

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 181
3024894

BETWEEN WAI YING (MELODY) CHENG
Applicant

A N D RICHORA GROUP LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: E Riley, Counsel for the Applicant
M Moncur, Advocate for the Respondent

Investigation Meeting: 7 June 2018

Submissions received: 7 June 2018 from both parties

Date of Oral Determination: 7 June 2018

ORAL DETERMINATION OF THE AUTHORITY

- A. I dismiss the application for stay of the proceedings.**
- B. I order Richora Group to comply by 14 June 2018 with the orders set out in the determination. Richora Group Limited is to pay Wai Ying Cheng by 14 June 2018 as follows:**
- a) **\$20,000 pursuant to s123(c)(i) Employment Relations Act 2000;**
 - b) **\$3,663.19 wage arrears for 21 January to 6 March 2017; and**
 - c) **\$2,250 as contribution to her legal costs.**
- C. I order Richora Group Limited to pay Wai Ying Cheng \$2,250 towards the legal costs of her application for non-compliance orders.**

Employment Relationship Problem

[1] Wai Ying Cheng also known as Melody Cheng has applied for a compliance order in respect of the Authority determination dated 26 January 2018 (the determination). Ms Cheng was found to be unjustifiably dismissed. Richora Group Limited to pay Wai Ying Cheng as follows:

- a) \$20,000 pursuant to s123(c)(i) Employment Relations Act 2000.
- b) \$3,663.19 wage arrears for 21 January to 6 March 2017.
- c) \$2,250 as contribution to her legal costs.

[2] It is accepted no payment under the above orders has occurred.

[3] At a telephone conference on 19 March 2018 Ms Moncur on behalf of Richora Group Limited (RGL) advised it had challenged the determination. It sought a stay of the Authority's order.

[4] I advised the parties I would grant a stay but only on the basis that the money owed was paid into a lawyer's trust account upon the following conditions:

- (a) it is held on interest bearing deposit, and
- (b) that the funds are not paid out unless there is an order of the Employment Court or further agreement between the parties to do so.

Stay

[5] Mr Jerry Li gave evidence at hearing in support of RGL's application for stay. Mr Li confirmed RGL would not make any payment into a solicitors trust account because he wished to have his appeal heard first. The de novo challenge is set down for hearing in 9-10 days time on 19 and 20 June 2018. He raised concerns about Ms Cheng's financial situation and ability to repay if he was successful.

[6] Mr Li accepted Ms Cheng was employed by RGL as a part time worker but was not required to work more than 20 hours per week dependant upon orders received. He also accepted RGL owes her wages but only from 22 February when she asked to be paid. He disputed she was dismissed on 7 March. He believed she did not wish to return and instead raised a personal grievance.

[7] Section 180 of the Employment Relations Act 2000 provides that an election to challenge a determination of the Authority does not operate as a stay of proceedings on the determination of the Authority unless the Court or Authority so orders. The Court has not granted a stay of proceedings.

[8] In determining whether or not to grant a stay, the Authority balances the successful party's rights to the fruits of a determination and the need to preserve the position in case the challenge is successful. Relevant factors are whether the challenge would be rendered nugatory if the stay were not granted; the bona fides of the application; the effect on any third parties; injury or detriment to the respondent if the stay is granted; the novelty and importance of the question involved; the public interest in the proceedings; the strength of the case and the overall balance of convenience. The overriding consideration in the exercise of the discretion must be the interests of justice.¹

[9] The primary submissions advanced in support of the stay was enforcement of the orders may render the appeal nugatory due to Ms Cheng's financial situation if RGL was required to pay before the outcome of its appeal and the strength of its case on challenge given the casual nature of the employment and concerns about quantification of wages. RGL felt making any payment in advance of appeal was a form of injustice.

[10] Ms Cheng was entitled to receive the amounts ordered immediately. RGL has not made any payments to Ms Cheng, including of wages it accepts she is owed. The non-payment and refusal to make payment into a solicitors trust account upon the above conditions raises doubt about RGLs financial situation and Ms Cheng's ability to receive payment if she successfully defends the challenge.

[11] Ms Cheng is likely to face further delays and uncertainty of payment if I was to grant a stay. Although the challenge may be heard in 9-10 days, there is no guarantee the matter may be resolved by an oral decision given on 20 June. That is a matter for the presiding Judge.

[12] There is no evidence other than submission by Mr Li that Ms Cheng is unable to repay any funds if the appeal is successful. Her partner operates his own business.

¹ *North Dunedin Holdings Ltd v Harris* [2011] NZEmpC 118 at [7].

There was nothing produced to support Mr Li's assertions he has researched and found her financial situation to be dire.

[13] RGLs case on appeal in my view is not strong. In terms of quantification of the wage arrears, the determination recorded RGL's solicitor's written advice on 31 March 2017 of an offer to pay Ms Cheng "for the duties she has performed for the company from 21 January 2017 to 6 March 2017, at the agreed hourly rate of \$19.72 (net)." Mr Li's allegation she should only be paid from 22 February being the date she sought payment of wages is unconvincing.

[14] In absence of any wage and time record as required by s133 of the Act or other evidence to the contrary, his allegation she worked less than the time she alleges is also unconvincing.

[15] RGL accepts Ms Cheng was employed and presented for work on 7 March 2017 but was locked out. The allegation she was not dismissed by the lockout is unconvincing. The evidence showed RGL was unhappy to have Ms Cheng in the workplace at all given they changed their locks and did not inform her this had occurred; Mr Li's suspicions Ms Cheng had complained to IRD that RGL was not paying wages or taxes and Mr Li being told by an RGL employee Ms Cheng's partner had entered the workplace on or about 7 March 2017.

[16] Mr Li's WeChat postings on 21 March were also derogatory of Ms Cheng. They indicated RGL was unlikely to continue her employment in the circumstances. No new evidence has been produced to dispute those events.

[17] There is nothing to suggest Ms Cheng acted in any way that could be termination of her employment. As noted above, RGLs case on appeal is not strong.

[18] There is public interest in these proceedings is for parties to comply with the orders of the Authority.

[19] The overall balance of convenience favours Ms Cheng.

[20] The interests of justice also favour declining the stay. I dismiss the application for stay of the proceedings.

Compliance

[21] There is an acceptance the above orders have not been complied with.

[22] I order Richora Group to comply by 14 June 2018 with the orders set out in the determination. Richora Group Limited is to pay Wai Ying Cheng by 14 June 2018 as follows:

- a) \$20,000 pursuant to s123(c)(i) Employment Relations Act 2000;
- b) \$3,663.19 wage arrears for 21 January to 6 March 2017; and
- c) \$2,250 as contribution to her legal costs.

Costs

[23] After hearing from the parties, I intend awarding a portion of costs using the Authority's daily notional tariff set at \$4,500 per hearing day. This matter has proceeded without briefs. The hearing time required was half a day. An award of \$2,250 costs is appropriate.

[24] I order Richora Group Limited to pay Wai Ying Cheng \$2,250 towards the legal costs of her application for non-compliance orders.

TG Tetitaha
Member of the Employment Relations Authority