substantive determination that it was Mr Li who personally required and caused Mr Ge to pay an unlawful employment premium to RAM in exchange for a job.⁵

[16] Although the Authority acknowledged that Mr Li disputed that he had required Mr Ge to pay an unlawful employment premium, after carefully testing the evidence of all witnesses in the RAM matter, the Authority did not find Mr Li to be a credible witness.

Should a compliance order be imposed on Mr Li?

[17] The Authority does not have jurisdiction to impose a compliance order on Mr Li.

[18] RAM is in liquidation so Mr Li cannot exercise his powers as RAM's director to order RAM to pay Mr Ge the money he was awarded by the Authority. The liquidator has declined Mr Ge permission to pursue proceedings against RAM. That is the end of the matter. Mr Ge is now simply one of RAM's unsecured creditors.

[19] Because Mr Li was not a party to the previous RAM proceedings, he cannot be ordered to comply with the Authority's previous determinations in the RAM proceedings. Compliance is RAM's responsibility, as the only named party in those proceedings. It is not Mr Li's personal responsibility.

Is Mr Li a person involved in RAM's breaches of employment standards?

[20] RAM's requirement of Mr Ge to pay it an unlawful employment premium in exchange for employment by it breached s 12A of the Wages Protection Act (WPA).

[21] Section 5 of the Act defines "*employment standards*" as including (among other things) provisions of the WPA. That means that the requirement of Mr Ge to pay an

⁴ [2018] NZERA 272.

⁵ Above n4.

unlawful employment premium was a breach of employment standards, because it breached the WPA.

[22] Section 142W of the Act defines a person involved in a breach of employment standards as someone who has (among other things) procured/induced or was concerned in or a party to the breach. Mr Li clearly falls within this definition.

[23] Mr Li was the person who required Mr Ge to pay the unlawful employment premium in exchange for employment. Mr Li was the person who handed Mr Ge the paper that recorded the amount of the unlawful employment premium and the bank account details for it to be paid into. Mr Li told Mr Ge he would not get an employment agreement to sign until he had paid the unlawful employment premium. Mr Ge confirmed to Mr Li personally that his (Mr Ge's) father had paid the unlawful employment premium. Mr Li authorised Mr Ge's engagement as an employee. Nothing occurred without Mr Li's direction and approval.

[24] Although RAM was Mr Ge's employer, Mr Li as RAM's sole director and shareholder was effectively RAM controlling mind. RAM therefore implemented Mr Li's wishes and decisions.

Should Mr Ge be granted leave to recover arrears of wages or other money from Mr Li personally?

[25] Section 142Y(2)(a) of the Act requires Mr Ge to be given leave by the Authority to personally pursue Mr Li for money RAM has defaulted paying Mr Ge.

[26] Mr Li appears to have deliberately structured RAM as a management company with very limited financial resources and then used that entity to employ Mr Ge to provide services to other related companies under Mr Li's control.

[27] It is that financial structure that has resulted in RAM going into liquidation and thereby defaulting on its obligations to pay Mr Ge the money the Authority had previously awarded him.

[28] Mr Ge is therefore now simply one of RAM's unsecured creditors, and is unlikely to be paid.

[29] This is an appropriate case to grant leave to Mr Ge under s 142Y(2)(a) of the Act to pursue Mr Li personally for money RAM has defaulted on paying Mr Ge.

Can Mr Ge recover the wages or money RAM owes him from Mr Li?

[30] Section 142Y of the Act enables Mr Ge to recover the “*wages or other money*” RAM has defaulted paying him from Mr Li personally because:

- (a) RAM has defaulted in paying Mr Ge any of the money he was awarded by the Authority;
- (b) The default arises from a breach of the employment standards, namely the breach of the WPA that involved Mr Li requiring Mr Ge to pay an unlawful employment premium in return for employment by RAM; and
- (c) Mr Li is a person involved in the breach of the WPA as per s 142W of the Act, because he was personally involved in all aspects of RAM’s breach of employment standards.

[31] However, Mr Ge may only recover reimbursement of the unlawful employment premium amount from Mr Li personally. That is the only breach of employment standards that is recoverable in accordance with the findings made by the Authority in the RAM proceedings.

[32] The other amounts the Authority awarded Mr Ge do not meet the requirements of s 142Y(1)(b) of the Act, meaning they are not recoverable from Mr Li personally, because these other amounts awarded by the Authority did not relate to breaches of employment standards.

Should interest be payable?

[33] Mr Ge borrowed the amount of the unlawful employment premium from his father, who paid the unlawful employment premium into a bank account nominated by Mr Li which was for a bank in China.

[34] Mr Ge has been deprived use of this money as a direct result of Mr Li’s personal actions. It is therefore appropriate that Mr Ge be awarded interest so he can repay the money his father lent him for the unlawful employment premium.

[35] Interest is therefore awarded to Mr Ge under the Interest on Money Claims Act 2016. Interest is to be calculated using the civil debt calculator on the Ministry of Justice (MoJ) website.

[36] Mr Li is ordered to pay Mr Ge interest on the NZD equivalent of RMB ¥165,000 from the date of the Authority's substantive determination dated 24 August 2018 until that amount has been repaid in full.

[37] The amount of RMB Mr Ge was awarded reimbursement of is to be converted into NZD at the foreign exchange rate advertised publicly by the Bank of New Zealand on 24 August 2018. The Authority does not currently have that information before it, but the parties are able to calculate it themselves.

[38] Either party may provide that information to the Authority if they want an order determining that amount in New Zealand dollars.

Outcome

[39] RAM has defaulted in reimbursing Mr Ge for the unlawful employment premium he paid it.

[40] Mr Ge is granted leave under s 142Y(2)(a) of the Act to recover the reimbursement of the unlawful employment premium that RAM has defaulted paying him (Mr Ge) from Mr Li personally.

[41] The requirements of s142W of the Act are met, because Mr Li is the person who was directly involved in the breach of employment standards that occurred.

[42] It was Mr Li who used RAM to engage in a breach of employment standards, because he (Mr Li) directed/procured/required the payment by Mr Ge of an unlawful employment premium, in breach of the WPA.

[43] Section 142Y(1) of the Act applies.

[44] Mr Ge is able to personally recover from Mr Li the amount required to reimburse Mr Ge for the unlawful employment premium RAM was ordered to reimburse him in paragraphs [73] and [74] of the Authority's substantive determination dated 24 August 2018.

[45] Interest runs on the outstanding amount of the unlawful employment premium from 24 August 2018 until it has been repaid in full.

Orders

[46] Within 28 days of the date of this determination, Mr Li is ordered to pay Mr Ge:

- (a) The amount required to fully reimburse Mr Ge for the unlawful employment premium he paid. This is to be calculated in New Zealand dollars in accordance with paragraph [74] of the Authority's substantive determination in the RAM proceedings.
- (b) Interest from 24 August 2018 on the outstanding unlawful employment premium amount until it has been reimbursed in full. This is to be calculated using the civil debt calculator on the MoJ website;
- (c) \$71.56 to reimburse him for his filing fee.

Rachel Larmer
Member of the Employment Relations Authority