

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 96
3128955

BETWEEN	LILI WANG Applicant
AND	HAPPY EATING LIMITED First respondent
	YING CAO Second Respondent
	XIAOLIANG SUN Third Respondent

Member of Authority:	Vicki Campbell
Representatives:	David Kim, counsel for Applicant Martin Lyttleton, advocate for Respondents
Investigation Meeting:	On the papers
Submissions and other information Received:	18 February 2021 from Applicant 29 January and 17 February 2021 from Respondents
Determination:	10 March 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. The following statements and/or documents are to be redacted or removed from the Authority's file:**
- a) Statement of Problem – page 6 paragraph 34 (redacted);**
 - b) Statement of Problem – page 6 paragraph 37 (redacted);**
 - c) Document 4.C (removed);**

d) Document 4.D (removed);

e) Document 4.L point 2 (redacted).

B. Ms Wang is ordered to provide a full copy of the 15 September 2020 recording to each of the three respondents within 14 days of the date of this determination.

C. Costs are reserved.

Employment relationship problem

[1] This determination deals with an application by Happy Eating Limited to have statements made in Ms Wang's statement of problem and associated documents lodged with the Authority, redacted or removed from the Authority's file.

[2] Ms Wang has lodged a statement of problem and associated documents seeking remedies for arrears of wages, personal grievances for unjustified disadvantage and dismissal and penalties for various breaches.

[3] Ms Wang has not objected to the application by Happy Eating Limited and has indicated she will abide by the decision of the Authority.

[4] This preliminary issue has been dealt with by me prior to the matter being investigated and determined by a Member of the Authority. The parties have consented to having this matter dealt with on the papers currently before the Authority.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all of the information I have before me I have carefully considered everything.

Discretion to admit evidence

[6] The Authority has a statutory discretion under s 160(2) of the Act to take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. The Authority must be guided in the exercise

of that discretion by the provisions of the Evidence Act 2006, even though it does not govern proceedings in the Authority.¹

Confidentiality of mediation

[7] A number of Happy Eating Limited's concerns relate to whether statements made by Ms Wang in the statement of problem and or within documents attached to her statement of problem were made during or in the process of mediation.

[8] Section 148(1) of the Act requires any person to whom mediation services are provided to keep confidential any statement, admission, or any information that, for the purposes of mediation, is disclosed orally in the course of the mediation. This confidential information is not admissible in the Authority.²

Referencing paragraphs in statement of problem

[9] Paragraph numbering has not been used in the statement of problem. In its application Happy Eating Limited has referred to page numbers and paragraph numbers as if the paragraphs had been numbered in a sequential order. To assist the parties I have referred to the same numbering as used by Happy Eating Limited.

Statement of problem – page 5 paragraph 24

[10] On 3 December 2020 the parties attended mediation in an attempt to resolve matters between them. Mediation was attended by two people representing the respondents. This included a person not known to Ms Wang but who had been at Ms Wang's place of work on 29 September 2020.

[11] In her statement of problem at paragraph 24 Ms Wang states (verbatim):

Later after the mediation meeting on 3 December 2020, we got to know that this lady was Shenshen Guan. She is the owner of New Zealand Fusion International Ltd T/A Golden Springs Holiday Park. She and her company was fined more than \$ 680,000 for exploiting workers and was banned from employing anyone for 18 months. Please see case file [2019] NZEMPC 181 of the Employment Court.

[12] Happy Eating Limited submits this statement is irrelevant to the issues for determination and should be redacted.

¹ *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340; [2014] 3 NZLR 713; [2014] ERNZ 80 at [24].

² Employment Relations Act 2000, s 148(3).

[13] The paragraph referred to is contained in section 2 of the statement of problem which is where an applicant is required to set out the facts that gave rise to the problem. In an earlier paragraph in this section Ms Wang refers to Ms Guan being involved in the situation giving rise to her personal grievances.

[14] At this very early stage in proceedings I have concluded it is possible Ms Wang has referred to Ms Guan's involvement at mediation to support her view that Ms Guan was acting on behalf of Happy Eating Limited during the events that transpired on 29 September 2020.

[15] It will be up to the presiding Member to determine the weight and/or relevance to be given to any evidence by Ms Wang as to Ms Guan's involvement in her employment relationship problems. I am reluctant at this early stage of the proceedings to redact this paragraph because the information may be relevant to what happened on 29 September 2020.

[16] In its 2019 judgment the Employment Court banned Ms Guan from being involved in the employment of employees for a period of 18 months commencing 28 days from 11 December 2019.³

[17] Any involvement by Ms Guan in the employment of employees for Happy Eating Limited may constitute a breach of the banning orders. This is not an issue for determination by the Authority however, a copy of this determination is to be sent to the Labour Inspectorate to consider as it thinks fit.

Statement of problem – page 5 paragraphs 28 and 30

[18] In these paragraphs Ms Wang refers to correspondence in which she requested copies of timesheets relating to information provided by Happy Eating Limited as to the hours Ms Wang had worked.

[19] Happy Eating Limited seeks to have these paragraphs deleted as being irrelevant to the employment relationship problems set out in the statement of problem.

³ *Labour Inspector v New Zealand Fusion International Limited & 1 Or* [2019] NZEmpC 181 at [105].

[20] In Ms Wang's application to the Authority she claims arrears of wages including for payment of overtime. The information regarding Ms Wang's requests for timesheets is relevant to her application and the paragraphs will not be redacted.

Statement of problem – page 5 paragraph 30

[21] This paragraph also relates to the requests for, and provision of timesheets from Happy Eating Limited. Ms Wang refers to documents attached to her statement of problem in which she alleges the timesheets are fake.

[22] Happy Eating Limited seeks to have this paragraph removed from the statement of problem on the grounds that it is not relevant to the proceedings.

[23] Whether the timesheets produced by Happy Eating Limited are to be relied upon will be a question for the presiding Member following a full investigation of Ms Wang's claims including the allegation that the timesheets are fake.

[24] The question as to the reliability of the timesheets is relevant to Ms Wang's claim and the paragraph will not be redacted.

Statement of problem – page 6 paragraph 34

[25] Happy Eating Limited seeks to have this paragraph removed from the statement of problem on the basis that its contents relate to the mediation process.

[26] I am satisfied the paragraph contains confidential information relating to the process of, and information exchanged as part of mediation.

[27] Paragraph 34 on page 6 of the statement of problem is not admissible and is to be redacted.

Statement of problem – page 6 paragraph 35

[28] This paragraph refers to a second mediation date being scheduled.

[29] Happy Eating Limited seeks to have the paragraph redacted because it is not relevant to the proceedings.

[30] This paragraph forms part of the timeline setting out the steps Ms Wang has taken to resolve her employment relationship problems. The inclusion of the paragraph does not offend any legal obligations on the parties. The application that the paragraph be redacted is declined.

Statement of problem – page 6 paragraph 36

[31] In this paragraph Ms Wang sets out a step taken by her representative to ensure the sole director for Happy Eating Limited and the second respondent would be present at a scheduled mediation.

[32] Happy Eating Limited and the second respondent seek to have this paragraph redacted on the grounds that it relates to the process of mediation and is not relevant to Ms Wang's employment relationship problems.

[33] The statement in paragraph 36 clearly relates to the second mediation, however, it is not uncommon for parties to seek the attendance of particular people at mediation. In this case the director (also the second respondent) had not attended the first mediation instead sending along two representatives, one of whom was Ms Guan.

[34] The statement does not disclose any information, statement or document that was disclosed for the purpose of or during mediation and does not offend any legal obligations on the parties. Accordingly, the application for the paragraph to be redacted is declined.

Statement of problem – page 6 paragraph 37

[35] This statement refers to mediation and includes information about what did or did not happen during mediation.

[36] Happy Eating Limited and the second respondent seek to have this paragraph redacted on the basis that it is covered by the confidentiality afforded by mediation processes.

[37] I am satisfied the paragraph contains confidential information relating to the process of, and information exchanged as part of mediation.

[38] Paragraph 37 on page 6 of the statement of problem is not admissible and is to be redacted.

Statement of problem – page 6 paragraph 38

[39] This paragraph includes assumptions about what may occur at mediation and refers to an offer having been made by Ms Wang to resolve matters.

[40] Happy Eating Limited seeks to have this paragraph redacted on the grounds that it is largely opinion, relates to mediation process and is privileged.

[41] The paragraph sets out Ms Wang's view of the usefulness of mediation. Ms Wang does not disclose any information about the offer only that one was made.

[42] The statement does not offend any legal obligations on the parties. Accordingly, the application for the paragraph to be redacted is declined.

Statement of problem – page 6 paragraphs 39 and 40

[43] In these paragraphs Ms Wang is critical of the involvement of Ms Guan in the mediation process and explains that this is why she wishes to take her claims to the Authority.

[44] Happy Eating Limited seek to have the paragraphs removed on the grounds that the statement is Ms Wang's opinion, the statement is disputed and it relates to the mediation process.

[45] The paragraphs set out Ms Wang's opinion and explanation as to why she wishes to progress her claims to the Authority. The statement does not offend any legal obligations on the parties. Accordingly, the application for the paragraph to be redacted is declined.

Documents attached to the statement of problem – document 4.C

[46] This document is a letter written on behalf of Ms Wang. While not expressed to be on a "without prejudice" basis the letter sets out an offer to settle Ms Wang's employment relationship problems. The letter also includes information about issues to be discussed at the next scheduled mediation.

[47] Happy Eating Limited seeks to have this document removed from the Authority's file on the grounds that it is a settlement offer made as part of the mediation process.

[48] I am satisfied the letter is a settlement offer made in the process of mediation and should be removed from the Authority's file.

Documents attached to the statement of problem – document 4.D

[49] This document is an email trail relating to document 4.C. Happy Eating Limited seeks to have this document removed from the Authority's file on the grounds that it relates to mediation and information exchanged during mediation.

[50] I am satisfied the email trail contains information relating to mediation and information exchanged during mediation and should be removed from the Authority's file.

Documents attached to the statement of problem – documents 4.H and 4.I

[51] Document 4.H contains information downloaded from Google Location. Document 4.I is the English translation of document 4.H.

[52] Ms Wang intends to use these documents to support her assertion that the timesheets produced by Happy Eating Limited are not accurate. This relates to her claim for arrears of wages.

[53] Happy Eating Limited seeks to have these documents removed from the Authority's file on the grounds that the information is not reliable and may not prove Ms Wang's claims.

[54] The weight to be given to any documents or evidence will be determined by the presiding Member following a full investigation into Ms Wang's claims including her claim for arrears of wages. The documents are relevant to the Authority's investigation and are admissible.

Documents attached to the statement of problem – documents 4.L and 4.M

[55] Document 4.L is a document headed up "to whom it may concern" and signed by Mr Kim. It sets out information relating to Ms Wang's disputed hours of work. On the penultimate page of the document at point 2 Mr Kim refers to statements made by Mr Lyttleton. Happy Eating Limited alleges the statements were made in mediation and are not admissible. I am satisfied it is more likely than not that these

statements were made under the auspices of mediation and are not admissible in the Authority. The statement made at point 2 of document 4.L is to be redacted.

[56] Document 4.L, at point 3, refers to statements made during a discussion between the third respondent and Ms Wang on 15 September 2020. Document 4.M attached to the statement of problem, is an extract of a transcript of a recording made by Ms Wang during that discussion. The recording was made covertly without the knowledge of the third respondent.

[57] Happy Eating Limited seeks the redaction of the information contained at point 3 of document 4.L on the grounds that the recording of the conversation between Ms Wang and the third respondent (the third respondent is the husband of the second respondent) was made covertly and that aspects of the discussion included settlement discussions.

[58] The transcript provided to the Authority contains only extracts of the discussion and does not disclose the full discussion between Ms Wang and the third respondent. The Court of Appeal has previously held that covert recordings are admissible unless the conversation was understood to be confidential or off the record.⁴

[59] Happy Eating Limited says it was always intended that the discussion was to resolve Ms Wang's employment relationship problems and should be protected. The Authority has not been provided with a copy of the full transcript of the recording. From the parts of the recording that have been disclosed I am unable to establish whether it was intended that the discussion be without prejudice or off the record. The extracts indicate Ms Wang and the third respondent were discussing Ms Wang's hours of work and payment of wages.

[60] The extracts do not disclose any settlement offers and may be of probative value. Happy Eating Limited is understandably critical of Ms Wang for providing only extracts from the recordings without providing the full recording so that he may have the transcript of the recording verified.

[61] It is not uncommon for covert recordings to be admitted as evidence in the Authority. It is premature at this stage to find the evidence is not relevant, however

⁴ *Talbot v Air New Zealand Ltd* [1995] ERNZ 256 at 366.

Ms Wang is ordered to make a full copy of the recording available to each of the three respondents within 14 days of the date of this determination. The presiding Member will determine what if any weight should attach to the extracts provided by Ms Wang.

Next steps

[62] This matter is to be allocated to a different Member who will investigate and determine Ms Wang's substantive claims.

Costs

[63] Costs are reserved and will be dealt with when dealing with costs for the substantive matter.

Vicki Campbell
Member of the Employment Relations Authority