

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 89
3271419

BETWEEN YU WANG
 Applicant

AND LIN ZHU
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 No appearance by the Respondent

Investigation Meeting: 16 February 2024 in Auckland

Date of Determination: 16 February 2024

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The parties

[1] The Applicant, Ms Yu Wang, was employed by Kihini Kitchens Limited (“Kihini Kitchens”). The Respondent, Mr Lin Zhu, is one of Kihini Kitchens’ two directors. He also holds 65 out of 100 of its shares.

[2] Kihini Kitchens failed to file its annual accounts, so the Companies Registrar has initiated action to remove it from the Companies Register. However, Ms Wang asked the Companies Registrar to keep it on the Register until her employment issues have been resolved.

Previous determinations

[3] The Authority has issued two previous determinations involving Ms Wang and Kihini Kitchens' failure to pay her money she is owed:

- (a) *Wang v Kihini Kitchens Limited* [2023] NZERA 494 (“the substantive determination”); and
- (b) *Wang v Kihini Kitchens Limited and Zhu* [2023] NZERA 700 (“the first compliance order determination”).

[4] This compliance order oral determination is the third determination the Authority has issued.

[5] The first determination involved only Kihini Kitchens as a party. However, the Authority also found that Mr Zhu was ‘a person involved in breaches of employment standards’, because he had been personally responsible for the breaches that had occurred.¹

[6] Ms Wang was given leave by the Authority to pursue Mr Zhu personally for wage arrears or money that Kihini Kitchens owed her but was unable to pay.²

[7] Mr Zhu was warned in directions issued by the Authority prior to the substantive investigation that he was at risk of being found to be ‘a person involved in breaches of employment standards’ and what that would mean for him personally.³ Mr Zhu was encouraged to participate in the Authority’s substantive investigation, but he elected not to do so.

[8] This oral determination is the second compliance order determination issued arising from Ms Wang’s employment by Kihini Kitchens.

¹ *Wang v Kihini Kitchens Limited* [2023] NZERA 494 at [54] to [36].

² Above n 1, at [66] to [68].

³ Above n 1, at [34] to [36].

Money awarded to Ms Wang

[9] In the substantive determination dated 1 September 2023, the Authority ordered Kihini Kitchens to pay Ms Wang:⁴

- (a) \$23,466.38 gross wage arrears;
- (b) Interest on \$23,466.38 gross to run from 10 October 2022 until that full amount has been repaid to her, to be calculated using the civil debt calculator on the Ministry of Justice website; and
- (c) \$71.55 to reimburse her filing fee.

Service of the substantive determination

[10] The Authority's substantive determination dated 1 September 2023 was served on Kihini Kitchen at its registered address for service as recorded on the Companies Register, by a process server from The Investigators New Zealand Limited ("The Investigators"). Service occurred at 12.05pm on 4 September 2023. It was also served on Mr Zhu at the same time at the same address in his capacity as a director of Kihini Kitchens.

[11] The process server reported to the Authority that he taped two separate envelopes which each contained a copy of the substantive determination to the front door of Kihini Kitchens' registered address for service. That occurred because the office was closed and it was clear that Kihini Kitchens had vacated the premises.

[12] One envelope was addressed to Kihini Kitchens. The other envelope was addressed to Mr Zhu. Photos of the two envelopes taped to the door of the registered address for service of Kihini Kitchens were provided to the Authority by the process server.

[13] A further copy of the substantive determination was also emailed by the Authority to Kihini Kitchens' email address.

[14] Yet another copy of the substantive determination was served by a process server on Kihini Kitchens' registered address for its business premises located at 520 Great South Road, Greenlane, Auckland. The business premises were closed, and the

⁴ Above n1, at [73].

process server reported back to the Authority that it looked as if they had also been vacated. The process server therefore fixed a copy of a sealed envelope containing the substantive determination to the office door of the business premises.

Service of the compliance order determination

[15] The compliance order determination dated 23 November 2023 was served on Kihini Kitchens and on Mr Zhu at Kihini Kitchens' registered address for service by a process server from The Investigators at 8.16am on 27 November 2024. Once again two envelopes were taped to the door of the registered office which was vacant, one addressed to Kihini Kitchens and the other addressed to Mr Zhu. The process server provided the Authority with photos of that.

[16] Another copy of the compliance order determination was sent by track and trace courier to Mr Zhu at Kihini Kitchens registered business address in Greenlane and to its registered address for service in Albert St Auckland. Yet another track and trace courier was sent to the address that Mr Zhu has listed, in his capacity as a director of Kihini Kitchens, on the Companies Register. This is his address at Mokoia Road in Birkenhead, Auckland. The courier provided the Authority with photo proof of delivery.

[17] Mr Zhu was also emailed a copy of the compliance order determination by the Authority at the email that ends in @qq.com.

Ms Wang's claims

[18] Ms Wang emailed Mr Zhu on 1 and 23 September 2023 asking for him in his capacity as one of Kihini Kitchen's directors to arrange for it to pay her the money she had been awarded by the Authority. No response was received. No money has been paid either by Kihini Kitchens or Mr Zhu. No steps have been taken for her to be paid.

[19] Ms Wang sought and was granted a compliance order from the Authority dated 23 November 2023 that:⁵

⁵ *Wang v Kihini Kitchens Ltd and Zhu* [2023] NZERA 700 at [55] to [58].

- (a) Ordered Mr Zhu as a director of Kihini Kitchen to take all necessary steps for it to pay Ms Wang the money she had been awarded by the Authority; or
- (b) Alternatively, if Kihini Kitchens was unable to pay Ms Wang the wage arrears and money she is owed, then Mr Zhu was ordered (as the person involved in the breaches of employment standards that had occurred) to personally pay her the wage arrears and money she is owed.

[20] Ms Wang emailed Mr Zhu on 23 November 2023, 30 November 2023 and 11 December 2023 requesting payment of the money she was awarded by the Authority. However, despite Ms Wang's multiple requests to be paid, and the Authority's two determinations, she has still not been paid anything. Nor have any payment arrangements been made. Mr Zhu and Kihini Kitchens have continued to ignore Ms Wang.

[21] The ongoing failure to pay Ms Wang for work she has done has caused, and is continuing to cause, her significant emotional distress and financial embarrassment.

The Authority's investigation

Statement of Problem

[22] Ms Wang lodged a Statement of Problem ("SoP") with the Authority on 5 January 2024 seeking a compliance order be issued against Mr Zhu to compel him to personally pay her the wage arrears and money that she had been awarded by the Authority which Kihini Kitchens was unable to pay her.

[23] The Authority was unable to prove service of the SoP on Mr Zhu via its usual method of track and trace courier, because there was no-one present at the address he has recorded on the Companies Register (as a director) who could sign to record that service had occurred.

[24] The Authority therefore engaged a process server from The Investigators to personally serve Mr Zhu at the address he had recorded on the Companies Register. The process server reported to the Authority that someone was present at that address, but the person denied knowing Mr Zhu and they also refused to come downstairs to meet the process server, so he could serve the SoP.

Directions of the Authority

[25] Directions of the Authority (“DoA”) were issued on 19 January 2024 that, due to service problems, ordered substituted service could occur on Mr Zhu at Kihini Kitchens’ registered address for service, because he was a director of the company and had an obligation to keep his address and Kihini Kitchens’ address for service on the Companies Register current.

[26] The DoA also recorded that this matter had been set down for an in-person investigation meeting on 16 February 2024. Mr Zhu was encouraged to participate in the Authority’s investigation. He was also put on notice that failure to do so could result in the Employment Court limiting his ability to challenge the Authority’s determination.

Service on Mr Zhu

[27] A process server from The Investigators personally served the SoP, the DoA and the Notice of Investigation Meeting (together referred to as “the service documents”) on Mr Zhu at Kihini Kitchens’ registered address for service. Service occurred at 8.24am on 24 January 2024 at Suite 5e located at 17 Albert Street Auckland.

[28] No-one was at the premises, which had been vacated, so the process server attached the service documents, which were inside an envelope which was addressed to Mr Zhu, to the door of the premises of the registered address for service. Photos of that were provided to the Authority.

No Statement in Reply

[29] Mr Zhu’s Statement in Reply (“SiR”) was due on 7 February 2024, being 14 days after the SoP was served on him. However, no SiR has been lodged. Mr Zhu has also failed to apply for leave to lodge a SiR out of time.

Non-engagement by Mr Zhu

[30] The DoA dated 19 January 2024 recorded the Authority’s preference to hear from both parties before it determined the compliance order application. However, it also recorded that Mr Zhu’s failure to engage in its investigation would not stop the Authority’s investigation from proceeding, or a determination from being issued.

Investigation meeting

[31] An in-person investigation meeting was held in Auckland on 16 February 2024 the Authority was assisted by a Mandarin interpreter. Ms Wang attended but Mr Zhu did not.

[32] The start time of the investigation meeting was delayed by 15 minutes to give Mr Zhu extra time to turn up, in case he was running late.

[33] The Authority was satisfied Mr Zhu had been served with the Notice of Investigation Meeting on 24 January 2024, so he must have elected not to attend today.

Breach of employment standards established, and preliminary indication given to Mr Zhu

[34] The Authority in its substantive determination dated 1 September 2023 found that Kihini Kitchen's failure to pay Ms Wang her wages was a breach of employment standards, as defined by s 5 of the Employment Relations Act 2000 ("the Act").⁶

[35] The Authority gave a preliminary indication in the DoA dated 19 January 2024 that, based on the available information at that time, it considered Ms Wang's application for a compliance order against Mr Zhu was likely to succeed. Mr Zhu was therefore on notice that he was potentially at risk of personal liability to pay the wage arrears and money Ms Wang was owed by Kihini Kitchens.

The issues

[36] The following issues are to be determined:

- (a) Has Ms Wang been paid any of the money the Authority awarded her?
- (b) If not, is Kihini Kitchens unable to pay Ms Wang the money she is owed?
- (c) If so, should the Authority order Mr Zhu to personally pay Ms Wang the money Kihini Kitchens still owes her?
- (d) What costs and disbursements should be awarded?

⁶ Above n1, at [51] and [52].

Has Ms Wang been paid any of the money the Authority awarded her?

[37] Ms Wang gave evidence under affirmation to the Authority during the investigation meeting that she had not been paid any of the money she has been awarded. Nor have any payment arrangements been made. Mr Zhu has not responded to any of Ms Wang's emails requesting payment.

[38] Ms Wang's uncontested evidence was accepted by the Authority.

Is Kihini Kitchens unable to pay Ms Wang the money she is owed?

[39] Kihini Kitchens' business has closed down. It has no employees and is no longer operating. Its business premises are closed. Ms Wang told the Authority she saw on Facebook at the end of last year that Kihini Kitchens was selling kitchen display items from its business premises where she has worked.

[40] Kihini Kitchens has not lodged its annual return with the Companies Office, and its removal from the Register has been advertised by the Companies Registrar. Kihini Kitchens has vacated its registered address for service and has not provided an updated address to the Companies Registrar.

[41] The evidence established on the balance of probabilities that Kihini Kitchens is unable to pay Ms Wang the wage arrears and other money she is owed.

Should the Authority order Mr Zhu to personally pay Ms Wang the money Kihini Kitchens still owes her?

[42] Section 142Y(2) of the Act provides that Ms Wang can recover her wage arrears from Mr Zhu personally, as 'a person involved in a breach of employment standards' with the Authority's leave. Ms Wang was granted that leave in the substantive determination dated 1 September 2023.⁷

[43] Mr Zhu has not complied with the orders the Authority made in its compliance order determination dated 23 November 2023.⁸ It is unlikely that Ms Wang will be paid any of the money she is owed unless a compliance order is issued by the Authority.

⁷ Above n 1, at [68].

⁸ Above n 5, at [55] to [57].

[44] Mr Zhu is the person who directly caused the breaches of employment standards by Kihini Kitchens to occur. He has also failed as one of Kihini Kitchens' directors to comply with the Authority's order that he take steps to ensure Kihini Kitchens paid Ms Wang the money she is owed.⁹ Nor has he paid her any money himself.

[45] Mr Zhu has failed to comply with the orders the Authority made in the first compliance order determination. His ongoing failure to engage with Ms Wang, or the Authority, strongly suggests he will not pay Ms Wang without being compelled to do so. A second compliance order against him is therefore appropriate and necessary in order to compel him to personally pay Ms Wang the wage arrears and other money she is owed by Kihini Kitchens, but which it is unable to pay her.

What if any costs and disbursements should be awarded?

[46] Ms Wang is the successful party. She was self-represented, so there is no issue as to costs. However, as the successful party she is entitled to have her filing fee of \$71.56 reimbursed by Mr Zhu.

[47] Accordingly, Mr Zhu is ordered within 14 days of the date of this determination to reimburse Ms Wang \$71.55 for her filing fee for this second compliance order application.

Orders

[48] Within 14 days of the date of this determination Mr Lin Zhu is ordered to comply with paragraphs [55] to [57] of the Authority's compliance order determination dated 23 November 2023 by personally paying Ms Wang:

- (a) \$23,466.38 wage arrears, from which he must calculate and deduct the correct PAYE, which is to be remitted to Inland Revenue on Ms Wang's behalf;
- (b) Interest calculated in accordance with the Interest on Money Claims Act 2016 on the amount of \$23,466.38, which is to run from 10 October 2022 until that full amount has been paid to her. The amount of interest to be paid increases daily, so it is to be calculated using the civil debt calculator on the Ministry of Justice website; and

⁹ Above n 5, at [30] and [31].

- (c) \$214.65 to reimburse her filing fees, being \$71.55 for her filing fee in the substantive matter plus \$71.55 for her filing fee on the first compliance order application plus \$71.55 for her filing fee for this second compliance order application.

Warning about breaches of this compliance order

[49] If Mr Zhu fails to comply with this compliance order, then Ms Wang may apply under s 138(6) of the Act to the Employment Court for an exercise of its powers under s 140(6) of the Act.

[50] The Employment Court's powers under s 140(6) of the Act include power to order (among other things) imprisonment for a period not exceeding three months, impose a fine up to a maximum of \$40,000 or order that property be sequestered.

[51] Any breach of this second compliance order made in this determination must therefore be pursued by Ms Wang in the Employment Court.

Service of this determination

[52] The Authority orders that substituted service of a copy of this oral determination may occur on Mr Zhu at Kihini Kitchens' registered address for service, as it is recorded on the Companies Register.

[53] A further copy of this determination will also be sent by the Authority via track and trace courier to the home address Mr Zhu has registered for himself on the Companies Register as a director of Kihini Kitchens.

Rachel Larmer
Member of the Employment Relations Authority