

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAUROA ROHE**

**[2019] NZERA 721
3077732**

BETWEEN WINNIE YAN
First Applicant

AND PENG CHEN
Respondent

Member of Authority: Eleanor Robinson

Investigation Meeting: 18 December 2019

Date of Oral Determination: 18 December 2019

Date of Written Determination: 18 December 2019

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Winnie Chen, claims that the Respondent, Peng Chen, failed to adhere to clause 2 of a mediated settlement agreement.

[2] On 12 December 2018 a Record of Settlement was entered into under s. 149 of the Employment Relations Act 2000 (the Act). The Record of Settlement was signed by the Applicant and by the Respondent, Mr Peng Chen. The Record of Settlement was also counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 12 December 2018.

[3] The issue which had been brought before the Authority by the Applicant is that the Respondent has not complied fully with clause 2 of the Record of Settlement, which states:

2. Peng Chen shall, without admission of liability, pay Winnie Yan, the sum of \$17,338.44 (seventeen thousand, three hundred and thirty eight dollars and forty four cents). This is the nett sum of the following:

- Wages owed for the period of May to end of August 2018, (\$10,182.80)
- All holiday pay owing: (\$3186.64) and
- Reimbursement of all expenses: (\$3969.00)

This sum shall be paid by way of 6 scheduled payments, made on the 1st of each month or the first business day after the 1st of the month, as follows

- Payment 1: \$3,000.00 (Three thousand dollars) on January 1st 2019
- Payment 2: \$3,000.00 (Three thousand dollars) on February 1st 2019
- Payment 3: \$3,000.00 (Three thousand dollars) on March 1st 2019
- Payment 4: \$3,000.00 (Three thousand dollars) on April 1st 2019
- Payment 5: \$3,000.00 (Three thousand dollars) on May 1st 2019
- Payment 6: \$2,338.44 (Two thousand dollars, three hundred and thirty eight dollars and forty four cents) on June 1st 2019

At the conclusion of this payment schedule it is deemed that all wage, holiday pay and reimbursement payments owed to Winnie have been satisfied.

Peng Chen acknowledges that in the event of a default in the above payment schedule that the remaining balance becomes immediately due and payable.

[4] The Record of Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- (a) were final, binding and enforceable; and
- (b) could not be cancelled; and
- (c) could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

Failure of Applicant to attend or be represented

[5] The Investigation Meeting was set down to be held today, 18 December 2019, as advised to the parties by means of a Notice of Investigation Meeting dated 4 December 2019.

[6] Mr Chen did not submit a Statement of Reply despite having been served the Statement of Problem on 14 October 2019, nor did he attend the case management conference

set down to schedule this matter despite having been advised of the date by the Authority Officer.

[7] Mr Chen was aware of the date of the investigation Meeting via the Notice of investigation which was posted, emailed and served on him personally by a process server.

[8] Mr Chen did not attend the Investigation Meeting. He was contacted by an Authority Officer and advised that he understood the Investigation Meeting to be taking place on a different date.

[9] I do not accept this. Mr Chen had ample notification of the date of the Investigation Meeting. I was satisfied that no good cause had been shown for Mr Chen's failure to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Act.

Issues

[10] The issue for determination is whether or not Peng Chen failed to comply with clause 2 of the mediated settlement.

Background Facts

[11] Ms Yan was employed by Mr Chen as a Personal Assistant between July 2017 and August 2018.

[12] After her employment with Mr Chen ended Ms Yan raised a wages arrear claim for unpaid entitlement.

[13] The parties attended mediation and entered into the Record of Settlement dated 12 December 2018.

[14] Ms Yan said that Mr Chen did not make the first scheduled payment of \$3,000.00 due on 1 January 2019 but made a payment of a total of \$1619.38 in two tranches on 3 January 2019.

[15] Mr Chen made one further payment of \$1500.00 on 7 April 2019.

[16] Ms Yan has received no further payments despite having contacted Mr Chen a number of times in respect of the agreed payments on 3 January 2019.

Compliance Order

[17] I am satisfied that Mr Chen has not complied fully with clause 2 of the Record of Settlement.

[18] Accordingly I find that Mr Chen to be in breach of clause 2 of the Record of Settlement.

[19] The Record of Settlement refers in clause 2 to the agreement of the parties that the remaining balance of the outstanding sums as set out in clause 2 becomes immediately due and payable in the event of a default in payment.

[20] From the evidence available to the Authority, I am satisfied that Mr Chen has failed to comply with clause 2 of the Record of Settlement.

[21] In order to effect compliance with the Record of Settlement, I therefore order Peng Chen to pay Ms Yan, no later than 14 days from the date of this determination, the remaining balance of monies in the sum of \$14,219.06 pursuant to s 137(1)(iii) of the Act.

Penalty

[22] Ms Yan said that the non-payment of her wages for some months which preceded the termination of her employment and the further failure to pay the agreed amounts following mediation caused her considerable stress and financial difficulties.

[23] Having considered the principles which should govern the imposition of a penalty¹, I determine that a penalty of \$3,000.00 is appropriate.

[24] I order that Peng Chen is to pay a penalty of \$3,000.00, of which 60% is to be paid to Ms Yan and 40% to the MBIE Trust Account. Payment is to be made within 14 days of the date of this Determination.

Filing Fee

[25] The Respondent is also ordered to pay Ms Yan the filing fee of \$71.56 within 14 days of the date of this Determination.

¹ *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

Costs

[26] Costs are awarded on the usual tariff basis on the Authority on the basis of a half day investigation meeting.

[27] **I order that Peng Chen pay to Ms Yan the sum of \$2,250.00 costs, pursuant to clause 15 of Schedule 2 of the Act**

Eleanor Robinson
Member of the Employment Relations Authority