

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 173
5407917

BETWEEN BAO HO VAN NGUYEN and
 VU HO VAN NGUYEN
 Applicants

AND HUE KIM THI TA
 TRADING AS LITTLE SAIGON
 RESTAURANT
 Respondent

Member of Authority: Christine Hickey

Representatives: Philip Cheyne, Counsel for Applicants
 Peter Rea, representative for Respondent

Investigation Meeting: 23 and 24 July 2014 in Christchurch
 Submissions received at the meeting
 Further evidence received on 10 October 2014

Determination: 5 November 2014

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination, Hue Kim Thi Ta is to pay Bao Ho Van Nguyen:**
- (i) \$6,519.66 gross in wage arrears;¹ and**
 - (ii) \$521.57 gross in unpaid holiday pay,² and**
 - (iii) Interest on both the wages arrears and holiday pay at 5% per annum from 3 January 2013 until paid in full, and**
 - (iv) \$327.50 gross in lost remuneration,³ and**
 - (v) \$6,000 in compensation,⁴ and**
 - (vi) \$1,000 by way of penalties.⁵**

¹ Under s 131 of the Employment Relations Act 2000 (the Act).

² Under s 23 of the Holiday Act 2003.

³ Under ss 123(1)(b) and 128 of the Act.

⁴ Under s 123(1)(c)(i) of the Act.

⁵ Under ss 132, 133 and 136 of the Act.

B. Within 28 days of this determination, Hue Kim Thi Ta is to pay Vu Ho Van Nguyen:

- (i) \$150,026.99 gross in wage arrears,⁶ and**
- (ii) \$12,002.16 gross in unpaid holiday pay,⁷ and**
- (iii) Interest on both those amounts at 5% per annum from 3 January 2013 until paid in full, and**
- (iv) \$327.50 gross in lost remuneration,⁸ and**
- (v) \$8,000 in compensation,⁹ and**
- (vi) \$4,000 by way of penalties.¹⁰**

Employment relationship problem

[1] Bao and Vu Ho Van Nguyen¹¹ are brothers who were employed by Hue Kim Thi Ta¹² as cooks in her Vietnamese restaurant, Little Saigon.

[2] Bao and Vu claim they were both unjustifiably dismissed, either actually or constructively, on 2 January 2013 by Ms Ta. By way of remedy they each claim compensation for humiliation, loss of dignity and injury to their feelings. They also claim lost remuneration following the dismissals and interest on that lost remuneration.

[3] Bao also claims that he was not paid from 20 November 2012 until his dismissal on 2 January 2013. He claims wages arrears and holiday pay and claims interest on those unpaid amounts.

[4] Vu's additional claims are that he was not paid wages from March 2009 until the day he was dismissed, aside from \$1,500. He acknowledges that there were two periods when the restaurant was closed due to the Christchurch earthquakes and asks me to consider whether he should be paid for those periods as well as for the periods

⁶ Under s 131 of the Employment Relations Act 2000 (the Act).

⁷ Under s 23 of the Holiday Act 2003.

⁸ Under ss 123(1)(b) and 128 of the Act.

⁹ Under s 123(1)(c)(i) of the Act.

¹⁰ Under ss 132, 133 and 136 of the Act.

¹¹ Who I refer to as Bao and Vu, only because of the possibility of confusion if they are both referred to as Mr Ho Van Nguyen.

¹² Who I refer to as Ms Ta.

he did work. He claims wages arrears and holiday pay, as well as interest on those amounts.

[5] Vu also claims that Ms Ta breached her duty of good faith to him by retaining the originals of his cooking qualifications. He asks for an order that the documents be returned to him. Ms Ta says she has already returned the documents.

[6] Bao and Vu also claim that Ms Ta breached legislative requirements by failing to keep and therefore failing to produce wages and time records. They claim penalties to punish the breaches and say that the penalties should be paid to them personally.

[7] Ms Ta denies that she dismissed Vu or Bao and says that they abandoned their employment. She says that because they left without giving her notice, she withheld Bao's pay and holiday pay and believes that she was entitled to do so because of a clause in his IEA. She did not specify which clause. She gave no evidence about why she had not paid Vu for the last part of his employment, but may believe she was similarly entitled to do so.

[8] Ms Ta says that she did pay Vu during his employment but acknowledges that there is some unquantified amount she probably still owes him for working on public holidays. Ms Ta acknowledges that she did not keep wages and time records during the time Vu and Bao were employed but challenges the number of hours per week they say they worked. She also says that Vu took days off during his employment so did not work 7 days a week, but she does not have a record of those days.

[9] Both Vu and Bao also seek costs for legal representation. They ask that I reserve my decision on costs until after this determination is made, which I do so.

Issues

[10] The issues the Authority needs to consider are:

- (a) What were the terms and conditions of employment of each applicant?
- (b) Whether s 132 of the Employment Relations Act 2000 (the Act) applies so that the Authority may accept Bao's and Vu's wage arrears claims as proved by their evidence alone;

- (c) What amounts are due to each applicant by way of wages and holiday pay;
- (d) Whether interest should be awarded, and if so, how much;
- (e) Whether the exchanges between Ms Ta and the applicants on 2 and 3 January 2013 amounted to dismissals;
- (f) If the applicants were unjustifiably dismissed what remedies they should receive? This issue includes a consideration of whether they contributed to their dismissal;
- (g) Whether Ms Ta breached provisions of the Act and/or the Minimum Wage Act 1983 and/or the applicants' IEAs;
- (h) If so, whether penalties should be awarded for those breaches, taking into account several considerations including s 3(ii) of the Act. If penalties are to be awarded, in what amount/s?

The Authority's investigation

[11] The investigation meeting took two days and was only possible with the invaluable assistance of an independent Vietnamese interpreter engaged by the Authority. All witnesses gave affirmed evidence.

[12] Bao and Vu gave evidence¹³ and Lara Prince, who formerly acted as their solicitor, also gave evidence on their behalf.

[13] Ms Ta gave evidence and seven witnesses gave evidence for her, all except two of those witnesses are members of her family. The other two witnesses being a friend of Ms Ta's and the chief cook from Little Saigon. Ms Ta was represented by a friend, Mr Rea, who made submissions on her behalf.

[14] In reaching my decision I have considered the evidence given by witnesses who appeared at the investigation meeting and the submissions of the parties. In accordance with s 174 (b) of the Employment Relations Act 2000 (the Act), I have not necessarily referred to all such information in this determination.

¹³ Bao's evidence was via Skype connection from the New Zealand Embassy in Hanoi.

Background

[15] Ms Ta supported Bao's and Vu's applications to Immigration New Zealand (INZ) for work permits to work for her at Little Saigon.¹⁴ The brothers are the sons of a cousin of Ms Ta. Their mother lives in Vietnam and owes Ms Ta money that equals about \$12,000 NZD. Ms Ta's cousin has no prospect of being able to earn the money herself to repay that debt. She suggested to Ms Ta that Vu could work for her to repay the debt.

[16] At the investigation meeting Vu said he accepted that as a dutiful son he should take on that responsibility. That arrangement between Ms Ta and Vu's mother and Vu was not made until Vu was already working for Ms Ta.

[17] The brothers did not speak English when they came to New Zealand, and do not now. From the time they started working for Ms Ta they were accommodated in a furnished garage on her residential property, along with one or two other employees. They took all their meals with Ms Ta's family usually at the restaurant. They were transported to and from work by Ms Ta or her husband.

[18] Vu and Bao both signed written employment agreements. I am confident that Vu's signature is on the second IEA, despite part of his signature being cut off during the process of photocopying.

[19] The applicants worked on 31 January 2012 and decided to go with friends on a fishing trip on 1 and 2 January 2013. Ms Ta went to Auckland and intended to return in the evening of 2 January 2013.

[20] Before they left Ms Ta asked the applicants to wash the Little Saigon tablecloths and have them clean for the restaurant to re-open on 3 January 2013. However, another employee who was also resident at Ms Ta's property¹⁵ assured the applicants that he would wash and dry the tablecloths and that they could go away fishing.

¹⁴ Bao began working in New Zealand for another relative that I believe to have been a brother of Ms Ta.

¹⁵ Who I understand to be Ms Ta's nephew.

[21] Ms Ta returned home earlier than expected on 2 January 2013 and noticed that the tablecloths were still soaking in the bath and had not been washed and dried. She set about getting them washed and dried. She then called Vu on his cell phone asking him if the tablecloths had been washed. He said that they had been and she asked him if he was sure. He said that he was sure and Ms Ta then revealed that she was at home and the tablecloths had not been washed. Vu offered to come back straightaway from fishing to get the tablecloths ready for the next day. Vu also rang the other employee who told him he had washed the tablecloths.

[22] It is here that the evidence starts to be in conflict. Vu and Bao say that they had started to drive home when Ms Ta telephoned again. She was very angry with them and called them *dogs*. They both say that Ms Ta told them to come back and move their belongings out of her home and said that they no longer had jobs.

[23] Ms Ta says she told them not to bother coming back early as she would clean the tablecloths. She says that she was not angry with them. She says that it made no sense dismissing them because she needed Vietnamese cooks for Little Saigon and for the new restaurant she had recently opened with her sister and brother, called Little Star.

[24] What is un-contradicted is that Vu and Bao went to Little Saigon the following day at about 10.30am to assist in setting up the restaurant for the day. Vu and Bao say that when Ms Ta came in she asked them what they were doing there. They say that exchange confirmed to them they had been dismissed because they were at the restaurant at 10.30am to set up as they always did. They say they did not know what to do or where to go because in losing their jobs they had lost their income, their accommodation and their source of food.

[25] Ms Ta's evidence in response to questioning was often evasive and rambling, not only in relation to the dismissal issue. Ms Ta's denial that she was not angry with Vu and Bao for not washing the tablecloths by the time she got home is not credible. Her evidence was that she told them they should not have agreed to wash the tablecloths if they did not intend to do it. Their agreement meant she felt she could take two days off and go to Auckland but she came home to find the tablecloths still dirty. The fact that she rang Vu and asked him if the tablecloths had been washed,

when she knew that had not, was aimed at catching him out in a lie. In response to questioning Ms Ta said she never speaks angrily but she speaks loudly and Vu may have thought she was angry when she was on the phone to him but she was not. However, Vu had lived and worked with her for nearly four years at that stage and it would be unusual that he mistook her tone of voice for anger, when it was not. Overall, I prefer Vu and Bao's evidence and find that they were actually, rather than constructively, dismissed by Ms Ta.¹⁶

The significance of Ms Ta's sister's involvement

[26] Ms Ta thought it crucial to point out that she and her sister and one of their brothers are engaged in a bitter business dispute about the 'new' restaurant. Ms Ta says that her sister has put the applicants up to making their claims solely to cause her trouble and expense. She also said that her sister has caused the applicants to make up their claims.

[27] I have taken into account that Ms Ta's sister accompanied the applicants to Community Law Canterbury (CLC) on 19 January 2013 where they obtained preliminary advice about their claims. Ms Ta's sister also accompanied the applicants and interpreted for them on 21 January 2013 when Ms Price and another solicitor interviewed them and obtained their instructions.

[28] At that stage the applicants had also made a complaint to a Labour Inspector. The Labour Inspector established that Ms Ta had not been keeping adequate wages and time records, holiday and leave records or copies of written employment agreements. However, in light of the fact that the Labour Inspector considered Ms Ta was committed to *the development of sustainable employment relations systems* and that the CLC was acting for the applicants the Labour Inspector decided to take no further action.

[29] Ms Ta did not provide copies of the applicants' IEAs after a written request from Vu and Bao's solicitors. Their solicitors obtained copies of the applicants'

¹⁶ The issue about whether or not the dismissals were unjustified is dealt with below.

IEAs,¹⁷ and INZ application forms completed by Ms Ta, from the Ministry of Business, Innovation and Employment, of which INZ is a part.

[30] Ms Prince prepared an affidavit for Bao, based on his earlier instructions, that was read to him in Vietnamese by an independent Language Line interpreter. Bao confirmed the draft affidavit as correct and on 9 September 2013 he signed and affirmed it in front of another solicitor.

[31] Ms Prince was also involved with interviewing Vu using an independent Language Line interpreter and later confirmed his statement of evidence with him with the assistance of a Language Line interpreter.

[32] Despite any possible ulterior motive on Ms Ta's sister's part I find that the process used by Ms Prince to complete the statements of evidence using independent interpreters and the process of testing the applicants' evidence under affirmation and by questioning at the investigation meeting, also with the assistance of an independent interpreter, have allowed me to safely make credibility judgments as necessary.

[33] Ms Ta, through Mr Rea, produced a written statement of evidence from Tam Ta and his wife Loan Nguyen, which said that before Bao left New Zealand for Vietnam he expressed regret at taking this legal action, said Ms Ta's sister made up the story and said he wished to work again for Ms Ta at Little Saigon. However, that "statement of evidence" had not been obtained directly from Mr Ta or from Ms Nguyen. When they were questioned at the investigation meeting their evidence was nothing like that in their joint "statement" and none of that "statement" was borne out.

[34] At the investigation meeting Bao denied ever having expressed regret at bringing these proceedings or being put up to it by Ms Ta's sister. He emphatically said that his evidence was true and correct and that he wouldn't have bothered *being here* if it was not true, by which he meant he would not have attended the NZ Embassy in Hanoi to be at the investigation meeting if they had not been dismissed. I have given no weight at all the written joint statement of Mr Ta and Ms Nguyen.

¹⁷ Except for Vu's first IEA which had not been retained by INZ.

[35] Vu's evidence was less than straightforward when it came to what part Ms Ta's sister has played in him and Bao leaving Little Saigon.¹⁸ He attempted to minimise her involvement, or that of her family, in picking him and Bao up on 3 January. However, Bao's evidence, which was given without having heard Vu's evidence, was compelling, clear and credible, especially in relation to the dismissals. Bao is also less under Ms Ta's sister's influence now that he is back in Vietnam and no longer working for her and living with her and her family. That means I have accorded his evidence greater weight.

[36] There was a concern raised by Ms Ta at the end of the first day of the meeting that there had been an attempt by a third party to interfere with her witnesses. Ms Ta and her witnesses were told that the appropriate authority for dealing with such allegations is the police. I am confident none of the evidence of Ms Ta's witnesses was negatively affected by any attempt to stop them giving evidence on her behalf. Indeed, if anything any such attempt seemed to have strengthened their resolve to support Ms Ta at the investigation meeting. They all gave credible and candid evidence.

Bao Ho Van Nguyen

What were his terms and conditions of employment?

[37] Clause 1 of Bao's IEA states the agreement takes effect from the date of the work permit issued by INZ. The IEA was signed on 14 November 2012 by both parties. Bao's work permit was issued on 20 November 2012.

[38] Ms Ta also says that despite the IEA stating that Bao's employment would begin on 20 November 2012 she did not have work for him until he started work on 9 December 2012, when Little Star had opened.

[39] Ms Ta says she was entitled to withhold his wages as he did not give her the notice he was required to give. Given my finding that Bao did not resign or abandon

¹⁸ I accept that it is proved on the balance of probabilities that on 3 January 2013 the applicants called Ms Ta's sister or her husband, who came to pick them up, took them back to their residence and collected their belongings. From that time Bao and Vu stayed with Ms Ta's sister and her family and worked for her (their starting date is disputed and will be dealt with below), until Bao returned to Vietnam. Vu still works for and lives with Ms Ta's sister and her family.

his employment but was dismissed there is no justification for withholding his wages and holiday pay.

[40] Even had Bao resigned or abandoned his employment Clause 8 (iii) of his IEA is the only possibly applicable clause. It provides that if his employment is terminated or he resigns that he authorises the employer to deduct from his wages whatever money he owes the employer *under the employment relationship*. In this case there is absolutely no evidence that Bao owed Ms Ta any money at all, let alone *under the employment relationship*.

[41] Ms Ta said that when she paid her employees, including the applicants, she would take off the PAYE tax and \$130 per week for their board costs. There is no clause in Bao's agreement that covers the cost of accommodation. There is also no clause that allowed Ms Ta to make deductions from Bao's pay. If she had done so it would have been in contravention of ss 4 and 5 of the Wages Protection Act 1983 because Bao had not given written consent to such deductions.

[42] I consider that Bao must be paid from 20 November 2012, the date that his IEA says that his employment began. It was not within his power to influence whether or not Ms Ta provided work for him from that date. Ms Ta chose to offer him work from the date of the issuing of his work permit; 20 November 2012 in the IEA. He accepted that offer. INZ agreed to grant a work permit on the basis that he began work on the date the work permit was granted. Ms Ta is not legally entitled to unilaterally vary that agreement. There is no evidence that Bao agreed not to work from 20 November 2012 until 9 December 2012.

Does s 132 of the Act apply?

[43] What remains to be established is how many hours a week Bao worked. Clause 5 of Bao's IEA says that he would work a maximum of 40 hours a week and would not be required to work overtime. Clause 8 provides that he would be paid \$638.40 gross per week; being \$15.96 per hour.

[44] Despite clause 5 of Bao's IEA saying that he would only work 40 hours a week I consider it proved that Bao worked an average of 66.5 hours a week over 7 days for the following reasons.

[45] Ms Ta's failure to keep wages and time records, in breach of s 130 of the Act, prejudiced Bao's ability to make an accurate claim for wage arrears and holiday pay. Section 132 of the Act says:

- (1) *Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that –*
- (a) *the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and*
 - (b) *The failure prejudiced the employee's ability to bring an accurate claim under section 131.*
- (2) *Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that these claims are incorrect, accept as proved all claims made by the employee in respect of –*
- (a) *the wages actually paid to the employee;*
 - (b) *the hours, days, and time worked by the employee.*

[46] Ms Ta has not proved that Bao's claims are incorrect and was unable to do so largely because she did not keep wages and time records. Therefore, I may rely on Bao's evidence to establish the hours, days and time he worked and I do so.

[47] The presumption that Bao's evidence of his relation to wages and holiday pay claims is reliable is strengthened by the fact that his evidence and Vu's evidence of the opening hours of the restaurant are the same as Ms Ta's evidence of the opening hours. Ms Ta also worked 7 days a week in the restaurant. Ms Ta said that Vu and Bao were able to have days off and did so, but she also said that they would come into the restaurant on their days off for their meals and would sometimes help out the other cooks in the restaurant on those days off. It is more likely than not that Bao worked 7 days a week.

[48] Bao had 1 and 2 January 2013 off work because the restaurant was closed. These were public holidays and fell on days that he would normally work. He is entitled to be paid for those days. Therefore, they are included in the calculations in the following paragraph.

How much is Bao owed?

[49] Bao is owed 66.5 hours per week multiplied by \$15.96 (the hourly rate specified in his IEA); being \$1,067.34 gross per week. That is because if he was paid the weekly gross amount specified in his IEA (\$638.40) for 66.5 hours a week he would receive only \$9.60 gross an hour, which is less than the minimum wage. Ms Ta must pay Bao \$6,519.66 wage arrears for the period from 20 November 2012 to 2 January 2013.

[50] Ms Ta must also pay Bao 8% holiday pay¹⁹ on the \$6,519.66; being \$521.57.

[51] The Authority has the power to award interest²⁰. The rate is currently 5% per annum.

[52] There is no valid reason for Ms Ta withholding Bao's wages and holiday pay. He should have had the use of the money from, at least, 3 January 2013.²¹ Ms Ta owes Bao \$7,041.23 in total. He is entitled to interest on that full amount at 5% per annum from 3 January 2013 until his wages arrears and holiday pay are paid in full.

Vu Ho Van Nguyen

[53] Vu worked for Ms Ta from early 2009 until 2 January 2013. He had three consecutive IEAs with three corresponding consecutive work permits. The first IEA has not been produced. INZ no longer has a copy of it and it is clear that Ms Ta did not retain copies of any of the IEAs. If she has copies of them she has not produced them on Vu's request or for the Authority's proceedings.

[54] Ms Ta gave conflicting evidence about whether the signatures on Vu's second and third IEAs are hers. First, she agreed that the signatures were hers and then said they looked like hers but could have been forged by un-named members of her family

¹⁹ Under s 23 of the Holidays Act 2003.

²⁰ Clause 11 of the Second Schedule of the Act at the rate prescribed by section 87(3) of the Judicature Act 1908

²¹ Clause 8(ii) of Bao's IEA provides that if dismissed he should have received his final pay on the day of his dismissal or the day after that.

who know how to forge her signature. However, I am confident that Ms Ta signed all three IEAs.

[55] Any arrangement between Ms Ta, Vu's mother and Vu that he would be responsible for paying his mother's debt does not form a part of his employment relationship and could not excuse Ms Ta from paying wages.

[56] Ms Ta's evidence was that she paid Vu \$2,280 per month after deducting \$419.96 PAYE and \$130 per week for accommodation. She equated a month with a four week period rather than a calendar month. She initially said she had paid Vu that amount every month. Her evidence was supported by copies of Inland Revenue Employer Monthly Schedules of PAYE which she submitted to the IRD.

[57] There were no copies of Employer Monthly Schedule of PAYE supplied for 2009. Employer Monthly Schedules were provided for:

- the 12 months of 2010; and
- for the period ended 31 January 2011; and
- for the period ended 29 February 2012; and
- for the periods ended 30 September 2012, 31 October 2012, 30 November 2012 and 31 December 2012.

Each supplied monthly schedule shows \$2,280 gross being paid to Vu and \$419.96 PAYE paid to the IRD.

[58] Mr Cheyne submits that Ms Ta's practice was to account to the IRD for PAYE, but that cannot be taken as evidence she had actually paid Vu \$2,280, or any other amount. Ms Prince's evidence was that she had previously encountered a practice of employers accounting to the IRD for PAYE but not paying the employee wages. She says it is relatively common practice by some employers of vulnerable migrant workers.

[59] Ms Ta admitted after questioning at the investigation meeting that at least for the 2012 months for which she had filed Employer Monthly Schedules she had not paid the PAYE to the IRD shown as being paid in the Monthly Schedules and had not

paid Vu any wages in July, August, September and October of 2012. Otherwise she says Vu was paid monthly in cash.

[60] Some of Ms Ta's witnesses gave evidence that they saw Vu receiving cash from Ms Ta on a monthly basis, which they understood to be his wages. They were not able to give any evidence about how much cash he received in any payment. Ms Ta did not provide payslips to her employees.

Does s 132 of the Act apply?

[61] Before the investigation meeting Ms Ta provided a photocopy of a page from a notebook belonging to her. Ms Ta says the notebook records payments to Teo, which is a name by which Vu is also known, totalling \$10,700 NZD:

<i>Teo</i>	<i>\$2000</i>	<i>23/11/2012</i>
<i>Teo</i>	<i>\$ 500</i>	<i>30/11/2012</i>
<i>Teo</i>	<i>\$2000</i>	<i>1/12/12</i>
<i>Teo</i>	<i>\$2000</i>	<i>6/12/12</i>
<i>Teo</i>	<i>\$ 200</i>	<i>10/12/12</i>
<i>Teo</i>	<i>\$2000</i>	<i>17/12/12</i>
<i>Teo</i>	<i>\$2000</i>	<i>30/12/12</i>

At the investigation meeting the original notebook was produced. The notebook also contains notes from some weeks in 2013 listing the days the restaurant was open and the daily takings.

[62] Ms Ta variously said the list quoted above represented money lent to Vu, money advanced to him before his wages were due and/or money that was due to him because he had not been paid in July, August, September and October 2012. She says she did not pay him from July to October 2012 because business was quiet.

[63] Ms Ta says Vu/Teo took the listed amounts from restaurant takings and wrote them in the list. She also says she gave him some cash at least once when he was at the Casino with her and it was recorded in the notebook later.

[64] Ms Ta says the handwriting in the book is Vu's but he denies that. I have not been able to establish whose writing it is. Ms Ta's inconsistent evidence about the notebook list and her admission only at the investigation meeting that she did not pay Vu for at least 4 months in a row in 2012 has not assisted in establishing her credibility.

[65] Ms Ta and some of her witnesses gave evidence that Vu used to go to the Casino to gamble and Ms Ta asks how he was able to do this if he had only been paid \$1,500 from early 2009 until 2 January 2013. Vu denies that he regularly went gambling at the Casino.

[66] I cannot exclude the possibility that the notebook records money given on those dates to Vu. It is unclear whether the amounts recorded were meant to be wages or to be loans unrelated to the employment relationship. I am left with the impression that Vu may have borrowed money from Ms Ta but I do not find it proved to the required level that any money provided to him and recorded in the notebook represents money paid as wages for work done, and due under his IEA.

[67] Whatever the list records it is in no way sufficient to meet the s 130 of the Act requirement that Ms Ta was to keep a wages and time record. The notebook list is not and could not be a wages and time record for November and December 2012 or for July, August, September and October 2012.

[68] Section 132 of the Act applies to Vu's claims for wage arrears and holiday pay, as it does to Bao's claims. The absence of wages, time and holiday records from Ms Ta prejudiced Vu's ability to bring an accurate claim for wages arrears and holiday pay. I do not consider that Ms Ta has proved that Vu's claims for wages are incorrect. Therefore, I am entitled to accept as proved Vu's claims of the hours, days and time worked and of the wages that were actually paid to him.

[69] That allows me to presume that Vu has proved his claims in relation to wages and holiday pay. That position is strengthened by the fact that Bao's and Vu's evidence of the opening hours of the restaurant are the same as Ms Ta's evidence of the opening hours. Ms Ta also worked 7 days a week in the restaurant. Ms Ta said that Vu and Bao were able to have days off and did so, but she also said that they

would come into the restaurant on their days off for meals and would sometimes help out the other cooks in the restaurant on those days off. It is more likely than not that Vu worked 7 days a week.

[70] I have some residual doubt about Vu's evidence about wages paid to him because of the dispute I have over the credibility of his evidence in relation to Ms Ta's sister's involvement in this case. However, Ms Ta's credibility is even more in doubt in relation to wages paid. While I cannot exclude the possibility that Vu was paid more than \$1,500 in wages over the whole period of his employment it is Ms Ta's failure to keep adequate records that has prejudiced his ability to bring accurate claims as well as her own ability to defend those claims.

How much is Vu owed in wage arrears and holiday pay?

The relevant terms and conditions under the first IEA and what is owed

[71] The absence of copies of Vu's work permits has hampered knowledge of the actual commencement dates of the work periods covered under the first two IEAs. The second and third IEAs, and likely the first IEA too, expressed the beginning of the employment relationship to be from the date of the issuing of the respective work permit. For the second and third IEA I have taken their commencement dates as the date they were entered into by the parties. I am confident that there was no non-working break between the first and second IEAs.

[72] Ms Ta agrees that Vu started working for her in early 2009. I accept Mr Cheyne's submission that since Vu has always maintained the month he started was March 2009 and as Ms Ta has not provided any evidence to the contrary it is fair to accept March 2009 as the starting date for Vu's first period of employment. I do so.

[73] Vu did not give evidence about what rate of pay he was on for the duration of the first IEA. Ms Ta's evidence was that the first IEA contained the same terms as the third IEA. I accept as likely that the first IEA was for wages of \$15.96 per hour.

[74] Vu's evidence is that he worked a total of 66.5 hours a week over 7 days. His evidence is that he was only paid \$1,500 in the entire time that he worked for Ms Ta

and that amount was paid by cheque. I accept his evidence, as I am entitled to do by s 132 of the Act.

The relevant terms and conditions under the second IEA

[75] The second IEA ran from 3 November 2010 until 25 April 2012. Clause 8 sets the weekly pay as \$675.60 for a 40 hour week. That works out at \$16.89 per hour. The attached Employer Supplementary Form filled in by Ms Ta to submit to INZ says the hourly rate would be \$14 per hour, which for a 40 hour week would amount to only \$560. However, the terms and conditions of the IEA are binding so Vu should have been paid \$16.89 per hour for hours worked during the second IEA.

[76] Business was interrupted on 22 February 2011 by the large Canterbury earthquake which closed the restaurant along with the area of the city in which it was located. The restaurant was closed from that afternoon until 5 January 2012.

[77] Vu should have been paid wages for 3 November 2010 to 22 February 2011.

[78] For six weeks after the February 2011 earthquake Ms Ta applied for and received government funded subsidies to allow her to pay her employees for the first six weeks that her business was closed. She received \$500 gross per week per employee. However, there is no evidence that she passed on any amount of those subsidies to Vu by way of wages. I consider it more likely that Vu was not paid after 22 February 2011.

[79] Vu should be paid the subsidy of \$500 per week for six weeks to 5 April 2011; being \$3,000 gross. He is responsible for accounting to IRD for any tax due out of this.

[80] There is some evidence that Vu may have had some other work in a fish and chip shop owned by a sister of Ms Ta for at least some of the time over the compulsory closedown period.

[81] Vu also says that he assisted with cleaning up at Little Saigon after its first closedown so that it could be opened again. He says that took 2 to 3 weeks. Ms Ta

says it took 2 to 3 days. I accept Vu's evidence of this as I am entitled to do under s 132 of the Act. He should be paid for 2.5 weeks of work, but at 40 hours per week rather than the 66.5 hours he worked when the restaurant was operating. 40 hours x \$16.89 per hours = \$675.60 x 2.5 weeks = \$1,689 gross.

[82] For most of the first closedown period Vu was not working through no fault of his own or Ms Ta's. He should not be paid for the periods he was not working and for which Ms Ta did not get any subsidy to pay him.

[83] The restaurant was open again between 5 January 2012 and approximately 9 April 2012. That is a period of 15 weeks for which Vu should have been paid his usual weekly wages. I agree with the amount claimed and consider that \$16,847.78 wages are due for that period.

[84] On 19 April 2012 the restaurant was again compulsorily closed for earthquake related reasons. There is no evidence that Vu was paid anything over that closedown period. I consider it likely that he was not paid for that period. The end of the second IEA, 25 April 2012, was during the closedown period. I do not consider he should be paid wages for the closedown period.

The relevant terms and conditions under the third IEA

[85] The third IEA was signed by both parties on 26 April 2012; during the second closedown.

[86] Clause 8 sets the weekly pay for 40 hours at \$638.40, which works out at \$15.96 per hour. This is the IEA which applied until Vu was dismissed on 2 January 2013. I accept Vu's evidence that while the restaurant was open he worked for 66.5 hours per week.

[87] The restaurant opened again on 24 July 2012. As already noted Ms Ta admits that Vu was not paid wages during from July to October 2012 because business was not good. I accept Vu's evidence that he was not paid wages as owed up 2 January 2013 either, as s 132 of the Act allows me to do.

[88] Vu should not be paid for the closedown period but should have been paid for the period from 24 July 2012 until his dismissal on 2 January 2013. That is a period of 23 weeks. The weekly hours were 66.5 x hourly rate of \$15.96 = \$1,061.34 x 23 weeks = \$24,410.82 gross, as claimed.

Total amount of wages owed

[89] Vu has claimed \$145,337.99 in unpaid wages plus whatever I have ordered to be paid for work over the closedown periods.

[90] During the investigation meeting it became clear that Vu had worked on some public holidays for which he had not been paid time and a half. However, Vu did not give evidence about this and it has been impossible to work out which public holidays were worked. This is part of the prejudice caused to Vu in making this application by Ms Ta's failure to keep wages, time and holiday records and is one that I have not been able to overcome. Therefore, I have not awarded anything extra for public holidays worked over and above the usual hourly rate that I have found to apply.

[91] I have undertaken my own calculations of how much Vu should have been paid for the period ending on 22 February 2011, over the whole of the 1st IEA and part of the 2nd IEA, for which Vu claims \$105,579.39. My calculations found a higher amount of wages due, even though I used a lower hourly rate for the first IEA but in all the circumstances and since only \$145,337.99 is claimed²² I consider that amount should be paid. I concur that amount takes into account a deduction of \$1,500 already paid. In addition, two further amounts must be paid to Vu:

- \$3,000 from the Employer Earthquake Subsidy, and
- \$1,689 for clean-up work done during the first closedown;
making a total of \$150,026.99.

[92] I also need to address whether Ms Ta was entitled to deduct \$130 per week for accommodation from Vu's wages and whether that should be reflected in what she should pay him. There is no clause in Vu's agreement that covers the cost of accommodation. There is also no clause that allowed Ms Ta to make deductions from

²² And I agree with the wage arrears totals claimed for the second and third periods of employment as claimed.

his pay for accommodation. If she had done so it would have been in contravention of ss 4 and 5 of the Wages Protection Act 1983 because Vu had not given his written consent to such deductions.

[93] Also, such deductions may have been in contravention of s 7 of the Minimum Wage Act 1983 which provides that any deduction for board cannot reduce the employee's wages by more than 15%.

[94] In addition, Ms Ta would not have been entitled to instruct her employees to direct part of their wages to paying her for their board²³.

[95] I appreciate that Ms Ta did accommodate and feed the applicants. However, I do not consider that any agreement they had with her about accommodation or board has been proved to be a part of their employment agreements and so I do not deal with that aspect of any agreements between Ms Ta and Bao or Ms Ta and Vu.

Holiday pay

[96] Ms Ta must also pay Vu 8% holiday pay²⁴ on the \$150,026.99; being \$12,002.16.

Interest

[97] The Authority has the power to award interest.²⁵ The rate is currently 5% per annum.

[98] There is no valid reason for Ms Ta withholding Vu's wages and holiday pay. He should have had the use of the money from at least 3 January 2013.²⁶ He is entitled to interest on that full amount at 5% per annum from 3 January 2013 until his wages arrears and holiday pay are paid in full.

²³ Section 12 of the Wages Protection Act 1983.

²⁴ Under s 23 of the Holidays Act 2003.

²⁵ Clause 11 of the Second Schedule of the Act at the rate prescribed by section 87(3) of the Judicature Act 1908.

²⁶ Clause 8(ii) of Vu's IEA provides that if dismissed he should have received his final pay on the day of his dismissal or the day after that.

Were the dismissals unjustified?

[99] Whether or not a dismissal or an action is justifiable is determined on an objective basis by applying the test specified in s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. A range of factors must be considered in applying the test.

[100] Those factors include whether:²⁷

- having regard to the resources available to the employer, the employer sufficiently investigated the allegations before dismissing the employee;
- the employer raised its concerns with the employee before dismissing or taking action against the employee;
- the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing the employee; and
- the employer genuinely considered the employee's explanation before dismissing the employee.

[101] The Act precludes the Authority from finding a dismissal or action to be unjustifiable solely because of defects in the employer's process if the defects were minor and did not result in the employee being treated unfairly.²⁸

[102] The summary dismissals of Vu and Bao were unjustified first, because the failure to wash the tablecloths by 2 January 2013 was not the type of action for which dismissal could be justified; it was not serious misconduct. It is arguable whether the agreement to wash the tablecloths was part of Vu and Bao's employment at all; as opposed to being an informal family arrangement. In addition, I am not at all certain that washing the tablecloths, *in their own time*²⁹ especially on a public holiday, was a task they were reasonably required to undertake as a part of their employment.

[103] Secondly, the dismissals were unjustified because there was no adherence to the minimum standards of procedural fairness as set out above.

²⁷ Section 103A(3) of the Act.

²⁸ Section 103A(5) of the Act.

²⁹ As stated in Ms Ta's second Statement in Reply received by the Authority on 23 June 2014.

[104] Ms Ta did not investigate why Vu and Bao had not washed the tablecloths by early on 2 January 2013 as she expected. If she had properly investigated she may have discovered that another employee had offered to take over the task from Vu and Bao and that Vu and Bao had accepted the offer and relied on that other employee, who had not yet completed the task.

[105] Ms Ta raised her concerns with Vu and Bao about the tablecloths not being washed only by way of expressing her displeasure. However, she did not give them an opportunity to make any explanation in response. Because they had not had the opportunity to make any explanation she could not have considered their explanation before deciding to dismiss them.

[106] The procedural defects were not minor and resulted in both Bao and Vu being treated unfairly.

[107] The decision to dismiss and the way Ms Ta made her decision to dismiss were not what a fair and reasonable employer could have done in all the circumstances at the time. Therefore, Vu and Bao have personal grievances of unjustifiable dismissal and I need to consider what remedies they may be entitled to.

Remedies

[108] Section 124 of the Act provides that when there is a personal grievance the Authority must in deciding on the *nature and extent of the remedies* consider the extent to which an employee's actions *contributed towards the situation that gave rise to the personal grievance*.

[109] Even if washing the tablecloths was a part of Bao's and Vu's employment duties I do not consider they contributed to the situation leading to their dismissals. They reasonably relied upon another employee's offer to wash the tablecloths and believed that they had until the evening of 2 January 2013 to make sure the task was completed, because that was when Ms Ta had told them she was returning to Christchurch. There will be no reduction in remedies for contribution.

Lost remuneration

[110] Section 123(1)(b) of the Act allows the Authority to provide for the reimbursement by Ms Ta of the whole or any part of wages Vu and Bao lost as a result of their grievances. Section 128(2) of the Act provides that I must order Ms Ta to pay Vu and Bao the lesser of a sum equal to their lost remuneration for 3 months or 3 months' ordinary time remuneration.

[111] Vu and Bao claim lost remuneration from 3 January 2013 until they started working at Little Star Vietnamese Restaurant on 4 February 2013.³⁰ Little Star is the restaurant that is the subject of dispute between Ms Ta, her sister, and one of their brothers.

[112] Four witnesses for Ms Ta gave evidence that at various dates in January 2013 (early January, 5th and 12th January) the applicants were seen cooking at the Little Star Vietnamese Restaurant.

[113] Vu's evidence is that they were there helping out in early January but says that they were not in paid employment until 4 February 2013, which is when the Inland Revenue Summary of Earnings to 31 March 2013 shows he began to be paid.

[114] However, I decline to award lost remuneration from Ms Ta up to 4 February. Instead I award lost remuneration for 3 and 4 January 2013 only. I accept that Vu and Bao were cooking at Little Star as early 5 January. Therefore, I consider that they were doing work that benefitted the owners of Little Star and they should instead seek remuneration for the time from 5 January to 4 February 2013 from the people running Little Star, not from Hue Kim Thi Ta.

[115] Ms Ta must pay Bao \$303.24 gross lost remuneration for 3 and 4 January 2013 plus holiday pay of 8% being \$24.26 gross; a total of \$327.50 gross.

[116] Ms Ta must pay Vu \$303.24 gross lost remuneration for 3 and 4 January 2013 plus holiday pay of 8% being \$24.26 gross; a total of \$327.50 gross.

³⁰ Which is the date on both Vu and Bao's IRD summaries of earnings.

Compensation

[117] Vu and Bao have both claimed compensation for humiliation, loss of dignity and injury to their feelings. Section 123(1)(c)(i) of the Act allows for such compensation to be awarded. Both applicants say they felt insulted by Ms Ta calling them *dogs*. Although she denies doing so I find it proved.

[118] Bao in particular gave evidence of how lost he felt when Ms Ta came into Little Saigon on the morning of 3 January 2013 and sked them both what they thought they were doing there. He said he went to the nearby shopping mall and wandered around wondering what he could do. He says he telephoned Ms Ta's sister's husband and told him what had happened and that he offered to come and pick them up.

[119] Vu says he felt *betrayed* by Ms Ta and that the fact that he had worked *very hard for her for nearly 4 years ... counted for nothing*. He says he felt *very vulnerable*.

[120] I consider that \$6,000 is reasonable compensation to be paid to Bao and \$8,000 is reasonable compensation to be paid to Vu.

Penalties for breaches of the Act and the Minimum Wage Act 1983

[121] Ms Ta must pay the penalty imposed under the orders set out at the beginning of the determination for the following reasons.

[122] The orders for wage arrears and holiday pay are made to put the applicants in the position they should have been in all along. The orders for lost remuneration and compensation are to compensate them for their unjustified dismissals.

[123] On the other hand, penalties do not compensate but focus on the conduct of the person who breaches legislative standards, or the provisions of an employment agreement. The function of penalties is to punish wrongdoing and to deter it from happening again, both in relation to Ms Ta personally and other employers in general.

[124] Ms Ta breached her obligations as an employer by failing to keep wages and time records and failing to produce wages and time records under ss 130 and 132 of the Act.

[125] The maximum penalty that can be imposed for breaches of the Act in the case of an individual as an employer, as opposed to a company or other corporation, is \$10,000.³¹

[126] I consider penalties should be imposed on Ms Ta to send an *unequivocal message*³² that breaches of minimum employment standards are totally unacceptable in New Zealand. There is an increasing number of cases in which vulnerable migrant workers have been subject to exploitation. Section 3(a)(ii) of the Act sets out that one of the purposes of the Act is to acknowledge and address the inherent inequality of power inherent in employment relationships. This inequality is greatly increased for workers such as Vu and Bao Ho Van Nguyen, who were very vulnerable to exploitation being able to work only under work permits specifically allowing them to work for Ms Ta, who do not speak English, who were likely unaware of their rights as employees and who were bound by complex personal and family loyalty to Ms Ta despite her illegal practices.

[127] In addition, I agree with the view expressed by Member Arthur recently that:

*In addition to the harm done to such workers, it is also an affront to those many other businesses that do make the effort of cost and time to properly observe the expected community standards as expressed in the legislation enacted by Parliament.*³³

[128] In setting the penalties for each breach I have taken into account the vulnerability of each applicant and in relation to Vu the length of time he was employed while the breaches were ongoing, the fact that other staff were employed under the same practices and the fact that Ms Ta could have had access to professional advisers to allow her to implement proper business practices. She was aware of her duty to pay PAYE but did either not make sure she knew of her duty to keep wages, time and holiday records or deliberately did not keep such records.

³¹ Section 135(2)(a) of the Act.

³² Such as in *Tan v Yang and Zhang* [2014] NZEmpC at 65 at paragraph [34] and the other cases cited at paragraph [1] of the decision

³³ *Kate Feeney, Labour Inspector v BY Limited* [2014] NZERA Auckland 208, paragraph [19]

[129] I also take into account that while Ms Ta says that since the intervention of the Labour Inspector she has amended her practice to keep wages and time records she has expressed no remorse for not having done so while employing the applicants, nor did she provide any explanation for her failure to do so. Simply saying that Vu preferred to be paid in cash since he did not have a bank account does not explain her failure to keep sufficient records required of her as an employer.

[130] In addition, the breaches were not merely technical and I do not believe they were inadvertent.

[131] I consider a significant penalty should be imposed³⁴ however; I have also taken into account Mr Rea's submission about the viability of Ms Ta's business if too large a penalty is imposed. I impose a global penalty for both breaches recognising that if there is a failure to keep wages and time records, a failure to provide wages and time records is axiomatic.

[132] I consider that Ms Ta should pay a penalty of \$5,000. Section 136(2) of the Act allows the Authority to order the whole or any part of a penalty to be paid to any person. In all the circumstances I consider that \$4,000 of the penalty should be paid to Vu and \$1,000 should be paid to Bao.

Breach of good faith in retaining Vu's original chef qualification documents?

[133] Ms Ta and Vu's evidence differs on this point. It is entirely possible Ms Ta has retained these and forgotten or has mislaid them. Ms Ta says she has returned the qualifications. I do not find the claim proved. Therefore, I dismiss this claim.

[134] I hope that INZ can assist Vu in gaining certified copies of his qualifications.

Costs

[135] Legal costs are reserved. Generally the losing party is expected to make a contribution towards of the winning parties' legal costs. The parties are invited to

³⁴ I have considered penalties imposed in other recent cases in setting the penalty amount.

agree on the matter. Usually the Authority awards costs on a daily tariff approach. The daily tariff is \$3,500 and the investigation meeting took a little under two full days. The losing party is generally expected to reimburse the other party for the \$71.56 it costs to lodge the application with the Authority.

[136] If the parties are unable to agree on costs the party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 28 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

Christine Hickey
Member of the Employment Relations Authority