

**NOTE: This determination
contains an order prohibiting
publication of certain
information at paragraph [55]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 667
3174925

BETWEEN	YVONNE ONG Applicant
AND	COMSOL (COMPUTER SOLUTIONS) LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Applicant in Person Tony Lamerton, director, and Vicki Campbell, counsel for the Respondent
Investigation Meeting:	21 November 2022 at Wellington
Submissions received:	6 and 9 December 2022 from Applicant 6 and 9 December 2022 from Respondent
Determination:	16 December 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Yvonne Ong is employed by the respondent company (Comsol) as its Chief Financial Officer. In January 2022, she was awarded a \$40,000 bonus by way of letter signed by Comsol's Managing Director, Mr Tony Lamerton. In January 2022, she was awarded a 5% pay rise. Neither her pay rise nor her bonus were paid, as Comsol's other director Mr Andrew King, says that Mr Lamerton was not authorised to make those payments.

[2] Ms Ong now raises claims for payment of her bonus, payment of her pay rise, interest on unpaid monies, and compensation for hurt and humiliation.

[3] Mr Lamerton accepts that he promised these payments to Ms Ong, and that they are due and owing. Mr King says that Mr Lamerton was not authorised to make these payments, and that therefore, nothing is owing to Ms Ong.

[4] I must therefore determine what Ms Ong is owed by Comsol, and if monies are owed, if it is appropriate to award interest, and compensation for hurt and humiliation.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Ms Ong, Mr Lamerton, and Mr King. All witnesses answered questions under oath or affirmation from me and the parties' representative. The parties also gave written closing submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination were:

- (a) Does Mr Lamerton's authorising of a bonus and pay rise to Ms Ong bind Comsol?
- (b) If Comsol is bound to make the payment (and Ms Ong suffered an unjustified disadvantage by way of Comsol refusing to pay her monies that were owed), what remedies should be awarded, considering:
 - Quantum;
 - Interest; and
 - Compensation under s123(1)(c)(i) of the Act?

Background

[8] There are two directors of Comsol, Mr Lamerton, and Mr King. Ms Ong was hired by, and reports to, Mr Lamerton on behalf of Comsol. Mr Lamerton has the day

to day responsibility of running Comsol. This includes hiring staff, making decisions as to staff wages and terms and conditions of employment, and dealing with customers and contractors. Mr King is not involved in the day to day running of the business. He describes his role in the business is that of “governance”, and says that Mr Lamerton’s role is that of “management”.

[9] Ms Ong says that early in 2020, in anticipation of potential adverse impacts from the Covid-19 pandemic, Comsol through Mr Lamerton asked her to put in extra work and hours when necessary, and in return she would be paid a bonus when Comsol was in a position to do so.

[10] Ms Ong says that she accepted this and worked hard in and for the company. She says she worked late in the evenings and on weekends consistently as Comsol has had a hard time recruiting staff over the last year or so. She says that in particular she took personal steps to intervene when a key client gave notice terminating its contract with Comsol, and as a result of her working directly with the Chief Financial Officer of that company, the client withdrew its termination and remains an engaged client of Comsol to this day.

[11] On 17 January 2022, Comsol wrote to Ms Ong, on company letterhead, and signed by Mr Lamerton as Managing Director, awarding her a \$40,000 bonus to be paid the following day.

[12] Payments from the Comsol company account require electronic authorisation from both directors. Mr King refused to authorise or otherwise make this payment, on the grounds that Mr Lamerton did not have authority to make a bonus payment to Ms Ong. He communicated that he disagreed with the payment to Mr Lamerton by email, but did not otherwise communicate with Ms Ong, and did not respond to her emails inquiring why he had failed to electronically authorise the payment.

[13] On 21 February 2022, Comsol wrote again to Ms Ong and another senior employee of the company awarding them each a 5% pay rise, commencing as of 1 April 2022. Mr Lamerton explained that he spoke with Ms Ong and the other employee to tell them that Comsol would be awarding 5% as a cost-of-living raise, and would not be in a position to match the then current CPI rate which was running at somewhat over 7%.

[14] As a result of pay and performance reviews, Comsol in due course awarded similar pay rises to two other staff who were employees, but did not give pay rises to the two staff who were contractors.

[15] Mr Lamerton explained that, although by this time he was aware that Mr King had not approved the bonus payment to Ms Ong, he had no concerns about Mr King approving a pay rise, as staff pay was reviewed on a yearly basis, and the increases he had approved were for less than the current inflation rate.

[16] Mr King authorised the increased wages payments to the other employees but refused to authorise the wage increase awarded to Ms Ong.

[17] Mr King says again that Mr Lamerton is not authorised to make this decision. Mr King accepts that Mr Lamerton did award the bonus and the pay rise to Ms Ong, in his capacity as Managing Director, and confirmed in writing on company letterhead.

[18] Instead, Mr King says that Mr Lamerton was not authorised to make decisions/payments to Ms Ong, because Comsol's constitution required all significant payments to be approved by both directors, and as he did not approve of any payments to Ms Ong, by definition Mr Lamerton was not authorised to make such payments. Mr King sought to demonstrate that Ms Ong was aware of the provision in the Comsol constitution describing how the board of Comsol was made up of both directors, and that she must therefore have been aware that even though Mr Lamerton had made written and verbal promises to her about the bonus payment and the wage rise, these were not payments "authorised" by Comsol, as they were not payments authorised by Comsol's board, and Comsol could only act through its board.

[19] Ms Ong rejected this. Her position was simply that she reported to Mr Lamerton, and had little or no dealings with Mr King because he did not take an active role in the running of Comsol. Ms Ong's position was that she was not deeply familiar with Comsol's constitution, and relied on Mr Lamerton, who is the Managing Director of Comsol, to act as her employer on a day-to-day basis, which was how it had always been. She also pointed out that she had not received a salary increase in the past, but in July 2020, she had been paid a \$40,000 bonus for work done in the previous year, and as far as she was aware, Mr Lamerton had also authorised that bonus and it had been paid without issue.

[20] Mr King said that Mr Lamerton was not authorised to pay that first bonus either and its payment occurred as a result of a mistake by the bank. He did not share this view with Ms Ong at the time.

[21] Ms Ong now claims payment of the bonus payment, the 5% wage rise, interest on unpaid monies, and compensation for hurt and humiliation.

[22] I must therefore determine, is Comsol bound by Mr Lamerton's promise of a bonus payment and a wage rise to Ms Ong? And if so, what orders should result, including whether it is appropriate to order Comsol to pay interest on unpaid monies, and/or compensation for hurt and humiliation.

Did Comsol Promise Ms Ong a bonus payment?

[23] Ms Ong is an employee of Comsol. Comsol is a limited liability company, with two directors, Mr King and Mr Lamerton.

[24] There can be no dispute that Comsol has promised Ms Ong a bonus – this promise is set out explicitly in writing, in a letter to Ms Ong from the Managing Director of the company, and signed by him, on company letterhead. All parties – Ms Ong, Mr Lamerton, and Mr King – accept that this promise has been made.

[25] The only defence Comsol raises through Mr King, is the argument that when Mr Lamerton wrote to Ms Ong awarding her the bonus, he was not “authorised” to do so, and that this lack of authorisation is specifically because (in Mr King's view) Mr Lamerton has not acted in accordance with the constitution, which requires certain payments to be authorised by the board – that is, by both directors together. There is a degree of circularity in this argument, in that if Mr King agreed to authorise the payment, it would then be in accordance with the constitution and authorised in Mr King's view, but because Mr King does not agree to authorise the payment, he says it is not authorised at all.

[26] It is clear that there is a communication breakdown between Mr King and Mr Lamerton, however, this is not determinative of the matter from Ms Ong's point of view. Ms Ong is an employee of Comsol, and has rights against the company as an employee. The question that needs to be answered is therefore, did Comsol as Ms

Ong's employer, make enforceable promises to her as to the bonus payment and/or the 5% wage increase?

[27] The answer to this question must be "yes", as the promises to pay Ms Ong are set out in writing, signed by a director of Comsol with responsibility for staffing matters. In addition, Ms Ong's employment agreement, containing terms set out in a document headed Code of Conduct, which has been initialled on each page by both parties, provides for the payment of bonuses as follows:

Bonuses

Bonuses are completely discretionary and are determined by the Managing Director, taking into account the company's profitability and cash position.

Bonuses are pro-rated according to the number of months employed (if less than 12 months) and if less than 40 hours per week.

[28] I must therefore consider if there are other circumstances which would mean Comsol is able to resile from making these promised payments.

[29] Companies by their very nature may only act through and by the actions of their directors. This is often expressed by saying that the directors are the "hands and mind" of the company.

[30] Section 17 of the Companies Act 1993 (the Companies Act) provides that:

(1) No act of a company and no transfer of property to or by a company is invalid merely because the company did not have the capacity, the right, or the power to do the act or to transfer or take a transfer of the property.

...

(3) The fact that an act is not, or would not be, in the best interests of a company does not affect the capacity of the company to do the act.

[31] Subsection (1) of section 17 of the Companies Act provides that, even if Mr King is correct in his assertion that Comsol was not able to validly make a transfer of property to Ms Ong (which is a matter which is not before me and on which I do not need to make comment) (eg, by paying her monies), this does not mean that the company is able to avoid the obligations that it has entered into.

[32] On the facts as they were before me, Comsol, via its Managing Director, entered into a binding promise to make both a bonus payment and a wages payment to its employee, Ms Ong. Ms Ong accepted this on its face, and acting in reliance on those

promises, performed additional duties and expended additional effort. Such promises amount to a binding contractual agreement on the company in the ordinary course, and in my view, should only be reluctantly disturbed. This is especially so in the context of an employment relationship which has the special characteristics of being a fiduciary relationship, and with the mutual statutory obligations of good faith.

[33] Section 18 of the Companies Act 1993 provides that:

- (1) A company...may not assert against a person dealing with the company or with a person who has acquired property, rights, or interests from the company that—
 - (a) ...the constitution of the company has not been complied with:
 - (b) a person named as a director of the company in the most recent notice received by the Registrar under section 159—
 - (i) is not a director of a company; or
 - (ii) has not been duly appointed; or
 - (iii) does not have authority to exercise a power which a director of a company carrying on business of the kind carried on by the company customarily has authority to exercise:...

unless the person has, or ought to have, by virtue of his or her position with or relationship to the company, knowledge of the matters referred to in any of paragraphs (a), (b), (c), (d), or (e), as the case may be.

[34] The starting point is that a company cannot automatically avoid its obligations by claiming that the agreement/s it has entered into are invalid because of non-compliance with the company's own constitution or its own internal requirements on directors.

[35] In order to advance his position, Mr King must be able to show that Ms Ong had knowledge, or ought to have knowledge, of the details in Comsol's constitution that (in Mr King's view) prevented Mr Lamerton from being able to properly award her both a bonus, and a pay rise.

[36] Ms Ong was clear that although she was aware that Comsol had a constitution, she had no actual knowledge of the singular clause of Comsol's constitution that Mr King relies on, and says that this was not something she needed to know to complete her work. She also stated that she had no knowledge that Mr King's approval and agreement was required in order for Comsol to be able to award her a bonus and/or pay rises. She says that Mr King had never before been involved in the decision-making

process around staff wages, including her wages. She explained that although she was aware that Mr King needed to provide security authorisation for payments coming from the company bank account, she was not aware that he was involved in the underlying decisions to award, or not to award, wages and other payments to staff. She said that as far as she knew, the decision-making was with Mr Lamerton as Managing Director, and always had been for as long as she had been with Comsol.

[37] Ms Ong also pointed out that she had previously been awarded a bonus of the same amount without issue, and Mr King had not been required to act as a second approver for that payment, so she had no reason to think this time was different. When Mr King suggested that this was because (in his view) the bank had made a mistake, Ms Ong said she was not aware of that and this had never been communicated to her.

[38] In short, Ms Ong resisted any suggestion that she had knowledge of either the company constitution and how it operated, or knowledge that decisions about wages and bonus payments required the unanimous agreement between Mr Lamerton and Mr King to be “authorised” by Comsol. Her evidence was to the contrary, that this was simply not how the business operated in practice, and Mr King had never told her otherwise.

[39] There was no suggestion that Mr King had ever communicated his various views to Ms Ong to the effect that Mr Lamerton was not “authorised” by Comsol’s constitution to make decisions around staff payments.

[40] Mr King (correctly, in my view) did not give evidence to the effect that Comsol did not make a promise to Ms Ong as its employee to pay her a bonus payment, and a 5% wage increase. He simply argued that the Authority should not view those promises as binding, because he did not personally agree with them when they were drawn to his attention. However, Mr King has not been able to show that the circumstances of this case fit within the narrow exceptions that are potentially available to Comsol under the Companies Act.

[41] In addition, Mr King has indicated that he understands that Ms Ong and Mr Lamerton are in a de facto relationship, and that because of this, the promises made to Ms Ong cannot be viewed as being payments “in the normal course of business”. I do not accept that this is relevant, because Mr King indicated in evidence that he believed

Ms Ong was in a de facto relationship with Mr Lamerton even before she was hired, and has not suggested he was concerned by this prior to this dispute. More significantly, this comment does not engage with the fundamental question in this matter, which is whether Comsol as an employer made a binding promise to Ms Ong as its employee. Any dispute Mr King has with Mr Lamerton as his fellow director falls to be resolved in another forum.

[42] I find that Comsol owes Ms Ong her bonus payment, and her 5% wage increase. Orders are made below accordingly.

Interest

[43] I have found that Comsol owes Ms Ong wage arrears, made up of the bonus payment, and a pay rise that was never implemented.

[44] Ms Ong claims interest on these unpaid monies.

[45] The Interest on Money Claims Act 2016 provides for a mandatory award of interest, as compensation for a delay in the payment of money, at section 10 of that Act.

[46] The amount of interest owing is to be calculated in accordance with that Act¹, and an interest site calculator is provided for the purposes of calculation², known as the Civil Debt Interest Calculator.

[47] Ms Ong should have been paid the bonus payment on 18 January 2022. The outstanding amount of \$40,000 attracts interest until paid. The amount of interest outstanding up to the date of this determination is \$783.84, and orders are made below for this to be paid to Ms Ong.

[48] Ms Ong's pay rise was awarded as of 1 April 2022. Accordingly, the amount of interest owing on this sum is \$101.39, and orders are made below for this to be paid to Ms Ong, in recognition of her loss of the use of the monies that should have been paid to her in a timely way.

¹ See section 12 of the Interest on Money Claims Act 2016.

² See section 13 of the Interest on Money Claims Act 2016.

Compensation for hurt and humiliation

[49] Ms Ong has claimed for payment in compensation for the hurt and humiliation that she experienced as a result of the disadvantage of having her wages withheld, and having to take this action in the Authority to recover what was owed to her.

[50] Ms Ong gave evidence that she was a “type A” personality, and work was very important to her; she put herself into her work. Her view was that she had worked hard for Comsol to earn the bonus and payrise she was eventually awarded, and to have these then denied by way of Mr King refusing to authorise the batch payment, and then refusing to discuss this with her, was very stressful for her. She described that she felt exploited and unvalued. This was very hard on her because she had to continue to go to work every day and manage the business including managing other staff, and keep up a brave face. Ms Ong gave evidence (accepted by both Mr Lamerton and Mr King) that she had needed to access EAP and seek advice from her doctor, who prescribed her anti-anxiety medication, and she then had to explain and justify to both Mr King and Mr Lamerton the appropriateness of these costs to Comsol in her role as CFO.

[51] I accept that Ms Ong has experienced hurt and humiliation. I note that Ms Ong continues to work at Comsol and has been able to keep her job and act effectively in it, and she also gave evidence that she did not tell friends or family about her difficulties, meaning that there is no wider more public aspect to her experience of embarrassment and distress. Weighing all these factors, I find that it is appropriate to award her \$5,000 in compensation for hurt and humiliation.

Other matters

[52] In the course of this matter, Ms Ong has filed some information about Mr King making comments about him on a personal basis, which comments have no bearing on the wage arrears claim. I have not made any reference to this information in this determination, and I record that I have decided to seal the Authority’s file on this matter because of this.

[53] Specifically, Mr King’s representative has provided a letter which it appears Ms Ong wrote to her local branch of a political party. Mr King seeks that the Authority make orders suppressing the publication of this information generally.

[54] My view is that it is not appropriate for the Authority to attempt to impose general non-publication orders on information which has already been published. With regard to information filed with the Authority, sealing the file is the appropriate response for the reasons already stated.

[55] I also record that I made a temporary non-publication order over certain sentences that formed part of Ms Ong's written submissions. In this respect, I record that Mr King has objected to 5 sentences in particular, with details as confirmed between the parties by email. I confirm that a non-publication order over all 5 sentences, which I understand have not been published elsewhere, is to stand on a permanent basis.

Orders:

[56] Comsol (Computer Solutions) Limited is to pay to Ms Yvonne Ong within 28 days of the date of this determination:

- a. \$40,000 gross, being the bonus awarded on 17 January 2022;
- b. \$6,600 gross, being the back-dated wages owed to Ms Ong up to the end of November 2022 when this matter was heard;
- c. A 5% increase to Ms Ong's base salary is to be applied as of 1 December 2022;
- d. \$783.84 without deduction, being interest payable on the unpaid bonus;
- e. \$101.39 without deduction, being interest payable on the back-dated wages;
- f. \$5,000 without deduction, being compensation for hurt and humiliation

Costs

[57] Ms Ong is the successful party, but did not engage representation, therefore no issue as to costs arises.

Claire English
Member of the Employment Relations Authority