

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 458
3217120

BETWEEN

MARKO PETRESKI
Applicant

AND

OPA ARCHITECTS LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
No appearance by the Respondent

Investigation: On the papers

Information Received: 21 June 2023 from the Applicant
No engagement by the Respondent

Date of Determination: 18 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Marko Petreski was employed by the Respondent, OPA Architects Limited (“OPA Architects”) as an Architectural Graduate under an individual employment agreement dated 26 March 2021 (“employment agreement”).

[2] Mr Petreski was employed for 40 hours per week on a salary of \$60,000 gross per annum, inclusive of KiwiSaver contributions. Clause 10.3 of his employment agreement stated he was to be paid monthly by direct transfer into his nominated bank account.

[3] On 3 February 2022 OPA Architects’ director, Mr Lin Zhu, sent a letter to employees stating that the company was experiencing financial difficulties. Mr Petreski was not paid any salary in February and March 2022.

[4] That failure to pay him at all for two months resulted in his resignation. However, Mr Petreski was still not paid any of his wage arrears or his annual holiday entitlements after his employment ended.

[5] The parties agreed in April 2022 that the Respondent owed the Applicant wage arrears totalling \$12,364.89 gross. Since then, the Applicant has received sporadic payments totalling \$8,065.29. The Applicant said he is still owed wage arrears of \$4,299.60 gross and his evidence about that was unchallenged.

The Authority's investigation

[6] Mr Petreski's Statement of Problem ("SoP") was lodged on 9 March 2023. The SoP was served on the Respondent's sole director Mr Lin Zhu at the Respondent's then business premises in Greenlane, Auckland.

[7] Service occurred by track and trace courier, which Mr Zhu signed for at 11.32am on 21 April 2023. He then returned the SoP to the Authority on 24 May 2023.

[8] The Authority held a Case Management Conference ("CMC") on 2 June 2023. The Applicant attended, but the Respondent did not.

[9] It was agreed with the Applicant that this matter was suitable for an 'on the papers' determination by the Authority. This was recorded in Directions of the Authority dated 2 June 2023 ("the DoA").

[10] The DoA recorded the outcome of the CMC and was served on the Respondent at its Greenlane business premises on 8 June 2023. This was delivered by track and trace courier that was signed for by "*Chaman Singh*" at 3.10 pm on 8 June 2023.

[11] The Authority in the DoA encouraged the Respondent to participate in the investigation process. However, it was also specifically informed that failure to do so would not stop this investigation from proceeding, nor the Authority from issuing a substantive determination.

[12] The DoA also put Mr Zhu on notice that the Authority may determine that he is a person involved in breaches of employment standards. If that occurred, the Respondent was put on notice that the Applicant could be given leave to recover any wage arrears or money that the Respondent was unable to pay him from Mr Zhu personally.

[13] The DoA also noted that there was no Statement in Reply (“SiR”), which meant the Respondent was required to apply for leave to file its SiR out of time. The DoA set out the steps the Respondent needed to take in order to apply for leave to file a SiR out of time.

[14] The Respondent was given until 16 June 2023 to seek leave to file a SiR out of time. No leave application was made. Nor has a Statement in Reply been lodged.

[15] The DoA directed the Respondent to provide the Authority and Applicant with copies of the Applicant’s employment documentation by 16 June 2023, regardless of whether or not it intended to participate in this investigation.

[16] The Respondent breached this direction. No wage and time records or holiday and leave records have been provided.

[17] The Authority also served the SoP on the Respondent at the address for service it had registered on the Companies Register. The SoP was served by track and trace courier, by taping it to the door of the service address on 29 May 2023. The Authority was provided with photos of the envelope that had the SoP in it taped to the door of the Respondent’s registered address for service.

[18] The Applicant lodged an affidavit on 21 June 2023. This attached as Exhibit B copies of all of his bank statements from 8 March 2021 to 8 June 2023. This information was provided to show that he had not received any wages or salary in February and March 2022 and to show what had been paid to him by the Respondent after his employment had ended.

[19] The Authority attempted to serve Applicant’s affidavit on the Respondent, along with additional copies of the SoP and DoA, at its registered address for service by track and trace courier on 27 June 2023. This was subsequently returned to the Authority with a courier sticker that said “*moved address.*”

[20] A company that changes its registered address for service must report the change to the Companies Registrar, so the new registered address for service can be updated on the update the change on the Companies Office register. That has not occurred.

[21] The original DoA gave the Respondent until 14 July 2023 to lodge its affidavit evidence and any submissions it wanted to make in response to the Applicant’s claims. The DoA also

set out the specific financial information the Respondent needed to include in its affidavit, if it lodged one.

[22] The original DoA specifically recorded that if the Respondent did not lodge a leave application, SiR, affidavit evidence and/or submissions, then the Authority would determine the Applicant's claims, and costs, based on the available evidence.

[23] The Authority issued a second DoA dated 27 July 2023. This recorded the service issues and provided:

- (a) That the SoP, the original DoA dated 2 June 2023, the Applicant's affidavit and the second DoA dated 27 July 2023 (together referred to as the "*service documents*") were to be served by a process server at the registered address for service; and
- (b) A second copy of the service documents was to be left for Mr Zhu (for his information) at the Respondent's business premises in Great South Road, Greenlane, Auckland.

[24] A process server served the service documents on the Respondent at its registered address for service on 28 July 2023. The service documents, which were in a sealed envelope, were taped by the process server to the door of the Respondent's registered address for service, at the address for service that was recorded on the Companies Register. The Authority was provided with a photo of that.

[25] The process server also attempted to serve a copy of the service documents on Mr Zhu during normal business hours at the Respondent's business premises in Greenlane. However, service did not occur because the Respondent's business was closed.

[26] Although the Respondent was given until 12pm on 17 August 2023 to lodge evidence in this matter, that did not occur. The Respondent has not engaged with the Authority at all.

Issues

[27] The following issues are to be determined:

- (a) Is the Applicant owed wage arrears?
- (b) If so, should he be awarded interest on his wage arrears?

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

Is the Applicant owed wage arrears?

[28] The Authority accepts the Applicant's uncontested affidavit evidence that he resigned because he was not paid anything in February and March 2022.

[29] The Applicant's evidence was that when he resigned, he was owed \$12,364.89 gross, of which only \$8,065.29 gross has been paid. Accordingly, the Applicant's evidence that the Respondent still owed him \$4,299.60 gross wage arrears is accepted by the Authority.

[30] A letter the Respondent sent the Applicant dated 19 April 2022 recorded that he was owed 11.51 days annual leave as at 1 April 2022. That letter was prepared by Mr Zhu on the Respondent's behalf, and it was sent to the Applicant to sign.

[31] The 19 April 2022 letter recorded the Applicant was owed \$12,364.89 in wage arrears as at that date. This consisted of \$9,708.74 unpaid salary for February and March 2022 plus \$2,656.15 annual leave entitlements, which should have been, but were not, paid to him when his employment ended. The letter recorded the Applicant was entitled to be paid (but had not been paid) for 11.51 days annual holiday pay.

[32] From the total amount owed, deductions of \$3,737.64 for PAYE, student loan and KiwiSaver were to be made by the Respondent and remitted to Inland Revenue Department (IRD).

[33] The Applicant provided the Authority with a copy of his bank statements from 9 March 2021 to 8 June 2023 in order to prove what he had and had not been paid by the Respondent.

[34] The Authority redacted the content of these bank statements before the Applicant's affidavit was served on the Respondent, in order to preserve the privacy and confidentiality of his financial information. The bank statements were attached as Exhibit B to the Applicant's affidavit that was sworn on 21 June 2023 and lodged with the Authority that same day.

[35] From the Applicant's bank statements, it is evident that the Respondent made the following payments on the following dates:

Date	Amount
30 April 2021	\$658.00
28 May 2021	\$3,387.00
30 June 2021	\$3,387.00
5 August 2021	\$3,387.00
31 August 2021	\$3,387.00
30 September 2021	\$3,387.00
1 November 2021	\$3,387.00
30 November 2021	\$3,387.00
30 December 2021	\$3,387.00
28 March 2022	\$3,387.00
30 June 2022	\$1,853.25
1 August 2022	\$1,693.50
22 December 2022	\$2,080.50

[36] The Applicant's wage arrears claim succeeds, because he established that he is still owed \$4,299.60 gross.

[37] Accordingly, within 28 days of the date of this determination, the Respondent is ordered to pay the Applicant his outstanding wage arrears of \$4,299.60 gross.

Should interest be awarded on the wage arrears the Applicant is owed?

[38] The Authority has discretion to award interest in accordance with clause 11 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[39] The wage arrears that the Applicant has been awarded in this determination should have been paid to him in February and March 2022. The Respondent has clearly deprived the Applicant of the use of his own wages, putting him in a precarious situation, and causing him considerable stress and financial pressure.

[40] It is appropriate for the Respondent to pay the Applicant interest on his total wage arrears of \$12,364.89 gross, which was the amount of wage arrears he was owed when his employment ended.

[41] The interest awarded to the Applicant is to run from 1 April 2022 until the full amount, including all interest owed, has been paid. Interest is to be calculated in accordance with the Interest on Money Claims Act 2016, by using the Civil Debt Calculator on the Ministry of Justice website.

Have breaches of employment standards occurred?

[42] Section 5 of the Employment Relations Act 2000 (“the Act”) defines “*employment standards*”.

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

- (a) The failure to pay the Applicant his wages when they became due and owing in February and March 2022 breached s 4 of the Wages Protection Act 1983, which requires an employer to pay a worker all of their wages, without deduction, when their wages become payable;
- (b) Section 82 of the Holidays Act 2003 (“the HA03”) was breached, by the Respondent’s failure to comply with the Authority’s direction on 2 June 2023 to provide a copy of the Applicant’s holiday and leave records;
- (c) Section 27 of the HA03 was breached, by the Respondent’s failure to pay the Applicant his annual leave entitlements when his employment ended. These should have been paid to him in his final pay, but that did not occur; and
- (d) Section 130 of the Act has been breached, by the Respondent’s failure to provide the Applicant with a copy of his wage and time records, as directed by the Authority on 2 June 2023.

[44] The Respondent has 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?

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

[46] Mr Zhu is the sole director and an 80 percent shareholder of the Respondent. He was the person that was personally responsible for ensuring that the Applicant was paid his full wages on time.

[47] Mr Zhu was the person who arranged with the Applicant to partially pay him some of his outstanding wage arrears, so he clearly has the ability to ensure that the Respondent meets its legal obligations.

[48] Mr Zhu is therefore a person involved in the breaches of employment standards, because he must have known, authorised, and directly aided and abetted the Respondent’s multiple breaches of employment standards regarding the Applicant’s employment.

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

[49] 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.

[50] 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 seeing 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.

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

[52] Accordingly, the Authority gives the Applicant leave under s 142Y(2) of the Act to recover his wage arrears and any other money (such as interest) the Respondent owes but cannot pay him, from Mr Zhu personally.

Other

[53] The Applicant should first seek to recover the wage arrears and money (such as interest) he has been awarded in this determination from the Respondent.

[54] If the Respondent is unable to pay or does not pay him, the Applicant may apply to the Authority for a compliance order against the Respondent and/or an order that Mr Zhu be required to personally pay the wage arrears and other money (including interest) that the Applicant is still owed.

[55] That will require a new Statement of Problem to be lodged with the Authority, which names OPA Architects Limited and Mr Zhu as Respondents. They will then have 14 days from service of the Statement of Problem on them to lodge a Statement in Reply.

What costs and disbursements should be awarded?

[56] Because the Applicant was self-represented, there is no issue as to costs.

[57] However, the Applicant as the successful party is entitled to have his filing fee of \$71.55 reimbursed. Accordingly, the Respondent is ordered to pay him that amount within 28 days of the date of this determination.

Outcome

[58] Within 28 days of the date of this determination, the Respondent is ordered to pay Mr Petreski:

- (a) \$4,299.60 gross wage arrears;
- (b) Interest on \$12,364.89 gross to run from 1 April 2021 until that full amount has been repaid to him, to be calculated using the civil debt calculator on the Ministry of Justice website; and
- (c) \$71.55 to reimburse his filing fee.