

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 394/08
5099189

BETWEEN NAI - TSU (DORIS) CHIU
Applicant

AND NEW DELI & CAFÉ LTD
First Respondent

NEW GUSTO CAFÉ LTD
Second Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
Ian Davidson, advocate for Respondents

Investigation Meeting: 16 and 22 May, 2, 9 and 18 July, 5 and 9 September,
15 October 2008

Determination: 18 November 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the circumstances of Ms Doris Chiu's employment and her subsequent dismissal by New Deli & Café Limited and New Gusto Café Limited.

[2] There is no dispute that Ms Chiu was dismissed from her waitressing job on 30 August 2007. The termination was confirmed in writing that day by Ms Lina Megawaty who is a director of both above-named respondent companies. The dismissal letter was given to Ms Chiu by another director of those companies, Mr John White.

[3] Ms Chiu has not complained to the Authority about her pay or conditions of employment, or anything else about her job, at least in relation to the period up to the day she told Ms Megawaty that she was pregnant. That was on either Friday 24

August 2007 or 4 days later on Tuesday 28 August. She was then just over 13 weeks pregnant, according to her doctor's notes.

Discrimination and disadvantage grievance raised

[4] Shortly after advising Ms Megawaty of her pregnancy and discussing it, Ms Chiu felt moved to raise a personal grievance. In it she complained to Ms Megawaty;

..... I have been disadvantaged and discriminated at work since I have informed you about my pregnancy.

[5] To remedy the grievance Ms Chiu asked the employers to stop discriminating against her because of her pregnancy and to leave her working hours unchanged. She also invited the employers to mediation with the Department of Labour.

Unjustified dismissal grievance raised

[6] On 30 August 2007 two days after raising her disadvantage/discrimination grievance, Ms Chiu was notified in writing by Ms Megawaty of her dismissal. The grounds were expressed to be that she had not shown proof of her eligibility to legally work in New Zealand. In the dismissal letter her job as a waitress was offered back, on condition she provided the proof of eligibility within eight days.

[7] Although Ms Chiu was entitled to work and had a permit as proof of that in her New Zealand passport, she did not show the document to her employers.

[8] The day after dismissal Ms Chiu raised a grievance that she had been unfairly dismissed. To remedy her second grievance she sought immediate reinstatement of her employment and again sought mediation.

Employers response

[9] A written response to both her grievances was given by the employers' representative, Mr Davidson, on 6 September 2007. For the reasons given in the letter the claims of disadvantage and discrimination were denied, as was the claim of unjustified dismissal. As to Ms Chiu's requests for mediation, Mr Davidson advised that in the circumstances the employers saw no point in taking part in that process.

The statement of problem

[10] Within seven days of her dismissal Ms Chiu lodged an application to the Authority raising an employment relationship problem, which she expressed as being;

- (i) *I have been discriminated and disadvantaged at work by my employer because of my pregnancy.*
- (ii) *The employer reduced my working hours without my consent.*
- (iii) *I have been unfairly dismissed by the employer through a stressful and humiliated process.*
- (iv) *Because of the unfair and unjustified dismissal, I am now becoming not eligible for Parental and Maternity Leave.*
- (v) *The employer did not pay the holiday pay and wages owing to me.*
- (vi) *The employer failed to report my income to IRD since I commenced my employment with New Deli & Café. The employer also did not pay my PAYE and ACC.*
- (vii) *Because of the verbal abuse and subsequently humiliating actions that the employer took, has put so much stress on me and my family.*

[11] Ms Chiu expressed the following to be the way she wanted the problem resolved by the Authority;

- (a) *An apology from the employer.*
- (b) *Reimbursement of the lost wages, holiday pay.*
- (c) *Compensation for humiliation and physical and emotional distress.*
- (d) *Compensation of annual holiday and parental leave.*
- (e) *Employer will pay the tax that they have failed to pay in the past.*

The statement in reply

[12] After receiving Ms Chiu's statement of problem, New Deli & Café Ltd lodged a statement in reply. That company denied each of the claims made by Ms Chiu, including the claims of discrimination, disadvantage and unjustified dismissal. New Deli admitted employing Ms Chiu as a waitress, to serve customers and make coffee at its Albany café, but claimed she had not completed six months employment and therefore had been ineligible for parental or maternity leave. It claimed that she had

been employed “*less than a month*” before being dismissed and that therefore “*PAYE had not been paid on her pay.*” New Deli stated that it intended to pay the PAYE.

[13] New Deli also stated it to be a relevant fact that the employment had commenced on or about 26 July 2007, not 14 February 2007 as Ms Chiu had claimed in her statement of problem. New Deli claimed that the July start date was supported by its wage and time records.

[14] Further, New Deli claimed that at the time of her engagement for employment, at the end of July 2007, Ms Chiu had been requested to provide proof of her ability to work in New Zealand but had failed to do so. It said in relation to this;

The respondent had requested proof of the applicant’s lawful right to be employed. On 29 August 2007 the respondent spoke to the Labour Department about its ability to employ the applicant. The DOL advised the respondent it could not employ the applicant unless she could prove her right to work.

On the 30th of August 2007 the applicant attended work but once again did not provide any proof that she could be lawfully employed in New Zealand.

The respondent therefore terminated the applicant’s employment but stated that they would re-engage her on existing terms and conditions provided she could show proof of her lawful entitlement to work in New Zealand within seven days.

[15] In relation to Ms Chiu’s pregnancy New Deli claimed;

The applicant [Ms Chiu] advised the respondent [New Deli] that she was pregnant. There was a conversation about pregnancy. There was a suggestion made to the applicant that if she became unwell during the pregnancy her hours could be reduced. The applicants hours were never reduced.

[16] In relation to PAYE deductions New Deli said the following in its statement in reply:

The respondent [New Deli] required the applicant’s [Ms Chiu’s] IRD number and Bank account details to pay her by direct credit. The applicant insisted on working for cash not the respondent. The respondent paid the applicant cash.

Mediation

[17] In its statement in reply received by the Authority on 19 September 2007, New Deli expressed willingness to attend mediation. Two days later the Authority therefore referred the parties to the mediation service of the Department of Labour for

that to be arranged. When Ms Chiu later complained about difficulties in getting her employers to agree to attend mediation it became necessary for the Authority to direct the parties to mediation, on 29 November.

[18] Ms Chiu complained a second time to the Authority and once again the Authority directed the parties to mediation, on 18 December 2007. The mediation was eventually held on 16 January 2008 which, in view of the prompt raising by Ms Chiu of her grievances and lodging of a statement of problem on 7 September 2007, was an unreasonably long period of time for her to wait for mediation, apparently because of the employers' unwillingness to attend at any time in the previous four months, contradicting the expressed willingness in the statement in reply.

[19] When Ms Chiu was dismissed New Deli expressly offered to re-employ her within seven days if she provided proof of her eligibility to work in New Zealand. It was readily within her means at that time to provide proof of her eligibility, by simply showing New Deli her passport in which there was a New Zealand residence permit current from before the employment began. It is quite possible that if mediation had taken place reasonably quickly after the grievance was raised, the issue of eligibility to work, if that genuinely was an issue for the employer, could have been resolved and the employment could have been continued, as Ms Chiu wanted even after dismissal and as the employers conditionally offered in the dismissal letter.

Identity of employer

[20] There is no dispute that near the commencement of her employment (on whatever date that was) Ms Chiu was given a written employment agreement by Ms Megawaty to sign. The employer in that agreement was specified to be "*New Deli & Café Ltd and New Gusto Café Ltd.*" They are two separately incorporated companies, of which Ms Megawaty and Mr White are listed as directors.

[21] During the course of the investigation several other employment agreements of other staff were provided to the Authority, all having the same two company names in them which are referred to as "*The Employer*" in each agreement.

[22] In principle a person may have more than one employer at the same time; *Orakei Group (2007) Limited (formerly PRP Auckland Limited) v. Hilton Doherty* unreported, 15 August 2008, WC 12A/08.

[23] Mr Davidson confirmed to the Authority that both companies had been the employer of Ms Chiu at material times. They will be referred to as the employer or the employers.

Ms Chiu's pregnancy, and her right to work in New Zealand

[24] Although by the time of the Authority's investigation there was little dispute about these two factual matters, during her employment they both played a significant part in the problems that arose in late August 2007.

[25] In relation to her pregnancy Ms Chiu produced to the Authority a copy of hospital birthing records showing that a baby was born to her on 20 February 2008. It is not in dispute that she advised Ms Megawaty of her pregnancy, but there is a conflict of evidence as to whether that was on 24 or 28 August 2007.

[26] In relation to her immigration status, at the start of the investigation Ms Chiu upon request produced both her New Zealand and Taiwan passports to the Authority. The former contains a Residence Permit issued under the Immigration Act 1987. It is current from 5 January 2007. Although Taiwanese by birth, Ms Chiu as a person of New Zealand nationality and as the holder of that permit was, I find, fully entitled to become employed in New Zealand at material times.

[27] It is another matter as to whether Mr Chiu ever showed either of her passports to the employers and, if so, when.

[28] From the beginning of its investigation the most obvious question for the Authority to ask Ms Chiu was; when proof was requested why had she not simply produced her passport to show the employers her eligibility to work in New Zealand?

[29] Ms Chiu answered this question at the start of her evidence. She said she had not produced that proof because she had already shown Ms Megawaty her passport, and because she believed her work eligibility was not the real concern the employers had about her employment once they knew she was pregnant. Her evidence was that she had shown Ms Megawaty the proof in February 2007, when she claims to have started work at the New Deli café.

[30] Ms Megawaty and Mr White claim that the employment started in late July or early August 2007 and that Ms Chiu had been asked then to provide proof that she

could legally work. They claim that the announcement made a few days before dismissal by Ms Chiu that she was pregnant, had nothing to do with the termination of her employment.

[31] Ms Chiu claims that after satisfying Ms Megawaty in February at the beginning of her employment that she was entitled to be employed, she had worked full time for several months and nothing more was said about this until just a few days after she had advised of her pregnancy. By that time, after more than six months in employment, she had become eligible to apply for 14 weeks paid maternity leave under the Parental Leave in Employment Protection Act 1987.

[32] The employers' written employment agreement which Ms Megawaty gave to Ms Chiu at the start of work (whenever that was), had in it a section at clause 6 dealing with the employee's entitlement to parental leave under the 1987 Act. Ms Chiu said she had taken advice from the Department of Labour information service about her entitlement and had thought that she would apply for that leave.

[33] Ms Chiu claims that it was no mere coincidence that the request in relation to her work eligibility came just a few days after she had announced her impending parental status. She believes that the request to show proof again over six months later was not motivated by any genuine concern the employers had about her entitlement to work. Ms Chiu suggests that the employers' real concern was tax related.

[34] Around the time of her dismissal Ms Chiu contacted the IRD. She said she was told by the Department that no tax had been forwarded from New Deli & Café Ltd in relation to her employment. She concluded that for her entire employment, which she alleges began in February 2007, PAYE deductions from her pay, if made at all by the employers, had not been forwarded to the IRD.

[35] In her final written submissions to the Authority, Ms Chiu advanced a theory about her dismissal relating to PAYE tax, as follows:

By dismissing me on the spot, the Respondent tried to prevent me from applying for Maternity Leave that would result in exposure of New Deli & Café Ltd failure to comply with their Tax obligation to IRD for not paying PAYE which was deducted from my wages.

[36] It is correct that an application for paid parental leave is made to the IRD, on the Department's standard form IR 880. It would seem inevitable from the information required to be supplied in that form by both employee and employer, that the IRD would eventually uncover any failure to remit PAYE for the qualifying period of employment. Under the Tax Administration Act 1994 at s 143, an offence is committed by an employer who fails to deduct PAYE from salary or wages and who fails to remit those deductions when required to the Department.

[37] There is no dispute that if Ms Chiu was employed at any time before the end of July 2007, the employers did not deduct PAYE from her pay at all, or they did not send it on to the IRD if the tax was deducted. New Deli & Café Ltd confirmed in its statement in reply that PAYE tax had not been paid in relation to Ms Chiu's employment, although this was for a period of employment after the end of July they claim was only about three weeks and which was all within the same month in which tax could be paid to the IRD.

[38] PAYE for the August period of Ms Chiu's employment has now been paid by New Deli to the IRD.

When did Ms Chiu advise Ms Megawaty of her pregnancy?

[39] Ms Chiu's evidence was that she gave that advice on 24 August 2007, a Friday. Ms Megawaty's evidence was that she had first heard of the pregnancy from Ms Chiu on the morning of 28 August, a Tuesday. She said it was in the afternoon on the same day that Ms Chiu had raised her discrimination/disadvantage grievance in writing. There is no dispute that that particular grievance was raised on 28 August.

[40] I prefer the evidence of Ms Chiu on this point, for two reasons. First Ms Chiu was examined by Dr Helen MacDonald on 24 August who confirmed the pregnancy, according to the record of the visit to the doctor. Second, in the EMA Northern call records Mr White provided to the Authority (on 9 July, without being requested to) the Entry 205350 records that New Deli & Café – John White, in response to a "*Problem,*" was emailed by the EMA help desk an "*a-z guide to employees parental leave entitlements.*" That email advice is recorded as being sent at 15:37 on 27 August 2007. The screen record does not show how long before then Mr White had asked the EMA for advice about this problem. There is no suggestion that Mr White knew of Ms Chiu's pregnancy before Ms Megawaty.

[41] The next EMA call record for New Deli/Mr White is 205426 in which the problem is noted as “*Immigration Act 1987.*” The date of response is noted as 28 August, at 4:50 pm.

[42] I conclude that the employers knew before 28 August that Ms Chiu was pregnant, or had said she was. It seems unlikely that she advised Ms Megawaty of her pregnancy in the morning on 28 August and then typed up her grievance letter to present at the meeting in the afternoon of the same day. Most likely the employers were told of the pregnancy on 24 August, I find.

[43] The EMA information volunteered by Mr White also shows that the employers had some concern in relation to “*maternity leave*” at the same time or even before they had asked the EMA for advice about Ms Chiu’s entitlement to work. Nevertheless the employers deny that the maternity leave concern had any bearing on their decision to dismiss Ms Chiu in relation to the work eligibility concern.

Duration of Ms Chiu’s employment- Six months or three weeks?

[44] The first allegation of fact made by Ms Chiu in her statement of problem is that she started her employment on 14 February 2007. Her evidence was that from that time on she worked every week until her dismissal on 30 August 2007, usually five days a week for seven or eight hours each day. She has provided a detailed record she kept of her attendances at work and of the wages she claims to have received in cash each week between her commencement of work and dismissal.

[45] She supported her evidence with bus tickets which indicate a trip made by a passenger each weekday, at about the same time, from the same bus stop near the New Deli café to the same destination. She produced pay envelopes with her name and the hours worked handwritten on them. In her own writing on each envelope she said, is the date she received the pay and the amount. Ms Chiu also produced New Zealand Post receipts showing that she had banked between \$400 and \$600 in cash each week during the several months she claims to have been employed at the New Deli cafe.

[46] Ms Chiu’s husband Mr Dan Krivulin affirmed in evidence that he had usually dropped her off early each week morning directly outside the New Deli café. He said this was on “95%” of the dates over the six months she claimed to have worked there. Mr Krivulin said that in March 2007 two or three weeks after his wife had started

work, he went inside the café and had met Ms Megawaty. On 30 August the day of dismissal, the employers filmed him on video as he entered the café early in the morning to collect his wife, shortly after she had been dismissed at about 6:20 am.

[47] Ms Chiu's claimed period of employment is just over six months, not three weeks as claimed by the Ms Megawaty and Mr White. The sharply conflicting evidence given by them was that Ms Chiu became an employee only at the end of July or the very beginning of August 2007. They have produced detailed computerised wage and time records supporting their evidence.

[48] When the Authority first interviewed Ms Megawaty she denied having had any association with Ms Chiu, in any way or for any reason, before 30 July 2007. She said she had first met Ms Chiu on or after that date when Ms Chiu had applied for a waitressing job. Later Ms Megawaty changed her evidence about this, first to the point where she suggested a possibility that she had encountered Ms Chiu at some earlier time as a customer, and then later again to the point where she admitted ringing Ms Chiu on 26 April 2007. She said her call then was in response to an enquiry made by Ms Chiu about possible work.

[49] Efforts to resolve this major conflict in the evidence led to a protracted investigation. Ironically, because of the scale and persistence of this conflict there has been universal agreement reached between the parties about one thing; that one or more witnesses while giving evidence under oath to the Authority must have lied. If Ms Chiu told lies then her husband Mr Krivulin clearly did so too, given the nature of the evidence he gave strongly supporting her claims. If Ms Megawaty told lies then her partner Mr White, who is also a director of both employer companies, did so as well, given the nature of his evidence strongly supporting that of Ms Megawaty.

[50] Although there may often be innocent explanations for conflicts of evidence between witnesses, that is most unlikely to be the case here. The factual matters in dispute are so fundamental and must be well within the knowledge and recollection of the parties, that there cannot have been an honest mistake made by whichever of the four main witnesses has given incorrect evidence.

[51] Not only has one or more witnesses deliberately and repeatedly lied when giving oral evidence but they have produced documents and records that have been obtained or created to support the untrue evidence.

[52] Unfortunately several customers of the café and some of its staff have been drawn in by both sides of this conflict which has resulted from the false evidence given by one or more witnesses.

[53] At the end of the first investigation meeting Ms Chiu, Mr Krivulin, Ms Megawaty and Mr White, were warned that giving false evidence could lead to a prosecution for an offence. Despite that warning it remained very clear during further meetings that the lies were being repeated and added to.

[54] It is highly relevant to the resolution of Ms Chiu's employment relationship problem to establish how long she worked for the employers, whether that was just over six months as she claims, or just over three weeks as the employers claim. Although undoubtedly there is scope for many different theories as to why one party or the other has extensively based its approach to this case on false evidence, the Authority is not required to determine the parties' motives in presenting their evidence. Motive in that regard is of little or no relevance to deciding how long Ms Chiu worked for the employers.

[55] If Ms Chiu worked longer than three weeks then she has a claim for annual holiday pay based on her true period of employment. A finding that the employment was longer than three weeks by several months also undermines the honesty and credibility of Ms Megawaty and Mr White as witnesses and throws seriously into doubt the employers' reason given for Ms Chiu's dismissal.

[56] To attempt to resolve this pivotal issue the Authority has had to look beyond the evidence of Ms Chiu and her husband, and of Ms Megawaty and Mr White. Evidence independent of theirs was obtained from;

Customers of the New Deli café,

Past and present employees of the café,

Telephone records,

A forensic examination of handwriting.

Customers of the café

[57] Seven customers were presented as witnesses on behalf of the employers and gave evidence that they had not seen, or could not recall having seen, Ms Chiu working at the premises on the many occasions that they had regularly visited the café

during 2007. Some of those witnesses were quite a lot surer of their evidence in this regard than others. One witness thought that she had seen Ms Chiu working, but at a different restaurant nearby run by different proprietors.

[58] The customers had each been approached by Ms Megawaty or Mr White around July 2008, nearly 12 months after Ms Chiu's employment had ended, and shown a photograph of her. They were asked if the person in the photo was someone they had ever seen working in the café. The still photograph had been produced from the video made by the employers of Ms Chiu being dismissed at around 6:20 am on 30 August 2007. Her husband appears in the video it was taken from, a short time later after being called to collect her. He appears to remonstrate with Mr White briefly, before leaving the cafe with his wife. In the photograph shown to the customers Ms Chiu is not dressed in the waitressing clothing supplied to her and understandably in the circumstances does not present as a smiling helpful waitress, as customers might have previously encountered her. In the photo she looks 'gobsmacked.'

[59] I accept that all the customer-witnesses called by the employers did their best to help the Authority by providing their recollections. I accept their evidence that they either did not see Ms Chiu working at the café at times when they were there and when she says she was there too, or they could not recall having seen her. Some weight has to be given to this evidence which was given by a number of witnesses who had no particular interest to protect in this case and no reason to do anything except tell the truth.

[60] But another customer gave evidence that he had seen and spoken to Ms Chiu while she appeared to be working in the café, and at times much earlier than July/August 2007. At the beginning of the investigation Ms Chiu gave the Authority a handwritten letter from the witness, which read:

To whom it may concern

I can confirm that during 2007 I was a very regular customer at the New Deli & Café in Albany.

I was from February 2007 to August 2007 waited upon by Doris Chiu whilst she was in the employ of the New Deli & Café as Doris served me most every day we were on a 1st name basis.

[61] It was signed by Mr Ken Olsen who was called as a witness by the Authority. His evidence was that in 2006 and 2007 he had been working in the vicinity of the New Deli café at Albany near the university campus and had regularly visited the place. He said he went there three or four mornings a week, between 7 and 7.30am, on most weeks.

[62] Mr Olsen confirmed that he was the author of the letter presented to the Authority and he confirmed that his signature was on it.

[63] Mr Olsen gave evidence that he had met Ms Chiu at the New Deli café in about February 2007. He had a particular recollection of that because he had asked her if she could translate documents written in Mandarin Chinese. This was how he became quite well acquainted with her at the café over several months. He said that he saw Ms Chiu attending the till at the premises during many of his visits and he had paid the café by cash or his Eftpos card, which Ms Chiu had handled through the till or machine.

[64] The evidence of the employers that Ms Chiu had only worked for about three weeks in August 2007 was put to Mr Olsen. He firmly rejected any possibility that he could be mistaken about seeing Ms Chiu working at the New Deli Café in the first few months of 2007 and long before August.

[65] In the record of phone calls and text messages Ms Chiu presented to the Authority as having been made by her to the café or to other employees or customers of the café, one of those was noted as having been to Mr Olsen. Mr Olsen confirmed in his evidence that he had received that text message. He explained that he had asked Ms Chiu to translate documents in March or April 2007 as he was about to undertake business with Chinese in China. He said he had made five trips there in October 2006, February, April, June and November 2007.

[66] Mr Olsen confirmed that the record made by Ms Chiu of a text message sent to him would have been about right in showing the date to be 12 July 2007. He explained that in planning his trip to China he had arranged to meet a Ms Wu there and had asked Ms Chiu, because of her fluency in Chinese, if she would ring Ms Wu and give some introductory information ahead of him travelling to meet her. He said that Ms Chiu had done this and he had reimbursed her the money for the call she made to China.

[67] Ms Chiu produced her cell phone to the Authority and brought up a screen showing that on 12 July 2007 at 6:30 am she had texted a particular 021 mobile phone number with the following message:

Hi, ken i talked to her yesterday, already let ms wu know, have a good flight.

[68] Mr Olsen confirmed he had received that text shortly before he had departed from Auckland on his trip to China. He confirmed that the cell number shown was his number, and he produced his business card which also has on it that number.

[69] The Authority does not doubt the veracity of Mr Olsen as an impartial and independent witness, nor does the Authority doubt the accuracy of Mr Olsen's memory about events in 2007. I find it likely from his evidence that Ms Chiu gave every appearance to him that she worked at the New Deli café when he often saw and spoke to her there, long before August 2007.

[70] If the employer's evidence in this case is correct that Ms Chiu had not been known to them and did not work at the New Deli café before 30 July, then Mr Olsen's evidence must have been untrue. I consider that to be unlikely from my observation of Mr Olsen answering questions, from the evidence he gave, from his background and from the way his evidence fits into the overall picture.

[71] I find from the evidence that Ms Chiu was unknown to Mr Olsen before he encountered her apparently working at the New Deli café and became friendly with her, to the extent of getting her help to translate Mandarin Chinese and assisting him with an introduction to a business person in China that he intended to meet.

[72] I regard the evidence of Mr Olsen as tending to prove that Ms Chiu could be seen at the premises of the New Deli café, from about February 2007 and much earlier than August 2007, and that from her activities she appeared to be working there or employed by the business. It is unlikely that Ms Chiu was masquerading as an employee, undetected by the employers, by serving customers and using the employers' till and Eftpos machine.

[73] The Authority will retain Mr Olsen's hand written statement signed by him on 28 March 2008, and it will be made available if required for other proceedings.

Employees of the café

[74] A number of past and present employees gave as evidence their recall of the period when Ms Chiu had worked with them at the New Deli café in 2007. Some were quite sure that was only in August 2007. There was evidence that Ms Chiu had been at the cafe before then, but as a customer not a waitress. Some of the witnesses had difficulty comprehending English because it was not their first language. The witnesses were sure that it was only August they had seen her but generally they could not provide details. One witness gave the same answer to many of the questions, “*all I remember is August.*”

[75] One former employee witness, Ms Jenna Choi, gave evidence that she had worked at the café with Ms Chiu from about February or March 2007 for about six months, until Ms Chiu finished in August.

[76] Ms Choi’s evidence was that after Ms Chiu had left Ms Megawaty told her to say to anyone who asked that Ms Chiu had worked for one month only. She said that would not have been a true statement to make. Nevertheless it appears that she may have signed such a statement saying the employment was only for one month, although it has not been produced to the Authority. From her evidence the Authority has some doubt as to whether Ms Choi was working at the new Deli café before April 2007, as the employers’ records indicate that she was not.

[77] Viewed on its own the evidence from past and present employees, including Ms Choi, leaves doubts both ways as to the true period of Ms Chiu’s employment. Some of the witnesses also appeared to be influenced by current employment interests. I consider there is more determinative evidence available from the telephone records.

Telephone records

[78] On the first day of the investigation meeting as part of her evidence, Ms Chiu produced a detailed handwritten record she had made of voice or text communications by telephone from March 2007 until after her dismissal in August. Some of the communications she claimed had been between her and Ms Megawaty.

[79] Ms Chiu's hand written record contains details of about 40 messages sent by her, 17 received and one missed call. To Ms Megawaty's number there are 2 calls shown, and there are 2 received from that number as well as the missed call.

[80] Ms Chiu presented her Seimens cell phone on which information matching that in her record was stored, and some of that information was displayed to the Authority during the investigation meeting.

[81] Only one communication is shown in the handwritten record as being to "Lina" before August 2007, and it reads as follows:

*09.03.07 6:14 0274 366 541 (Lina)
Are u coming to pick me up? I'm waiting.*

[82] The handwritten record shows two calls noted as being from "Lina." They are as follows:

26.04.07 15:01 0274-366-541 (Lina)

(Lina forgot to give me the payment envelope)

Thursday is my pay day.

and,

16.07.07 06:55 0274 366 541 (Lina)

(I was late for 6:30 shift)

[83] The handwritten record contains one call missed by Ms Chiu's on her cell phone, as follows:

17.03.07 06:53 0274 366 541 (Lina)

(Lina asked me if I can work tomorrow because Imelta's son is in hospital so I told her that I'll come)

[84] During the investigation meeting upon request Ms Chiu brought up the screen on her cell phone with the information shown on her handwritten record for March 2007. The screen reads as follows:

09.03.07 06:14

0274 366 541

ARE u coming to pick me up? i'm waiting.

[85] That screen was shown to Ms Megawaty and Mr Davidson, and the Authority has subsequently made and retained a photograph of it and several other screens.

[86] When shown the screen Ms Megawaty confirmed that the number 0274 366 541 was the mobile number she was using in 2007 and continues to use. Her response to this information was to repeat her earlier evidence that she had first met Ms Chiu on 30 July 2007 when Ms Chiu had gone to the New Gusto Café (which Mr White manages) to apply for an advertised job and had been directed to the New Deli café (which she manages) nearby.

[87] This was also the evidence of Mr White, that he had not met Ms Chiu before the end of July 2007 when Ms Chiu had applied for a job, initially at the New Gusto cafe.

[88] Mr White in his evidence in relation to the data displayed on Ms Chiu's cell phone, purporting to show that there had been communication in March 2007, suggested that Ms Chiu had doctored or tampered in some way with the cell phone to make it display false information. He said this could be done by using a data communication cable.

[89] Mr White made no attempt to explain how technically it is possible to alter a cell phone in the way he had suggested but he persisted in putting forward material obtained from the internet, such as the information from the "*SMS Fun*" website which indicates that you can "*fool your friends with fake messages.*" He also produced information from "*FAKEMYTEXT*," apparently a programme allowing anonymous texts to be sent.

[90] The Authority began considering whether to have Ms Chiu's cell phone examined by a technician or an expert of some kind, to see whether on-screen data had been input after the date shown, by tampering. The possibility of obtaining telephone records was not raised by anyone including the Authority during the investigation meeting on the first day.

[91] Using its powers under s 160 of the Employment Relations Act, the Authority later called for evidence or information from Telecom about calls made from the cell phone number of Ms Megawaty in the time periods around the calls shown in Ms Chiu's records.

[92] In response Telecom provided a copy of an invoice dated 21 May 2007 under the name New Deli & Café Ltd. The invoice lists calls made from the number “27 436 6541” and shows that on 26 April 2007 at 2:57 pm a call was made to the number “21-107 6399.” That is the cell phone number of Ms Chiu.

[93] The Telecom records therefore confirm as correct at least one of the screens shown on Ms Chiu’s cell phone, and also her hand written record presented to the Authority about that particular call. The call was made some three months before August 2007 or the end of July 2007, when Ms Megawaty claimed to have first met Ms Chiu.

[94] Telecom was unable to find any record of the call Ms Chiu claimed she had received on 16 July 2007 at 6:55 by text from Ms Megawaty. Given that this call was made at 6:55 according to Ms Chiu, it seems it would have qualified for Telecom’s Freeminutes programme and therefore not be shown on the account, as there was no charge for it. Similarly, the call on 17 March 2007 as a missed call would not appear on the record either, because it was not answered and there was no charge for it.

[95] When Ms Megawaty was shown the Telecom record during a later meeting it was obvious that both she and Mr White were concerned that it had come into evidence in the investigation. It seems likely to me that they had known what was in the statement, which was a business record of the employer companies. The calls for Mr White’s cell number are also on the statement and it is likely they had seen the statement when it was received and before they paid the invoiced charges to Telecom.

[96] At the 2 July meeting after being shown the Telecom statement Ms Megawaty denied making the call on 26 April shown in it. Her explanation for it was that a café customer must have borrowed her cell phone to ring Ms Chiu.

[97] At the next investigation meeting on 9 July a week later Ms Megawaty gave another explanation. This was that she had made the call to Ms Chiu at a time before Ms Chiu had become employed in the café but after she had applied for a job there. Previously her evidence was that she had not known Ms Chiu’s cell number until she started working at the New Deli café after the end of July 2007.

[98] Finally Ms Megawaty accepted the accuracy of Ms Chiu’s records of all the calls between their cell phones, although she said the 9 March text had been sent to her number by mistake instead of to Ms Chiu’s husband.

[99] When questioned why such records as the Telecom statement had not been sought to be produced or obtained by the employers from the start of the investigation meetings, Mr White said that those records had been taken away from them because of an IRD investigation into his companies and that his accountant held them. I consider that is an unlikely reason why a copy of the records could still not have been obtained from Telecom or from the accountant or from the IRD, if the employers had wished to present a statement as exculpatory evidence in support of their case to the Authority.

[100] A week after the Telecom statement had been produced, at the 9 July meeting of the Authority some written material was offered by Mr White. In it at the page 1, paragraph 1, he addressed the production of the records by saying;

We were asked [by the Authority] to give an explanation of the phone call to Doris on 26/4/07. We did not believe such a call had really been made. So we did not check out telephone records which were with our Accountant and IRD.

[101] I regard that explanation as unlikely and consider it to be much more probable that if Mr White truly had not believed the call had been made then he would have checked the Telecom statements to obtain proof of that for the Authority. If they showed the call had not been made then Mr White would have known that Ms Chiu's honesty would be seriously undermined early on in the investigation, probably saving himself and his business a great deal of time and money by not prolonging the investigation.

[102] Although Mr White may be a novice at Authority investigations, he was represented from the start by a person very experienced in employment disputes and I expect he was advised by Mr Davidson of the need to locate all material relevant to the claims. Mr White did not wait to be asked before presenting other information or material he thought the Authority should see, and it seems incongruous that he did not offer the Telecom records, unless there was something in them he did not want the Authority to see. He went to considerable lengths and some personal expense to get some of the material he presented, such as the details he obtained from Land Transport about the ownership of a car he believed Mr Krivulin had been driving. The fact that this had little to do with the case did not stop Mr White from pressing this and other information of little relevance on the Authority, without being asked.

[103] Mr White's evidence that he had not checked the Telecom statements is not credible. It is likely that he did not want the records to be seen, since he and/or Ms Megawaty very well knew what was in them. I reject his explanation for not producing them or even referring to their existence so that the Authority could use its powers to get access to them if he could not.

[104] Before finally accepting that she had rung Ms Chiu on 26 April, Ms Megawaty's explanation was that a customer in the café must have borrowed her phone to make a call which happened to be to Ms Chiu. Ms Megawaty explained that a customer who did not have a cell phone could not use the landline in the business because it was barred, and so would need to borrow a cell phone. She said that from time to time she did lend her cell phone to customers for them to use.

[105] It was obvious to the Authority that Ms Megawaty in the interval between the 2 and 9 July interviews had thought about the explanation first given that a customer had borrowed her phone. I reject her explanation that she suffered memory lapse and that "*It takes time to remember.*" Ms Megawaty and Mr White have had good reason from Ms Chiu's claims brought against their business as far back as September 2007 to remember what happened. They had even more reason from May 2008 when Ms Chiu presented her handwritten record of calls and the cell phone screens with the same information on it. The Authority does not accept that it took several months to jog Ms Megawaty's memory of when and how she had been in contact with Ms Chiu before August 2007.

[106] Although it is quite possible that customers borrow Ms Megawaty's cell phone from time to time, the fact that a customer happened to ring Ms Chiu and the sequence of possible events after that time in April 2007, makes this explanation a highly unlikely one.

[107] I find it highly unlikely that a customer rang Ms Chiu up on Ms Megawaty's phone in April 2007, as a result of which call a record was created on Ms Chiu's cell phone. I find it highly unlikely that about four months later when Ms Chiu was dismissed she hatched a plan to bring bogus claims against her employers and which she was able to support with the information obtained completely by chance back April 2007 when the customer/associate of hers had rung, at that time for nothing to do with making false claims at a future date.

[108] The alternative explanation is equally unlikely, that in around February/March or April of 2007, Ms Chiu had already hatched a plan which would rely first upon her becoming pregnant at a future date, and second on her employer dismissing her against her wishes. Then, the under that far-sighted plan the April call could be used as evidence of earlier employment. It is not surprising that Ms Megawaty eventually admitted that she had been the person who rang Ms Chiu.

[109] The record of calls was put squarely in issue by Ms Chiu at the first investigation meeting held on 16 May 2008, when the employers were given a copy of her detailed written log of calls and were shown the cell phone screens for particular calls. The only response then from the employers was to accuse Ms Chiu of tampering with the cell phone and fabricating evidence. They did not offer to produce Telecom statements to verify that claim and did not even refer to the existence of those records.

[110] Ms Chiu was not in a position to resolve the issue of the phone calls, as she had no access to the employers' business records. Mr White and Ms Megawaty did have that access but elected not to present any Telecom statements, so the Authority obtained them to try and resolve the on-going conflict of evidence. The May statement was the employer's own record, which it had received in May 2007 over 12 months before the statement was sighted again by Ms Megawaty and Mr White.

[111] The Authority rejects the suggestion that Ms Megawaty and/or Mr White became muddled or confused during the investigation, so that they gave changing explanations about any communications they had with Ms Chiu at times prior to August 2007.

[112] Ms Megawaty had also made no earlier attempt to produce the slip which Ms Chiu had written her cell phone number on and which Ms Megawaty claims was signed by Ms Chiu when she still was looking for a job, long before she became employed. I consider it likely the employers knew of the existence of the slip from the start of the investigation, but also knew it had been filled out by Ms Chiu, as she said in her evidence, when she started work in February, not in April and not in July/August. The slip is printed with the words "*New Gusto*" which is where Ms Chiu said she first enquired about a job and from where she was sent by Mr White to see Ms Megawaty at the New Deli café nearby. Mr Krivulin said he had driven his wife to those two places and waited outside on that occasion in February 2007.

[113] Ms Chiu's record of calls, finally accepted by Ms Megawaty as correct, included the text sent on 9 March 2007 to Ms Megawaty's cell phone number, with the message "*ARE u coming to pick me up? i'm waiting.*" Ms Megawaty's explanation for this was that Ms Chiu had meant to send it to her husband Dan, at 6:14 am, but had accidentally sent it to Ms Megawaty's number which she must have obtained from the café while still looking for work and nearly four months before she first became employed.

[114] I consider it quite unlikely Ms Chiu would have mistaken Ms Megawaty's cell number for her husband's before sending the text message. That explanation once again relies on coincidence of events and accidental occurrences, as with others given by the employers. It is also unlikely that Ms Chiu would make such a mistake because it is quite clear to the Authority from this investigation that by nature she is meticulous about recording details, particularly those involving numbers, and she is a thorough, careful and alert person. Also, the evidence shows Dan's cell number, like her own, begins with 021 not 027. Why she would send such a message at 6:14 in the morning to her husband for him to pick her up (from where?) is not able to be explained by Ms Megawaty.

[115] The employers do accept that at least during August 2007, 6:14 am was just before her start time at the New Deli café, but they would put it down to coincidence that several months earlier in March she had, by mistake, texted their number at about that same time although about a personal or domestic matter which had nothing to do with any job she had.

[116] I accept the evidence of Ms Chiu that the telephone communications with Ms Megawaty did occur as shown on her cell phone screens and as recorded by her. One of the calls was independently verified by a Telecom customer statement sent to New Deli.

[117] I accept the likely reason why the communications occurred was because Ms Chiu had become employed by Ms Megawaty at the New Deli café, by March and April 2007, if not earlier. The communications were to do with employment she had already commenced at least by March 2007, as Mr Olsen independently confirmed with his evidence.

Bus Tickets and Bank Deposit Receipts

[118] No suggestion has been made that these were not authentic. I accept that they relate to bus trips made by Ms Chiu and deposits she made into her TSB account. There are Ritchies bus company tickets showing 44 bus trips made between 26 April and 23 August 2007. The NZ Post receipts show bank deposits made on 24 occasions, between 15 March and 4 September 2007.

[119] In that period according to the receipts the total amount banked was \$11,787. In the period of employment claimed by Ms Chiu from 14 February to 30 August 2007, the total wages she claims to have received from the employers' is \$13,822. Ms Chiu's husband is employed as a manager and was presumably earning an income at material times. The couple paid \$340 per week rent to Dr Lang, who gave that evidence to the Authority. The bank deposit information indicates that Ms Chiu had an income stream from some source, and that she was able to save most of it.

[120] By the dates of many of them, the bus tickets and deposit receipts were collected by Ms Chiu several months before she was dismissed on 30 August, and before she had notified the employer of her pregnancy a few days earlier. According to medical evidence, she did not conceive until 20 May, and so quite a number of the tickets and receipts relate to dates before she had even become pregnant.

[121] I accept that Ms Chiu did not collect the tickets and receipts in anticipation of becoming pregnant, or of raising a discrimination grievance much later on, or of being dismissed shortly after that. The latter two events she could not have known in advance would happen to her. There is no indication that the employers' action of dismissal was engineered or provoked by her, and she immediately sought reinstatement in raising a dismissal grievance.

[122] I accept that Ms Chiu, as she said, is a person who closely monitors her expenses or outgoings, and that is why she kept the bus tickets and deposit receipts. She is clearly exact and methodical in keeping records and in her habits with the management of her personal finances.

[123] In relation to 9 March 2007, the date she rang Ms Megawaty's cell number at 6:14 am, there is no corresponding bus ticket. The first of the 44 bus tickets is for a trip made in April. The first of the 24 banking receipts is dated 15 March 2007, when Ms Chiu deposited \$780. The next is 24 March, when \$550 was deposited.

[124] In relation to 26 April 2007 when Ms Megawaty, as she has belatedly admitted and as shown in the Telecom statement, rang Ms Chiu at 2.57 pm, there is a bus ticket for that day. It shows a ride from the Massey University stop nearby to the New Deli café, taken at 1:48 pm to the Constellation bus station. That is the same trip taken at the same time, as shown on all the bus tickets. They include the tickets in August when the employers admit they employed Ms Chiu and when the employers' hours of work allowed her to catch that particular bus once she had finished for the day.

[125] In relation to 26 April when the employers claim Ms Chiu was merely a prospective employee who was rung up on that day by Ms Megawaty about the possibility of work, on 21 August, five days earlier, Ms Chiu had banked \$460. On 28 August, two days later, she banked \$440. The deposits shown on all the receipts are usually amounts between \$400 and \$500.

[126] By comparison, during the admitted period of employment in August she banked;

\$420 on the 3rd,

\$450 on the 10th,

\$440 on 17th,

\$440 on 25th, and

\$462.50, the final pay by cheque, was banked on 4 September.

[127] The bus tickets and deposit receipts indicate no difference in the patterns of Ms Chiu's travel and banking activities between March/April and August 2007. That information is consistent with her claim to have been employed at the New Deli café several months before August 2007.

Handwriting examination

[128] Ms Chiu's evidence was that for most weeks during her six months of employment she had received her pay in an envelope with "*Doris*" handwritten on it as well as the number of hours for which the pay had been made up. Ms Chiu said she had not seen who had written her name on them. Twenty envelopes were produced in evidence.

[129] The Authority sent the envelopes together with samples of handwriting agreed to be respectively hers, Ms Megawaty's and Mr White's, to the Police for forensic examination. Ms Chiu considers that the report obtained from the Police document examiner is favourable to her case. I agree with Mr Davidson that because of necessary limitations on the scope of the analysis, the report should carry little weight in the investigation of Ms Chiu's claims.

[130] The Police report is set aside by the Authority for the following reasons. The Police Senior Document Examiner found, for the reasons given in her five page report, some evidence that Ms Megawaty had written "Doris" on the pay envelopes. She also noted there was some evidence that Ms Megawaty had not completed the handwriting tests administered by the Authority in her natural handwriting but had provided the samples slowly and carefully, and in a way showing some stylised features.

[131] The document examination was necessarily based on the presumption that the person who had written "Doris" on the envelopes had been either Ms Chiu herself, or Ms Megawaty or Mr White. Of those three, the Document Examiner concluded that it was more likely that Ms Megawaty had written "Doris" than that Ms Chiu or Mr White had. But a possibility remains that it was another person outside the pool of three, a possibility which the tests had not been designed to exclude. No weight is therefore given to the Police Document Examination report.

Ms Chiu's leverage

[132] There was another piece of information presented by Ms Chiu in relation to which the explanation of Mr White and Ms Megawaty lacked credibility. The employers admitted that for three weeks of employment in August 2007 they had paid Ms Chiu in cash; notes and coins. This in itself is curious given that they employ quite a number of staff and apparently usually pay by direct credit into a bank.

[133] In correspondence to the EMA from Mr White (which he produced without being requested to by the Authority) he referred to Ms Chiu as having fabricated all sorts of accusations, and also that:

There are many things that make us doubt her honesty, including her insistence in being paid in cash, her false accusations against us and her secrecy regarding her passport.

[134] An interesting part of the message from Mr White is the assertion that Ms Chiu had sufficient leverage in seeking employment to require the employers to pay her cash. I find that implausible and consider that there is some other explanation why cash was paid to Ms Chiu. That arrangement suited the employers for some reason, as well as Ms Chiu.

[135] However the final payment upon dismissal made to Ms Chiu was by cheque and whereas Mr White produced a computerised record which he said was of gross payments and showing tax taken out of Ms Chiu's pay for the three weeks of employment, the amount shown on the cheque coincided with the amount of a gross pay rather than a net pay based on the hourly rate that Ms Chiu had received in the hand according to the records.

[136] Mr White's explanation for this was that he had simply made a mistake in calculating the pay. The cheque itself had been written out by Ms Megawaty. I find it unlikely that these employers who have been in business for a number of years and employ a number of staff in that time are not alert to the amounts that they write on cheques. Nor do they pay employees more than they are entitled to by mistake, as relatively small business operators.

[137] The amount of the cheque was about the same as amounts that had previously been paid in cash to Ms Chiu. The records produced by the employers show payments of \$483.38 and \$479.37, before the final payment by cheque of \$462.50. Ms Chiu's evidence is that she received, in cash, amounts very close to those of \$485 and \$482 before the final payment. I accept that she received those amounts and consider it unlikely that Ms Megawaty had really intended to pay her a net sum of only \$370.44 but mistakenly paid her the higher gross amount. The amount \$370 would have been quite out of keeping with the earlier payments made for similar hours worked.

[138] I consider a more plausible explanation to be that the money paid in cash to Ms Chiu was not the subject of a deduction for PAYE retained by the employer and remitted to the IRD. Most likely the wages records were created on computer after the dismissal to show tax as having been deducted and paid to the IRD, which in fact is what happened but only after Ms Chiu had been dismissed and brought a personal grievance claim.

[139] Mr White also told the EMA on 3 September 2007 that Ms Chiu was creating a problem for her “*financial gain*” and was “*using her pregnancy as a form of leverage.*” The grievance letters themselves give no indication of her trying to coerce any payments from Ms Megawaty and Mr White. She made no mention that she wanted any money to resolve the first grievance, which was raised on 28 August, but asked the employers to stop discriminating against her and to leave her hours of work unchanged. She also sought mediation.

[140] Although in the second grievance, which she raised the day after her dismissal, Ms Chiu sought money it was to reimburse her for lost wages which at that stage, a single day after dismissal, was an amount less than \$100. This was hardly extortionate. She also sought mediation, for the second time. It appears that when Mr White contacted the EMA for advice he had reasons other than bogus financial claims made by an employee for being concerned about Ms Chiu’s grievances.

[141] In his written submission presented to the Authority at the 18 July investigation meeting, Mr White contended (paragraph 52) that Ms Chiu had falsified her commencement of employment date because that was the only way she could get parental leave. As well as dishonest, an employee would be stupid or naïve or both to even try such a thing, given the information required in the application form IR 880. That is how Mr White claims he views Ms Chiu.

[142] Further, Mr White said that after Ms Chiu had been dismissed on 30 August;

*..... Doris made no attempts to contact us to resolve her [our?] concerns.
Surely she could have asked for a meeting with us.*

Again Mr White has tried to overlook the facts. Ms Chiu sought a meeting with her employers, in mediation, twice, but was fobbed off for four months. She sought mediation even before she was dismissed, in her first grievance. The day after she was dismissed she again sought mediation. I find that it was not Ms Chiu who avoided meeting.

Conclusion from the evidence

[143] For the above reasons the Authority finds it more likely than not that Ms Chiu worked for the employers at the café from much earlier than late July or early August 2007, when her employers claim she started. I find that she worked for much longer than the three weeks claimed by the employers. The first text call to Ms Megawaty,

made at 6:14 am, was on 9 March, just a few weeks after the start date Ms Chiu claims of 14 February 2007. I conclude the latter is the most likely date she commenced with the employers.

[144] The employers have no wage and time records for the total period of employment. I accept the accuracy of Ms Chiu's records which were kept carefully and methodically out of habit by her.

Claims

[145] On the basis of the findings as to the period of employment of Ms Chiu, the claims to be determined by the Authority are;

A claim for annual holiday pay, based on employment for the period from 14 February to 30 August 2007,

Grievance claims of discrimination, disadvantage and dismissal, and claims for reimbursement of lost wages and compensation with regard to those,

A claim for compensation for loss of paid maternity leave.

Annual holiday pay

[146] I find that Ms Chiu was not paid the correct amount of annual holiday pay. The employer calculated holiday pay for three weeks employment rather than six months. Even then the calculated amount remains unpaid a year after the employment ended.

[147] I accept Ms Chiu's record of the days and hours of work as accurate. The calculation at 8% of total gross earnings has to be made by the Authority on the basis of a presumed gross hourly rate, as the only record is of the rate received in the hand by Ms Chiu. She has recorded total payments received of \$13,822.50. Applying 8% to those earnings, grossed up for tax (at 19%) to \$17,064.20, gives \$1,365.14 annual holiday pay.

[148] There is a further holiday pay entitlement for pay owing for the days of 27 and 28 August. The total hours of 15.5 are shown in the records of the employers who admit the calculated final pay has not been given to Ms Chiu. The gross wages due for the final two days of employment are therefore \$239.20. The holiday pay at 8% is \$19.13. Total holiday pay due is therefore \$1,384.27.

[149] Pursuant to s 131 of the Employment Relations Act and s 74(1) of the Holidays Act 2003, the employers are ordered to pay Ms Chiu holiday pay for untaken accumulated annual holidays of \$1,384.27.

[150] Interest is to be paid to Ms Chiu at 6 % per annum (the current 90-day bill rate is 6.2%) on that sum from 30 August 2007, until payment is completed.

Personal grievance claims

[151] To resolve the claim of unjustified dismissal the Authority must consider whether the ground for dismissal was as stated by the employers, or was something else.

[152] Ms Megawaty and Mr White have claimed that when Ms Chiu first became employed they had asked her for proof of her entitlement to work in New Zealand. They claimed that about three weeks later, when she had continually failed to provide that proof, they were justified in dismissing her and were required to do so by law.

[153] Since I have found they were not telling the truth about the length of employment it is difficult to believe the reason given for dismissal. I find it is untrue that Ms Chiu was asked at the end of July or the beginning of August to provide proof of her entitlement to be employed. I accept her evidence that she had provided or offered to provide that proof over six months earlier.

[154] I reject the claim of the employers that after six months employment Ms Chiu's immigration status suddenly became a matter of great urgency to be resolved immediately. The real problem for the employers was likely to be the impending disclosure to the IRD of their failure to pay PAYE on six months wages, once Ms Chiu applied for paid maternity leave.

[155] I find that the immigration status of Ms Chiu was a pretext for the dismissal and that the real reason had more to do with her pregnancy or impending parental status and the further consequences of that. There was clearly no justification for dismissing her on the grounds of pregnancy, and none has been contended. Dismissal on the ground of sex is defined as being an act of discrimination; s 103(1)(c) and s 105(1)(a) of the Employment Relations Act 2000. Under the provisions of the Human Rights Act 1993 incorporated into the 2000 Act, 'sex' is defined by s 21 as including pregnancy.

[156] I accept the evidence of Ms Chiu that she had already offered satisfactory proof of her eligibility to work. That explains why she did not regard the request to do so again as genuine in the circumstances and why she did not produce her passport, as would have been easy for her to do.

[157] Whatever the real reason was for the dismissal, I find that failure to prove eligibility to work was not that reason. Applying the test of justification at s 103A of the Employment Relations Act 2000, I find, on an objective basis, that the employers' actions and how the employers' acted were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred. Therefore the dismissal must be determined as being unjustified.

Disadvantage and discrimination grievance

[158] Because of their close proximity in time and event the dismissal grievance subsumes the disadvantage and discrimination grievances. I consider that the employers conduct between 24 August and 30 August should be treated as giving rise to one grievance, unjustified dismissal.

[159] In any event I find that there was no actual disadvantage in the employment prior to dismissal, and the same is true of the discrimination. The unlawful action was dismissal from the employment rather than disadvantage in it.

Paid parental leave

[160] After six months employment at the New Deli café as I find there had been by mid August 2007, Ms Chiu qualified to apply for paid maternity leave under s 7 and Part 7A of the Parental Leave and Employment Protection Act 1987. There is no reason why an application by her would not have been accepted so that once her baby was born she would have been paid for 14 weeks at the rate of her previous weekly earnings.

[161] Ms Chiu had until mid-November 2007 to notify her employers if she was going to apply to take paid maternity leave. Her unjustified dismissal prevented Ms Chiu from applying and caused her to lose the chance or opportunity of securing that paid leave. Mr Chiu has claimed compensation for her loss and I find she is entitled to that.

[162] One remedy available for unjustified dismissal is compensation under s 123(1)(c) of the Employment Relations Act. Cases to date have held that compensation under paragraph (ii) of s 123(1)(c) for loss of an expected benefit, must relate to a benefit provided by the employment agreement. Paid parental leave is not that type of benefit, as it is provided by statute rather than contract.

[163] Compensation under the broader scope of s 123(1)(c) is not confined to hurt feelings and loss of benefit compensation, but is expressed to be inclusive of those heads. I consider that compensation for loss of an expected statutory benefit, such as paid maternity leave, may be awarded under that provision, as the categories of compensation are not expressed to be exhaustive.

[164] The civil remedy of compensatory damages for breach of contract is also available from the Authority under s 162 of the Act. The loss to Ms Chiu is quantifiable as being at least the 14 weeks pay she would have received. That loss sprang directly from the employers' unlawful act in dismissing Ms Chiu unjustifiably. That loss was a direct and quite foreseeable consequence of the breach of the employment agreement and was not a remote consequence of the unjustified dismissal.

[165] I calculate the compensation or damages on the basis of the maximum statutory entitlement of \$407.36 gross per week for paid maternity leave. For 14 weeks the lost pay would have been \$5,703.04 gross. After tax (at 19%) Ms Chiu would have received a total of \$4,619.47. That is the amount to be paid by the employers as compensation or damages, but Ms Chiu shall also be entitled to claim any refund available from the tax of \$1,083.47 which ordinarily would have been deducted. The employers shall account for that tax. The award is intended to fully restore Ms Chiu to the position she would probably have achieved, if the opportunity for applying for paid maternity leave had not been unlawfully taken away by the employers.

Remedies for unjustified dismissal

[166] Had she not been dismissed it is likely that Ms Chiu would have continued working for at least the four months from September through December 2007. She says she would have worked on through January 2008 as well, to just a few week before the birth of her baby, expected later in February. I allow for the possibility

that for medical or other reason she may have decided to stop work sooner rather than later, or that she may have reduced her hours or even days of work. Ms Chiu had had earlier difficulties with her health when pregnant, and it is quite possible she would have decided to stop work earlier than January.

[167] The requirement for her to mitigate her loss of remuneration during some or all of the five months from the end of August 2007 until the end of January 2008 must be considered against the failure of the employers' to attend mediation in a timely way, thereby providing an opportunity for resolving the grievance through that process as she had advised the employers' she wanted.

[168] In the circumstances Ms Chiu is to be reimbursed lost wages for the three month period specified by s 128(2) of the Act. Based on ordinary earnings for a 40 hour week at a presumed gross rate of \$15.43 per hour, for 13 weeks the amount is \$8,023.60.

[169] To this must be added the pay still owing for 27 and 28 August of \$239.20, giving a total of \$8,262.80.

[170] Pursuant to s 128(3) of the Act the employers are ordered to pay Ms Chiu \$8,262.80 for lost wages, calculated on the basis of a presumed gross hourly rate of pay. Interest is to be paid at 6 % from the date of this determination (18 November 2008) until full payment has been received by Ms Chiu.

[171] I am satisfied that Ms Chiu suffered substantial emotional harm through the unjustified dismissal itself and the consequential loss of her chance to secure the statutory entitlement to paid maternity leave. This harm has been aggravated by the conduct of the employers in persisting with false evidence about the employment. Ms Chiu consequently has been required to attend several meeting of the Authority, as she has acted for herself throughout this unnecessarily drawn out investigation. At those meetings she has had to experience the further humiliation of being called to her face a liar and a fraud, and a fabricator of evidence. She has heard and seen her husband's reputation attacked by Mr White in particular, with lurid insinuations of his having underworld connections and even some association with people smugglers.

[172] Through very great effort no doubt, Ms Chiu remained dignified and restrained throughout the ordeal the employers put her through in this investigation. Throughout all of this Ms Chiu has had her new born baby to care for and

unfortunately her memory of the birth of her child will long be marred by what happened when she told her employers she was pregnant.

[173] I assess compensation at \$8,000 taking into account all the circumstances, including the other remedies awarded and overall the harm suffered by Ms Chiu to her feelings, her dignity and her pride. The employers are therefore ordered to pay \$8,000 to Ms Chiu pursuant to s 123(1)(c)(i) of the Act.

Contribution

[174] In assessing remedies I have not made any reduction for contribution pursuant to s 124 of the Act, as I find that Ms Chiu was not in any way to blame for her unjustified dismissal. Her action in not producing her passport on or after 30 August 2007 cannot be characterised as blameworthy, as that action was not causally connected to the circumstances that gave rise to her grievance. Those circumstances were that the employers dismissed her for a reason or reasons other than her declining to prove that she was legally entitled to work in New Zealand.

Determination

[175] The Authority has found that Ms Chiu was employed by New Deli & Café Ltd and New Gusto Café Ltd from 14 February 2007 until she was dismissed on 30 August 2007. She was not paid annual holiday pay for the entire period of employment and is entitled to recover what is owed in that regard.

[176] The Authority has found that Ms Chiu's dismissal was unjustified. The real grounds or reasons for it were not as stated by her employers. She did not contribute to the situation that gave rise to her personal grievance. She is entitled to the remedies of reimbursement of lost wages and compensation for hurt feelings, humiliation and distress.

[177] Ms Chiu's right to apply for paid maternity leave on the basis her qualifying length of service was lost as a result of the employers' unlawful action in dismissing her unjustifiably. She is entitled to be compensated for loss of the opportunity to apply for the leave.

Orders of the Authority

[178] New Deli & Café Ltd and New Gusto Café Ltd are ordered jointly and severally to pay Ms Chiu the following;

- (a) As annual holiday pay - **\$1,384.27**.
- (b) As interest on the above sum of holiday pay - **6%**, from 30 August 2007 until paid in full.
- (c) In reimbursement of lost wages for 3 months (and including pay for 27 and 28 August 2007) - **\$8,262.80**.
- (d) As interest on the above lost wages - **6%**, from the date of this determination (18 November 2008) until paid in full.
- (e) As compensation for hurt feelings, humiliation and distress - **\$8,000**.
- (f) As compensation/damages for loss of chance to apply for paid maternity leave - **\$4,619.47**.

[179] Although I have found that Ms Megawaty and Mr White gave false evidence I am fully confident that their representative Mr Davidson, who is well known professionally to the Authority, has had nothing to do with that. I have seen or heard nothing to suggest that he was in any way involved. As an advocate Mr Davidson had to rely upon what his clients said happened, and he had to present their case according to those instructions.

[180] All of the considerable quantity of documentary and other material supplied to the Authority by the parties, and by Telecom, the Police and other agencies, will stay with the Authority on its file for the time being. Application may be made in writing at any time by any of the parties for the release of any of that material if it is needed for any purpose, which should be advised in the application.

Costs

[181] As Ms Chiu has had no legal representation for the investigation meetings or for the entire investigation apparently, there are no legal costs for her to seek recovery of.

A Dumbleton
Member of the Employment Relations Authority