

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: 01 May 2013

Determination: 02 May 2013

DETERMINATION OF THE AUTHORITY

- A. The application for a compliance order is adjourned sine die.**
- B. The parties are to attend mediation in an attempt to resolve this matter within 28 days of the date of this determination.**
- C. The applicant is granted leave to bring her application for compliance back before the Authority by giving 14 days notice of her intention to do so.**
- D. Costs are reserved.**

Employment Relationship Problem

[1] In a determination dated 15 October 2012¹, (“the determination”) I made a number of findings against the respondent, South Pacific Limited in respect of its

¹ [2012] NZERA Auckland 367

employment of the applicant Ms Tian. The respondent 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 requiring the respondent to comply with the determination. On the same day, the respondent filed a statement of claim in the Employment Court challenging, on a de novo basis the determination.

[3] In a Minute dated 12 November 2012, Judge Colgan sought a report in relation to good faith pursuant to s181 of the Employment Relations Act 2000 (“the Act”). The Authority’s good faith report stated that the respondent failed to attend mediation as directed and failed to attend the investigation meeting. This conduct by the respondent obstructed the Authority’s investigation rather than facilitated it. The Court took this in to account when deciding whether the respondent’s challenge to the determination should be dealt with on a de novo basis under s182 of the Act. In an interlocutory judgment of the Court dated 22 March 2013², Judge Inglis stated;

One of the underlying principles of the Act is that employment relationship problems be dealt with in the first instance through mediation and investigation by the Authority. That principle will be undermined if the plaintiff’s challenge is permitted to proceed on a de novo basis. However I am satisfied that in the circumstances of this case a just result can be achieved by imposing strict conditions on the challenge, and by having regard to any additional costs that the defendant has been put to through any subsequent costs award.

[4] The Court allowed South Pacific to proceed with its challenge on a de novo basis but made strict timetabling orders and a direction that the parties were to attend mediation within 28 days of the date of the Court’s judgment. The parties are attending mediation on 17 May 2013. Ms Moncur on behalf of Ms Tian argued that the compliance order should be made because the Authority has issued its determination and there has been no application by South Pacific Limited seeking a stay of execution of the determination. Mr Pa’u opposed the application for a compliance order and argued that the Court will be determining South Pacific Limited’s challenge to the determination and there could be a substantial miscarriage of justice if in the meantime a compliance order is made.

² South Pacific Limited v Jingxin Tian [2013] NZ EmpC44

[5] 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. South Pacific Limited is actively pursuing a challenge to the determination and the parties are attending mediation in respect of that challenge in just over two weeks on the 17th of May. I do not believe it to be in the interests of justice for a compliance order to issue at this stage. I make the following orders:

- A. Ms Tian's application for a compliance order is adjourned sine die.
- B. The parties are directed to attend mediation within 28 days of the date of this determination in respect of this application for compliance order.
- C. Ms Tian is granted leave to bring her application back before the Authority by giving 14 days notice of her intention to do so.
- D. An investigation meeting will then be set down at a time suitable to the parties.
- E. Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority

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