

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 235
5401404**

BETWEEN

JINGXIN TIAN
Applicant

AND

SOUTH PACIFIC LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: May Moncur, for Applicant
Paul Pa'u for Respondent

Investigation Meeting: 07 June 2013

Determination: 10 June 2013

DETERMINATION OF THE AUTHORITY

- A. The application for a compliance order is granted.**
- B. South Pacific Limited is ordered to pay costs of \$571.56 to Ms Tian.**

Employment Relationship Problem

[1] In a determination dated 15 October 2012¹, (“the substantive determination”) the Authority made a number of findings against the respondent, South Pacific Limited (“South Pacific”) in respect of its employment of the applicant Ms Tian. South Pacific was ordered to make various payments and a penalty was imposed upon it. No payments have been made.

[2] On 9 November 2012, Ms Tian filed an application in the Authority seeking a compliance order that South Pacific comply with the substantive determination. On

¹ [2012] NZERA Auckland 367

the same day, South Pacific filed a statement of claim in the Employment Court challenging, on a de novo basis the substantive determination.

[3] In a determination by the Authority dated 02 May 2013² reference was made to the progress of the proceedings in the Employment Court and Ms Tian's application for a compliance order was adjourned sine die. The Authority directed the parties to attend mediation and Ms Tian was granted leave to bring her application for compliance order back before the Authority by giving 14 day notice of her intention to do so. The parties attended mediation but the matter did not settle. Ms Tian has brought her application for a compliance order back before the Authority.

[4] Relevant to the current application for a compliance order is the substantive determination in which the Authority made the following orders:

- B. *South Pacific is ordered to repay the sum of \$33,510 to Ms Tian, pursuant to s.12A(2) of the Wages Protection Act.*
- C. *South Pacific is ordered to pay a penalty of \$10,000 in respect of its breach of s.12A(2) of the Wages Protection Act. South Pacific shall pay \$5000 of the total amount of the penalty(\$10,000) into the Authority for subsequent payment to the Crown Bank Account. The remaining \$5000 is to be paid by South Pacific to Ms Tian.*
- D. *South Pacific is ordered to pay Ms Tian wages due to her totalling \$12,400.*
- E. *South Pacific is ordered to pay Ms Tian holiday pay owing to her totalling \$1,455.20.*
- F. *Ms Tian was unjustifiably dismissed by South Pacific. South Pacific is ordered to pay Ms Tian distress compensation in the sum of \$10,000*
- G. *South Pacific breached its statutory obligations of good faith to Ms Tian and is ordered to pay a penalty in the sum of \$5000 pursuant to section 4A of the Act. \$2000 of the total amount of the penalty (\$5000) shall be paid in to the Authority for subsequent payment to the Crown Bank Account. The remaining \$3000 shall be paid by South Pacific to Ms Tian.*
- H. *South Pacific is ordered to pay Ms Tian the sum of \$1750 in costs being the notional tariff for a half day investigation meeting in the Authority together with the sum of \$71.56 being the filing fee.*

² [2013] NZERA Auckland 160

[5] The total amount ordered to be paid by South Pacific to Ms Tian and which has not been is \$67,186.76.

[6] Ms Tian seeks a compliance order under s137 of the Employment Relations Act 2000 (“the Act”). Costs are also sought. Ms Moncur on behalf of Ms Tian submitted that the compliance order should be made because the Authority has issued its substantive determination, it has not been set aside, it is binding and should be enforced.

[7] Mr Pa’u submitted South Pacific did not accept and was challenging the Authority’s substantive determination which was based on “*lies*” told to it by Ms Tian. Affidavits filed by Ms Catherine Kwok (Hui Ling Kwok and referred to in the substantive determination as Catherine Guo) a former director of South Pacific and Amy Chen, South Pacific’s former Accountant which have been filed in the Employment Court in support of South Pacific’s challenge were lodged in the Authority and relied on by Mr Pa’u to oppose Ms Tian’s application for compliance order. Ms Kwok and Ms Tian both depose in their affidavits that Ms Tian’s evidence in the Authority, which formed the basis of findings made by the Authority in the substantive determination, were untruthful. In such circumstances Mr Pa’u submitted a compliance order should not be issued.

[8] Further, Mr Pa’u for South Pacific submitted South Pacific had ceased trading and had no ability to pay the amounts ordered by the Authority in the substantive determination. Mr Pa’u submitted Ms Tian’s application was a waste of the Authority’s resources. Ms Kwok confirmed that South Pacific had ceased trading and could not pay the amounts ordered. No financial records were provided to support South Pacific’s claim of inability to pay and South Pacific’s current director Mr Dongwei Lui did not attend the investigation meeting or provide any evidence regarding South Pacific’s financial position.

[9] South Pacific has an obligation to make payment to Ms Tian of the monies ordered by the Authority in the substantive determination issued almost 8 months ago. The fact that South Pacific disputes findings made by the Authority in the substantive determination and has filed a challenge in the Employment Court does not mean Ms Tian should be denied payment of monies ordered to be paid to her by South Pacific.

[10] The power to order compliance is a discretionary one. In exercising its discretion the Authority is to consider a number of factors including ensuring justice between the parties³. Ms Tian has a substantive determination in her favour, it has not been overturned or set aside by the Employment Court. Attempts at mediation directed by both the Authority and the Employment Court have not been successful. A date for the hearing by the Employment Court of South Pacific's challenge has yet to be set down.

[11] I believe it is in the interests of justice for a compliance order to now issue requiring South Pacific to comply with the Authority's substantive determination and pay Ms Tian the sum of \$67,186.76.

Costs

[12] Ms Tian is entitled to be paid the application fee paid to the Authority relating to these proceedings and also some contribution to her legal costs. South Pacific is ordered to pay Ms Tian the sum of \$71.56 being the application fee and a further \$500 towards her legal costs.

[13] *Note:* Pursuant to Reg 26 of the Employment Relations Authority Regulations 2000, Ms Tian is to provided with a certificate of determination, sealed with the seal of the Authority recording that the respondent is ordered to pay the sums, including costs, as set out in this determination. The total sum to be paid by South Pacific is \$67,758.32.

Anna Fitzgibbon
Member of the Employment Relations Authority

³ *United Food and Chemical Workers Union of NZ v. Talley* [1992] 1 ERNZ 756