

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 304  
3001407

BETWEEN

JINQI GE  
Applicant

A N D

RENAISSANCE ASSETS  
MANAGEMENT LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person  
John Macdonald and Majka Cherrington, Counsel for  
Respondent

Investigation Meeting: On the papers

Submissions Received: 19 September 2018 from Applicant  
28 September 2018 from Respondent

Date of Determination: 01 October 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment Relationship Problem**

[1] Section 12A of the Wages Protection Act 1983 (WPA) prohibits an employer or person on the employer's behalf, from seeking or receiving any premium in respect of the employment of any person.

[2] Mr Ge succeeded in proving to the required standard of proof that Renaissance Assets Management Limited (RAM) required him to pay an unlawful employment premium for his job.<sup>1</sup>

[3] In its substantive determination the Authority ordered RAM to pay Mr Ge the unlawful employment premium that RAM had required him to pay for his job.<sup>2</sup>

[4] Paragraphs [75] – [77] of the Authority’s substantive determination<sup>3</sup> gave the parties an opportunity to provide submissions on penalty issues relating to the unlawful employment premium.

[5] Section 165(2)(b) of the Act provides a maximum potential penalty for a company of \$20,000 per breach.

[6] Section 133A of the Employment Relations Act 2000 (the Act) sets out the factors the employment institutions must consider when determining penalties. These are:

- (a) the object stated in s.3;
- (b) the nature and extent of the breach of involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent;
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach of the person involved in the breach, because of the breach or involvement in the breach;
- (e) whether the person in breach or the person involved in the breach is paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;
- (g) whether the person in breach or the person involved in the breach has previously been found by the employment institutions in proceedings

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<sup>1</sup> [2018] NZERA Auckland 272.

<sup>2</sup> Supra at paragraphs [70]-[72].

<sup>3</sup> Supra.

under the Act, or any other enactment, to engage in any similar conduct;

[7] *Object of the Act* – Section 3 (a)(i) provides that one object of the Act is to build productive employment relationships through the promotion of good faith by recognising the implied mutual obligations of trust and confidence and statutory good faith behaviour.

[8] *Nature and extent of breach* – There was one instance of Mr Zimming (Eric) Li, acting on behalf of RAM as RAM's director and shareholder, requiring Mr Ge to pay an unlawful employment premium for his (Mr Ge's) job.

[9] *Intentionality* – The breach was deliberate. Mr Li wrote down the information relating to the payment arrangements of the unlawful employment premium on a slip of paper which he gave to Mr Ge. Mr Li also told Mr Ge he could not sign an employment agreement or start work until he had paid the employment premium.

[10] *Loss or damage* – The payment of the premium had a significant adverse affect on Mr Ge. After Mr Ge believed he had been dismissed on 25 November 2016 he sought repayment of it by Mr Li. Mr Ge's requests for repayment lead to Mr Li taking disciplinary actions against Mr Ge that resulted in Mr Ge's unjustified dismissal. His unjustified dismissal lead to Mr Ge's work visa being revoked by Immigration New Zealand thereby depriving him of the opportunity to work and of the benefit of receiving a salary.

[11] *Restitution* – There has not been any restitution to date. RAM was ordered by the Authority to repay Mr Ge the unlawful employment premium but that has not yet occurred.<sup>4</sup> There are no mitigating matters relating to the unlawful employment premium.

[12] *Circumstances of breach* – This breach involved an non New Zealand national. Mr Ge was vulnerable in terms of not being aware of New Zealand employment law. English is not Mr Ge's first language. Mr Ge also required a work visa to be able to work in New Zealand. Mr Ge's work visa was limited to his employment with RAM so the loss of his employment resulted in the loss of his work visa. This breach involved an imbalance of power and a misuse of Mr Li's power on

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behalf of RAM as an employer, to Mr Ge's financial cost. The full context of the breach is addressed in the Authority's substantive determination.<sup>5</sup>

[13] *Previous offending* – RAM is a first offender. There is no history of RAM or Mr Li previously requiring an unlawful employment premium from its employees.

[14] The Employment Court in *Tan v Yang and Zhang*<sup>6</sup> imposed a penalty of \$6,000 to send a clear deterrent message. This was a doubling of the Authority's penalty of \$3,500 that it had imposed in that case.

[15] *Tan* involved a maximum penalty of \$10,000 because Mr Tan was an individual who sought an unlawful employment premium as opposed to RAM who as a company sought the unlawful premium so is liable to a potential maximum penalty of \$20,000.

[16] The Employment Court in *Tan* noted that the cases it had referenced in its judgment involved a broad range of penalties from \$7,000 - \$15,000 imposed on a company.

[17] The penalty imposed is not to compensate Mr Ge but is to punish RAM and to deter RAM and others from engaging in such conduct in future.

[18] This case clearly warrants the imposition of a penalty. RAM is ordered, within 28 days of the date of this determination, to pay a penalty of \$10,000 for its breach of s12A of the WPA.

[19] RAM must pay \$5,000 of this penalty to the Crown bank account. The remaining \$5,000 of the penalty imposed is to be paid to Mr Ge directly under s.136(2) of the Act to reflect the financial harm he has suffered as a result of RAM's breach.

[20] In *Borsboom v Preet PVT Ltd*<sup>7</sup> the Employment Court considered its decision in *Tan v Yang*<sup>8</sup> and outlined a four step process for setting penalties in a Labour Inspector matter, which can be applied to other penalty cases.

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<sup>5</sup> Ibid 1.

<sup>6</sup> [2014] NZEmpC 65.

<sup>7</sup> [2016] NZEmpC 143.

<sup>8</sup> [2014] ERNZ 733.

[21] *Step 1, nature and number of breaches* - One breach of s.12A of the WPA which has a maximum penalty of \$20,000.

[22] *Step 2, severity of the breach* - A breach of this nature is a serious and substantial breach of the objects of the Act and of the minimum code protections given to employees by the WPA. An aggravating feature is the fact that Mr Ge was a vulnerable employee. A mitigating factor is that this is the first time RAM has been found liable for breaching s.12A of the WPA.

[23] *Step 3, RAM's financial circumstances* - No financial information was presented at the investigation meeting. Nor was it provided in accordance with this timetable set for the Authority's determination of the penalty issues. Ms Cherrington submitted that RAM has stopped operating so it has no other staff and is not making a profit. No evidence was provided to support that submission. RAM obviously has funds available to it because it is pursuing a challenge to the Employment Court regarding the Authority's substantive determination.

[24] *Step 4, proportionality of outcome* - The \$10,000 penalty imposed is in line with the level of penalty imposed by the Employment Court in *Tan*, which was \$6,000 out of a maximum potential penalty of \$10,000 for an individual. It is also consistent with the \$7,000 penalty imposed by the Authority in 2012 on a company in *Zhou v Harbit International Ltd*<sup>9</sup> for a breach of s.12A of the WPA. The Zhou case involved an unlawful employment premium of \$13,849.60 which was less than half the amount of the unlawful employment premium required in this case.

[25] It is also proportional to the amount of the unlawful employment premium (which in today's currency conversion is approximately NZ \$35,000) because it represents less than 30% of what Mr Ge paid. The employment premium requested was Chinese RMB 161,000, although due to a misunderstanding between him and his father who actually paid the unlawful employment premium Mr Ge actually paid Chinese RMB 165,000.

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<sup>9</sup> [2012] NZERA 404.

**What if any costs should be awarded?**

[26] Mr Ge has sought an award of costs and disbursements in his favour. Ms Cherrington submits that costs should lie where they fall. I do not agree with that. Costs should follow the event as is normal practice in the Authority.

[27] There is insufficient information before the Authority for it to determine costs today.

[28] Although Mr Ge represented himself during the investigation meeting he incurred legal costs of counsel who represented him at an earlier stage in the proceedings.

[29] Mr Ge as the successful party is entitled to an award of costs towards the actual legal costs he incurred. The parties are encouraged to resolve costs by agreement.

[30] The Authority will adopt its usual notional daily tariff based approach to costs, which must then be adjusted to reflect the particular circumstances of this case. That will include reflecting that Mr Ge was not accompanied by counsel during the four day investigation meeting. If there have been without prejudice except as to costs offers to settle then that will also be taken into account along with any other factors the parties wish to raise.

[31] The issue of reimbursing some or all of Mr Ge's father's travel from China will also be considered. Mr Ge is to provide copies of his father's flights details and costs.

[32] If agreement regarding costs is not reached then Mr Ge has 14 days within which to file proof of his actual legal costs by providing invoices. These invoices must make it clear exactly what work or legal services these invoice(s) covered.

[33] RAM then has 14 days within which to file its costs submissions. Mr Ge has 7 further days within which to file any reply he wants to make to RAM's costs submissions.

**Rachel Larmer**  
**Member of the Employment Relations Authority**