

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 494
3219240

BETWEEN YU WANG
Applicant

AND KIHINI KITCHENS LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
No appearance by the Respondent

Investigation Meeting: 31 August 2023 at Auckland

Date of Determination: 1 September 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Yu Wang, was employed by the Respondent, Kihini Kitchens Limited, as a Marketing Specialist under an individual employment agreement the parties signed on 20 May 2021.

[2] Ms Wang's first day of work was 24 May 2021, she had an unpaid four week break in May/June 2022 and her employment ended on 10 October 2022. She was based in the Kihini Kitchens Limited's ("the Respondent's") showroom.

[3] Clause 9 of Ms Wang's employment agreement said that she would be paid monthly by direct transfer into her nominated bank account and that KiwiSaver contributions would be made in accordance with the provisions of the KiwiSaver Act 2006.

[4] Ms Wang said she was not paid any of her salary for the months of February, March, April, August, September and for the ten days she worked in October 2022. She has still not

been paid any of her wage arrears of \$23,466.38 gross. Ms Wang sought to recover her wage arrears from the Respondent, or if it is unable to pay her, from one of its director's Mr Lin Zhu personally.

[5] The Respondent has not responded to Ms Wang's wage arrears claim, it has not engaged with the Authority at all and it did not attend the investigation meeting.

The Authority's investigation

Statement of Problem

[6] Ms Wang lodged a Statement of Problem ("SoP") with the Authority on 21 March 2023 that sought recovery of wage arrears.

[7] The SoP was served by track and trace courier on the Respondent at its registered office in Great South Road, Greenlane, Auckland 4.04 pm on Monday 15 May 2023. The SoP was signed for by "*Chaman Singh*". It was then returned to the Authority by courier on 24 May 2023, without the Respondent completing the Statement in Reply form which had been provided to it with the SoP.

Case Management Conference

[8] A letter was couriered to the Respondent at its address for service on 8 July 2023 advising that a Case Management Conference ("CMC") had been set up on 18 July 2023 to timetable Ms Wang's claim for an investigation meeting.

[9] On 17 July 2023 the Authority Officer called the Respondent, on the phone number it had on its website, to say that the CMC was going to be held the following day (18 July 2023). However, the call was not answered, so a message was left. The Authority Officer's voicemail message was not responded to.

[10] The CMC was held on 18 July 2023 which Ms Wang attended, but the Respondent did not. The Authority was assisted during the CMC by a Mandarin speaking interpreter.

[11] At the beginning of the CMC the Authority Officer attempted to call the Respondent on two different mobile phone numbers that were on its website. The first number was not answered and voicemails were blocked. The second number was not answered, but a voicemail was left by the Authority Officer. No response was received from the Respondent.

[12] The outcome of the CMC was recorded in Directions of the Authority (“DoA”) dated 18 July 2023. The DoA set out how the Respondent could participate in the Authority’s investigation. Again no response was received from the Respondent after the DoA was sent to it.

No Statement in Reply

[13] No Statement in Reply has been lodged.

[14] The DoA dated 18 July 2023 recorded that if the Respondent wanted to defend Ms Wang’s claims then it had to seek leave to file a Statement in Reply out of time. The process for that was set out in the DoA, and the Respondent was given until 12 pm on 31 July 2023 to apply for leave to lodge a Statement in Reply out of time.

[15] No leave application was made.

Non-engagement of Respondent

[16] The DoA dated 18 July 2023 recorded the Authority’s preference to hear from both parties before it issued a substantive determination. However, the DoA noted that the Respondent’s failure to engage in the Authority’s investigation process would not stop its investigation from proceeding or a substantive determination from being issued.

[17] The DoA also specifically recorded that if the Respondent did not seek leave to file a Statement in Reply out of time, or provide copies of relevant important documentation and/or other information, then the Authority would determine the substantive claims, and costs, based on the evidence it had available to it.

Applicant’s documents

[18] Ms Wang provided the Authority with a letter incorrectly dated 26 May 2022 which Mr Zhu sent her via WeChat on 4 November 2022, which admitted the Respondent owed her the wage arrears she has now sought to recover.

[19] Ms Wang did not notice the date was incorrect until the Authority pointed it out to her at the investigation meeting. She explained the mistake with the date by saying the letter would have been updated from a previous letter of that same date (26 May 2022) that Mr Zhu had given Ms Wang in an attempt to get her to return to work, after she left because she had not been paid for three months.

[20] Ms Wang had left her employment in May 2022 but then returned in June 2022. She was away for a total of four weeks because Mr Zhu begged her to return to work for the Respondent. Mr Zhu told Ms Wang he was going to China so desperately needed someone to work for the Respondent while he was away. Mr Zhu said he would treat the four weeks Ms Wang had not been working as “*unpaid leave*”.

[21] Ms Wang was reluctant as she had still not been paid her arrears, but agreed to return to work for the Respondent after Mr Zhu promised her she would be paid her wage arrears. Mr Zhu told Ms Wang that the Respondent’s business was doing much better so it could pay her, but that if it could not pay her then he would pay her himself out of his own money. She believed him, which is why she agreed to return to work for the Respondent.

[22] Ms Wang was given a letter dated 26 May 2022, that Mr Zhu signed and sent on behalf of the Respondent, which recorded she had not been paid in February, March and April 2022. The Respondent admitted that Ms Wang was owed \$18,526.14 gross as at 26 May 2022, consisting of annual leave entitlements, wage and commission arrears as part of a promise to pay her if she returned to work.

[23] Ms Wang also provided the Authority with a copy of another letter from the Respondent (sent by Mr Zhu) to her dated 27 October 2022 which recorded that as at 10 October 2022 (being her last day of work) she was owed 7.85 days annual holiday and 4.35 days sick leave.

[24] Ms Wang produced an undated letter from the Respondent to her, also signed by Mr Zhu, which recorded a pay rise from \$52,000 per annum to \$62,400 per annum, effective from 4 July 2022. There was also a change made to Ms Wang’s commission structure and bonus entitlements that was more favourable to her.

[25] Ms Wang said this was done by Mr Zhu to keep her working for the Respondent, even though she had not been paid for many months. She signed the salary increase letter on 26 July 2022. Ms Wang also provided the Authority with a salary statement which showed the salary she had been paid in 2021 and 2022 from the Respondent.

[26] The incorrectly dated 26 May 2022 letter Ms Wang received on 4 November 2022 via WeChat was sent by Mr Zhu and it recorded that the Respondent owed her wage arrears of \$23,466.38 gross, consisting of unpaid salary, unpaid annual leave pay in lieu, and commission arrears.

[27] Ms Wang signed the letter on 21 November 2022 to show that she accepted the Respondent's wage arrears calculations. She confirmed to the Authority that she agreed with the wage arrears calculations the Respondent, via Mr Zhu, had sent her on 4 November 2022.

Failure by Respondent to provide employment documentation

[28] The Respondent was directed on 18 July 2023 to provide the Authority with a copy of the Applicant's wage and time records, as required by s 130 of the Employment Relations Act 2000 ("the Act"), her holiday and leave records, as required by s 81 of the Holidays Act 2003 ("HA03"), her payslips and her final pay advice.

[29] None of that information was provided.

[30] The DoA noted that in the absence of this information being submitted by the Respondent, then the Authority could accept Ms Wang's evidence about her pay and hours of work.

[31] The Authority also provided a preliminary indication in the DoA that, based on the currently available evidence, Ms Wang's claim for wage arrears appeared to have merit, especially in light of the Respondent's letter to her (incorrectly) dated 26 May 2022 which recorded she was owed wage arrears of \$23,466.38 gross as at 10 October 2022.

Additional service on the Respondent

[32] The DoA and the Notice of Investigation Meeting ("Notice of IM") were served on the Respondent, along with a further copy of the Statement of Problem ("*the second service documents*"), at its registered address for service in Albert Street, Auckland Central by a process server at 11.49am on 17 August 2023.

[33] No-one was present, so the second service document were taped by the process server to the door of the registered address for service the Respondent had recorded on the Companies Office Register and a photo of that was provided to the Authority.

Alleged breach of employment standards

[34] The Authority recorded in the DoA that failure by the Respondent to pay Ms Wang's wages as they became due would involve a breach of employment standards.

[35] That meant that if Mr Zhu was found to be ‘a person involved in breach(es) of employment standards’, then he could be personally required to pay any wage arrears that the Authority found the Respondent owed, but was unable to pay Ms Wang.

[36] Mr Zhu was therefore put on notice that he was potentially at risk of personal liability, should the necessary circumstances be established by Ms Wang.

Attempts to contact the Respondent before the IM

[37] On 29 August 2023 an Authority Officer called the two mobile phone numbers the Respondent has recorded on its public website, in an attempt to engage the Respondent in the Authority’s investigation process. Neither call was answered.

Investigation meeting

[38] An in-person investigation meeting was held in Auckland on 31 August 2023.

[39] The Authority was assisted by a Mandarin interpreter. The start time of the investigation meeting was slightly delayed to give the Respondent some extra time to turn up, in case it was experiencing traffic or parking problems.

[40] The Respondent did not attend the Authority’s investigation meeting. It did however have the Notice of IM served on it on 17 August 2023 at its registered address for service, so the Respondent must have elected not to participate in the Authority’s investigation.

The issues

[41] The following issues are to be determined:

- (a) Is the Applicant owed wage arrears?
- (b) If so, should interest be awarded on the outstanding wage arrears?
- (c) Has a breach of employment standards occurred?
- (d) If so, is Mr Lin Zhu a person involved in a breach of employment standards?
- (e) If so, should the Authority grant the Applicant leave to recover any wage arrears or other money she is owed by the Respondent (but is unable to pay) from Mr Zhu personally?
- (f) What costs and disbursements should the successful party be awarded?

Is the Applicant owed wage arrears?

[42] The Applicant's uncontested evidence was that she is still owed wage arrears of \$23,466.38 gross, which is the amount the Respondent recorded in the letter Mr Zhu sent her on 4 November 2023.

[43] The Applicant told the Authority that no payments have been made to reduce that amount since the Respondent admitted she was owed it in November 2022.

[44] From the \$23,466.38 gross wage arrears the Respondent owed Ms Wang, deductions of \$4,135.51 for PAYE, student loan and KiwiSaver were to be made, leaving a net amount to her of \$19,330.87. The Applicant recorded this net amount owing to her in the Statement of Problem.

Should interest be awarded on the outstanding wage arrears?

[45] The Authority has discretion to award interest pursuant to clause 11 of Schedule 2 of the Act.

[46] The wage arrears awarded to the Applicant in this determination should have been paid to her in the month it became due for work she had already done for the Respondent. Her first missed wages payment occurred as far back as February 2022, almost 18 months ago and continued up to October 2022, ten months ago.

[47] Although the Respondent's letter was incorrectly dated 26 May 2022 (when it should have said 4 November 2022), it accurately set out Ms Wang's entitlements up to and including 10 October 2022. Ms Wang received this letter after asking Mr Zhu for her wage arrears to be paid "ASAP".

[48] Ms Wang has been deprived of the use of her own wages. That has put her under a lot of financial pressure and has caused her financial hardship, and considerable stress.

[49] It is appropriate for the Respondent to pay Ms Wang interest on the total wage arrears she is owed of \$23,466.38 gross, which was the amount she was owed when her employment ended on 10 October 2022.

[50] The interest awarded to Ms Wang is to run from 10 October 2022 until the full amount, including all interest she is owed, has been paid. Interest is to be quantified in accordance with

the Interest on Money Claims Act 2016, by using the civil debt calculator on the Ministry of Justice website.

Has a breach of employment standards occurred?

[51] Section 5 of the Act defines “*employment standards*”.

[52] The following breaches of employment standards have occurred:

- (a) Failure to pay Ms Wang her wages when they became due and owing in February, March, April, August, September and October 2022, in breach of s 4 of the Wages Protection Act 1983, which requires the worker to be paid all of their wages, without deduction, as they become payable;
- (b) Section 82 of the HA03 was breached, by the Respondent’s failure to provide the Authority and Ms Wang with copies of her holiday and leave records, as directed by the Authority on 18 July 2023;
- (c) Section 130 of the Act has been breached, by the Respondent’s failure to provide the Authority and Applicant with her wage and time records, as directed by the Authority on 18 July 2023; and
- (d) Section 27 of the HA03 was breached, by the Respondent’s failure to pay Ms Wang her annual leave entitlements when her employment ended on 10 October 2022. These should have been paid to her in her final pay, but because she was not paid her final pay, which did not occur.

[53] The Respondent has clearly engaged in multiple breaches of minimum employment standards, as defined by s 5 of the Act.

Is Lin Zhu a person involved in a breach of employment standards?

[54] Mr Zhu is one of two directors, with the other director being Ran Xu. Mr Zhu also has a 65 percent shareholding in the Respondent.

[55] Ms Wang said she did not have any communication or dealings with Ms Xu about work matters as she only dealt with Mr Zhu. Mr Zhu was often in China, so he would meet with Ms Wang online to assign her work and she reported to him about her duties and other work matters.

[56] Mr Zhu was put on notice in the DoA dated 18 July 2023 that he was at risk of being found to be a ‘person involved in breach(es) of employment standards’ if Ms Wang’s claim that the Respondent failed to pay her wages succeeded.

[57] Despite that forewarning, Mr Zhu elected not to participate in the Authority’s investigation.

[58] Ms Wang’s uncontested evidence was that all of her dealings were with Mr Zhu. He was the one responsible for paying her wages. He was the person who employed her and negotiated with her about her remuneration. He was the one she raised her wage arrears concerns with. He was the one that induced Ms Wang to keep working without being paid.

[59] Mr Zhu admitted to Ms Wang that the Respondent owed her the wage arrears she is claiming and he said he would pay her personally if the Respondent could not. Mr Zhu was also the person who signed the letters to Ms Wang, recording her arrears and wage entitlements.

[60] Ms Wang is concerned the Respondent may not be able to pay her because the business is no longer open. The Authority also noted that the office the Respondent used as its registered address for service has been vacated, although it has not been changed on the Companies Register.

[61] Section 142W of the Act provides that a person is “*involved in a breach of employment standards*” if a person has (among other things) aided, abetted, counselled or procured the breach or induced it, or has in any way directly or indirectly, being knowingly concerned in or a party to the breach.

[62] Ms Wang’s uncontested evidence established that Mr Zhu is ‘a person involved in breaches of employment standards’, because he must have known, authorised, and directly aided and abetted the Respondent’s multiple breaches of employment standards regarding Ms Wang’s employment. That evidence was accepted.

[63] Mr Zhu was the person who was directly and deliberately involved in all of the breaches of employment standards that occurred.

Should the Authority grant Ms Wang leave to recover wage arrears or money she is owed by the Respondent from Mr Zhu personally, if the Respondent is unable to pay it?

[64] There is a risk the Respondent will not be able to pay Ms Wang the money she is awarded by the Authority and that Ms Wang may face difficulty in recovering her wage arrears.

[65] The Respondent does not have any employees (Ms Wang said she was the last employee to leave) and the process server reported back to the Authority on 17 August 2023 that the Respondent's business was closed during normal work hours and looked as if it had been mostly vacated. The Respondent has also vacated its registered address for service, without notifying the Companies Registrar of its new registered address for service.

[66] Section 142Y of the Act provides that an employee may recover wages or other money payable by an employer from a person who is not the employer in certain circumstances. These include where there has been a default in the payment of wages or other money payable, the default is due to a breach of employment standards, and the person the employee is seeking to recover the wages or other money from personally is a person involved in a breach of employment standards, within the meaning of s 142W of the Act.

[67] All of the factors required by s 142Y(1) of the Act have been met.

[68] Accordingly, Ms Wang is granted leave under s 142Y(2) of the Act to recover her wage arrears and any other money (such as interest) the Respondent owes her, but which it is unable pay, from Mr Zhu personally.

Next steps

[69] Ms Wang should first seek to recover the wage arrears and money (meaning interest) she has been awarded in this determination from the Respondent. This may involve applying to liquidate the company if need be.

[70] If the Respondent does not pay her the money she is owed Ms Wang may apply for a compliance order to compel it to do so. If the Respondent is unable to pay is unable to pay the wage arrears and money it owes her, then she can apply to the Authority for an order that Mr Zhu be required to personally her.

[71] Both scenarios will require Ms Wang to lodge a new Statement of Problem with the Authority.

What costs and disbursements should be awarded?

[72] Ms Wang was self-represented, so there is no issue as to costs. However, as the successful party she is entitled to have her filing fee of \$71.55 reimbursed by the Respondent.

Outcome

[73] Within 14 days of the date of this determination, the Respondent is ordered to pay Ms Wang:

- (a) \$23,466.38 gross wage arrears;
- (b) Interest on \$23,466.38 gross to run from 10 October 2022 until that full amount has been repaid to her, to be calculated using the civil debt calculator on the Ministry of Justice website; and
- (c) \$71.55 to reimburse her filing fee.

Rachel Larmer
Member of the Employment Relations Authority