

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 185
3123052

BETWEEN	JIAJUN LI Applicant
AND	A BETTER CHANCE CHARITABLE TRUST Respondent

Member of Authority:	Claire English
Representatives:	May Moncur, advocate for the Applicant Y Yang and H Huang, counsel for the Respondent
Investigation Meeting:	26 January and 28 January 2022
Submissions received:	9 February 2022 from Applicant 14 March 2022 from Respondent
Determination:	6 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Ms Li) worked as an administrative assistant for the respondent, a charitable trust (Better Chance).

[2] Ms Li was employed on a series of fixed term employment agreements, starting in November 2018. In late 2019, she became pregnant. When her most recent fixed term agreement came to an end in March 2020, her employment was not renewed. Ms Li was distressed at this, and believed that her employment had been terminated because of her pregnancy.

[3] Ms Li raises claims of unjustified dismissal and unjustified disadvantage, on the basis that her fixed term employment agreements were not genuine and her employment should not have been brought to an end, as well as claims for unpaid annual leave, unpaid wages for work done, penalties for statutory breaches, and costs.

[4] Better Chance accepts that there were flaws in its employment documents and processes, but maintains that the reason for the ending of Ms Li's employment was due to a lack of funding available to Better Chance, in other words, that Ms Li's employment came to an end because of a redundancy situation. Better Chance strongly denies that Ms Li's pregnancy was a motivating factor, and likewise denies that she is owed any additional monies in relation to annual leave or other work done.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Ms Li and her husband, as well as Mr Jianhua (Sunny) Chen, the Managing Director of Better Chance, Ms Liming (Elvy) Lu, Ms Xin (Melany) Yin, and Mr Xiao (Denis) Zhang. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also provided legal submissions.

[6] 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. It has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination were:

- (a) Was Ms Li unjustifiably dismissed or unjustifiably disadvantaged?
- (b) If Better Chance's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - Lost wages; and
 - Compensation under s123(1)(c)(i) of the Act
- (c) Is Ms Li owed wages for unpaid work?
- (d) Is Ms Li owed annual leave payable on the ending of her employment?
- (e) Should any penalties for statutory breaches be awarded?
- (f) Should either party contribute to the costs of representation of the other party.

Background

[8] Better Chance is a charitable trust, and was represented at the investigation meeting by its managing director, Mr Jianhua (Sunny) Chen. Mr Chen described how he had built up the business over the last eight years, to serve the Chinese community in Auckland. He eloquently described the service ethic behind Better Chance, including what he saw as its guiding principle that when we are strong, we can help others who need our strength, so that in turn, when we are in need, they have the strength to help us.

[9] Both Mr Chen and other staff acknowledged that, even though Better Chance might not be able to offer high pay rates, it was a matter of pride to them to have jobs which allowed them to serve their community.

[10] The funds for Better Chance's operation come from community grants, and especially since the effects of Covid-19 pandemic beginning in around January 2020, funding from Ministry of Social Development for various community outreach programmes carried out by Better Chance, which now include home deliveries of food and masks.

[11] Ms Li was employed beginning on 5 November 2018, as an office administrator. She gave evidence that in addition to general administrative duties, she also provided services to Better Chance's older members, including providing painting classes, and assisting individual members on a 1:1 basis helping them resolve issues such as applying for passports or driver's licences, for example. In addition, she ran children's art classes, and created and provided photographs and publicity and promotional material for Better Chance. Ms Li said that she got on well with Better Chance's older members, and her connections with them were an important part of her job.

[12] Ms Li initially worked in Better Chance's East Auckland branch, as her home was in Botany Bay. She was at all times employed on a series of fixed term employment agreements. Mr Chen explained that the purpose of the fixed term agreements was to align staff employment with Better Chance's various funding streams, and he did not want to offer permanent employment when the grants Better Chance relied on to pay wages were often short term.

[13] The fixed term agreements used by Better Chance did not clearly set out any reason for the fixed term. They were not compliant with the requirements of section 66 of the Employment Relations Act 2000. This was acknowledged by Mr Chen on behalf of Better Chance, who advised that Better Chance is now receiving specialist employment law advice on such matters, but this was not something he was aware of at the time.

[14] Ms Li understood that her employment could end at the end of the fixed term. She also understood that, if she was “competent” at her job, she could expect to have her contract renewed. This is what happened with other staff, and it was also what happened for her. Other staff also gave evidence that they expected their employment to continue if they were “competent”, despite the use of the fixed term provision. When Ms Li’s initial fixed term employment agreement of three months expired, she was offered a second fixed term employment agreement, followed by a third such agreement, and then a fourth. This fourth agreement was due to end on 31 March 2020. Towards the end of 2019, Ms Li became pregnant.

[15] Ms Li advised that she was worried about the potential for discrimination because of her pregnancy, as this is something that happens in China.

[16] In January 2020, the staff and management at Better Chance began to notice the effects of Covid-19 on the Chinese community, as international travel became more difficult, people began to isolate, and were unable to access family support. Better Chance began to focus on things such as delivery of food bags and masks for those who needed them.

[17] In February 2020, Ms Li was directed to work out of the Avondale office. She was not consulted about this, and as she was unable to drive at that time, this change had a big impact on her. Her husband’s employment had recently ended, so he drove her to work and back each day, but this was hard on the family, especially as Ms Li was at that point the only income earner. She accepted the transfer to Avondale as she believed doing so was necessary to keep her job, but felt that something was wrong.

[18] It was in January or February that Ms Li’s pregnancy was announced at a staff meeting. She recalls that Mr Chen asked the gender of the baby, which she took to be an overly personal inquiry, and which made her worry about discrimination again.

[19] On Friday 20 March 2020, Mr Chen met with Ms Li privately, and told her that he would not renew her contract of employment when it expired on 31 March, as Better Chance’s funding applications were not being granted at that time.

[20] Mr Chen also advised that he would give Ms Li a further and final fixed term employment agreement from 31 March to 26 April 2020, which would effectively cover the payment of her annual leave. Mr Chen said that he understood, and had instructed, that during this time, Ms Li would only do “handover tasks”, which he felt were less work than her normal duties.

[21] Ms Li described how devastated she felt over the loss of her job. On the afternoon of Monday 23 March, the country went into Level 3 lockdown for the first time. Two days later, New Zealand went into Level 4 lockdown for the first time¹.

[22] Ms Li gave evidence that she worked from home during the last week of March and into April, doing various tasks related to handover and also some of her normal administrative duties that could be done from home.

[23] Better Chance disputes this, saying that Ms Li could and should have completed her handover tasks prior to the end of March, and that the only tasks Ms Li was asked to complete were handover tasks and signing her own final contract. Ms Li was upset by what she said was Better Chance’s insistence that she print out documents, sign them, and bring hard copies to the office, rather than information being provided by email.

[24] There is some dispute over what happened during the last month of Ms Li’s employment, but it seems that there were problems with Ms Li’s internet connectivity due to some construction work that was taking place on her street. The office administrator for Better Chance indicated that she had asked Ms Li to print out documents and bring them in as a response or solution, when Ms Li said she didn’t have proper internet access. It is apparent that the office administrator was frustrated with what she saw as Ms Li delaying the handover of her work (despite the impact of the country being at Level 4), and she continued to ask Ms Li to complete what she saw as necessary tasks even after Ms Li’s final fixed term employment agreement had ended on 26 April.

¹ On Monday 23 March 2020, New Zealand moved to Level 3. At 11.59 pm on 25 March 2020, New Zealand moved to Level 4.

[25] During April 2020, Ms Li asked Better Chance to complete the IRD forms that would have enabled her to receive parental leave payments from IRD. Despite Ms Li having worked for Better Chance for sufficient time to qualify for parental leave payments in accordance with the relevant Act², Better Chance declined to complete these forms, on the grounds that her employment was ending on 26 April 2020.

[26] There was no discussion about Better Chance holding Ms Li's job open for her to return to after taking parental leave. At the time, both Better Chance and Ms Li were generally unaware of the provisions of the Parental Leave and Employment Protection Act 1987.

[27] Ms Li's employment came to an end on 26 April 2020, and she was paid up to that day. She gave evidence that she was greatly distressed about both the loss of her job and the financial difficulties this put her family in, and also because she attributed the loss of her job to her pregnancy. While of the view that it is not appropriate to detail all the medical evidence provided to me here, I record that Ms Li suffered severe mental health impacts, including anxiety, depression, and being unable to sleep or eat.

[28] Ms Li became aware that Better Chance was advertising for new staff in May after the ending of her employment. At the investigation meeting, Mr Chen admitted that he had employed at least one other staff member and also his wife shortly after the ending of Ms Li's employment. Mr Chen's wife was employed on an hourly rate that was almost \$10 per hour higher than Ms Li's hourly rate.

[29] Ms Li received mental health intervention both before and after the birth of her baby, including counselling and medication. Her mental health took some time to improve.

[30] Her support worker identified that she should have been receiving parental leave payments, and helped reach out to Better Chance and explain the relevant form. Better Chance eventually signed the form, and Ms Li was able to receive the parental leave payments properly due to her, albeit late. Better Chance now accepts that its initial refusal to sign the forms was in error, and say that the forms were signed when this was explained.

² See the definitions of the parental leave payment threshold test at section 2BA(4) of the Parental Leave and Employment Protection Act 1987.

[31] Ms Li raised a personal grievance claim against Better Chance. The parties attended mediation, which was unsuccessful. Ms Li says that, as she and her husband were driving home from that mediation, she received a phone call from a person who knew both her and Mr Chen. She said this person blamed her for the “failure” of mediation, eg that she had not settled her claim against Better Chance, and threatened her by saying that her and her husband would be “backlisted” and would not be able to work in the Chinese community in the future. She believes that Mr Chen must have been aware of the call, as the information about the mediation relayed to her by the caller could only have come from Mr Chen, as neither she nor her husband had mentioned the mediation to anyone.

[32] Mr Chen denies being aware of such a call, although he admitted that he did discuss the mediation with another person.

[33] Better Chance now advises that, as a direct result of Ms Li’s personal grievance claim, it has sought professional advice on employment matters, and has updated its policies and procedures to reflect this advice. In particular, Better Chance rightly concedes that the fixed term employment agreements provided to Ms Li and other staff were not compliant with legislation, and accepts that it made a mistake when it first refused to sign the forms for Ms Li’s parental leave payments.

[34] However, Better Chance denies that Ms Li was unjustifiably dismissed, that she was discriminated against as a result of her pregnancy, or that she is owed any wages, compensation, or other payments.

Findings:

[35] Ms Li was a permanent employee of Better Chance.

[36] There are multiple reasons for this. The first is that the fixed term agreements Ms Li was provided with did not comply with section 66 of the Act, in that they did not advise Ms Li of the reasons for employment being for a fixed term. This failure means that Better Chance is not able to rely on the fixed term provision as being effective, as set out in subsection 66(6) of the Act. Instead, the Act provides that Ms Li is entitled to treat the term as ineffective, as she has done.

[37] Mr Chen explained that he did not want to offer fixed term employment when the funding for staff wages was provided to Better Chance in relatively short term blocks, the supposedly short term nature of Better Chance's funding model did not matter in practice. Both Ms Li and other staff gave evidence that they expected their employment to continue beyond their first fixed term if they were "competent", and that this was in fact, what they experienced. In reality, Better Chance provided its staff with continuous employment, albeit by getting them to sign multiple fixed term employment agreements. Those agreements ran "back to back", such that the staff who were offered them experienced no breaks in their employment or pay. No steps were taken to terminate employment at the end of the fixed term agreements. No staff member described any changes to their employment as a result of the ending of one fixed term agreement and the start of another. Rather, Better Chance ensured that staff experienced a seamless transition with apparent continuity of employment, despite the use of repeated fixed term agreements.

[38] In addition, Ms Li had been employed on a continuous full-time basis for almost 18 months before the ending of her employment on 26 April 2020.

[39] Accordingly, I find that Ms Li was, as a matter of fact, a permanent employee. Better Chance cannot rely on the ending of her fixed term agreement to bring Ms Li's employment to an end. The court has long held that:

The use of fixed term contracts is no substitute for facing up to obligations on redundancy or on performance or disciplinary issues³.

[40] Better Chance must show that its actions in ending Ms Li's employment, were consistent with the obligations of an employer to act in good faith, and to act in a fair manner.

[41] The test of justification is set out at paragraph 103A of the Act. The test is whether Better Chance's actions, and how Better Chance acted in terminating Ms Li's employment, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[42] In reaching my conclusion, I must consider:

³ *O'Neill v Victoria University of Wellington*, Employment Court, Wellington, 11/12/1996, Goddard Chief Judge, WEC82/96, W111/95, at page 15.

- a. did Better Chance sufficiently investigate before taking action;
- b. did Better Chance raise any concerns that it had with Ms Li before taking action;
- c. did Ms Li have a reasonable opportunity to respond;
- d. did Better Chance genuinely consider Ms Li's position.

[43] I may also take into account any other factors I think are appropriate.

[44] As became apparent throughout the evidence, Ms Li believed that something had changed for the worse in her employment relationship with Better Chance, and that her employment was being unfairly brought to an end. She attributed this to her pregnancy. She pointed to a number of actions by Better Chance which she says demonstrate this. These can be summarised as follows: the requirement that she work from the Avondale office rather than the Howick office when this had never been a requirement before; a comment by Mr Chen inquiring about the gender of her baby; the failure of Better Chance to renew her fixed term contract when this had never been a problem before; the refusal to complete the forms that would have allowed her to receive the parental leave payment to which she was entitled; and Better Chance's general lack of support and repeated requests for documents during Level 4 including after her employment had ended on 26 April 2020.

[45] Throughout his evidence, Mr Chen rejected that Ms Li's employment had ended because of her pregnancy. He says in particular that the failure to fill out the parental leave payment forms was a mistake, and this was rectified as soon as the correct situation was understood. He also said that his question to Ms Li about the gender of her baby was in the context of the meeting where her pregnancy was announced, and he was making conversation. He then freely admitted that the reason Ms Li had been asked to work from the Avondale office was because he and the office administrator had formed a view that Ms Li was not competent in her work, and was working short hours, and having her work out of the "head office" in Avondale was a way in which her work could be more closely monitored. He did not discuss this with Ms Li, because he was of the view that it was up to her to improve herself, and in any case, her fixed term employment was coming to an end in March 2020.

[46] The office administrator also gave evidence to the effect that she believed Ms Li was not “competent” in her work, and that this view necessitated both the move to Avondale, and her own repeated requests to Ms Li both during the Level 4 lockdown and after Ms Li’s employment ended, for the completion of unspecified “handover” tasks which were in the office administrator’s view, quick and easy.

[47] I note that Mr Chen’s evidence (including his statement that he assessed Ms Li’s performance as being only “30%”) is entirely consistent with evidence given by Ms Li and other staff, that the fixed term employment agreements would be renewed indefinitely, unless an employee was deemed not “competent” in their work.

[48] I have no hesitation in finding that it was this adverse perception of Ms Li that led to the ending of her employment. This amounted to a dismissal.

[49] In ending Ms Li’s employment, Better Chance did not meet the tests of justification required in section 103A of the Act.

[50] There is no evidence that Better Chance investigated its concerns about Ms Li’s performance, or lack thereof. This seems to have been a view formed by Mr Chen after speaking with the office administrator, and this informal discussion cannot be said to be an investigation. The only concrete concern voiced by Mr Chen seemed to be a concern around Ms Li’s timekeeping, and even this was vaguely expressed.

[51] Better Chance did not raise any concerns with Ms Li about either her performance or her timekeeping. Mr Chen accepted that this was so, and gave the impression he was reluctant to engage in what would have been a difficult conversation.

[52] Ms Li had no opportunity to respond, as she was not aware of these concerns until they were expressed to her for the first time at the investigation meeting. Likewise, Better Chance did not consider Ms Li’s position, as it chose not to engage with her.

[53] Concerns around timekeeping are concerns of a type that could potentially have been remedied if the parties had had an open conversation, discussing Better Chance’s expectations and Ms Li’s needs and perspectives. The same comment applies to concerns about “competency”, as Ms Li was able to explain in the investigation meeting

what she considered her job entailed, which suggests that a meaningful discussion could have occurred if Mr Chen had been willing to raise any concerns he held with an open mind.

[54] He did not do this. Ms Li's dismissal is unjustified.

[55] For completeness, I note that in subsequent written submissions for Better Chance, it was argued that Ms Li's dismissal was a redundancy, attributable to a lack of funding available to Better Chance. I do not accept this is an accurate or full explanation of why Ms Li's employment came to an end, in light of the adverse perception of Ms Li held by Mr Chen, and in light of the fact that shortly after Ms Li's dismissal, Better Chance had no difficulties employing other staff, including at least one who was paid at a higher rate.

[56] In any event, even if I had been persuaded that Ms Li's employment came to an end as a result of a redundancy situation, this would not change the obligations on Better Chance to comply with section 103A of the Act. There is no evidence that Better Chance investigated the alleged redundancy situation, no evidence that Better Chance consulted with Ms Li prior to Mr Chen advising her that Better Chance would not be continuing her employment, and no evidence that Better Chance took Ms Li's feedback into account or considered any alternatives to redundancy before making this decision and conveying it to Ms Li. The lack of process, as well as the lack of good cause, are both sufficient to make Ms Li's dismissal, when viewed properly, unjustifiable.

Remedies

[57] Ms Li is entitled to remedies as a result of her unjustified dismissal. She raises claims for 10 week's lost income; 73.5 hours of unpaid work; compensation of \$25,000 for hurt and humiliation; unpaid holiday pay; penalties for breaches of good faith and the Holidays Act 2003; and costs.

[58] Section 128 of the Act states that where the Authority finds that the employee has a personal grievance; and that the employee has lost remuneration as a result of the personal grievance, the Authority must order the employer to pay to the employee the

lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[59] Following the ending of her employment on 26 April 2020, Ms Li was very distressed. She continued to receive correspondence from the office administrator into the month of May asking her to complete certain tasks which in the view of the office administrator were outstanding. She claims 10 weeks lost wages, from 26 April through to the date of her parental leave payments commencing on 10 July. This is calculated at her hourly rate of \$18.90, for a 40 hour week, being \$756.00 gross per week, and \$7,560.00 gross for 10 weeks.

[60] I find that Ms Li had a reasonable expectation that her employment would have continued through to the date of her parental leave. "Back to back" fixed term employment agreements had always been offered to her in the past, and shortly after the ending of her employment, Better Chance employed new staff members, including Mr Chen's wife at a significantly higher hourly rate than was paid to Ms Li, to perform similar tasks. This demonstrates there was funding available, including at higher levels than Ms Li had been paid. But for Ms Li's unjustified dismissal, her employment would have continued until she took parental leave.

[61] Accordingly, Better Chance is ordered to pay to Ms Li 10 weeks wages, calculated as \$7,560.00 gross. Holiday pay is also payable on this sum at the rate of 8%. Better Chance is ordered to pay \$604.80 gross to Ms Li in holiday pay.

[62] Ms Li has also claimed that during her employment, she worked for a total of 73.5 hours without being paid. This was overtime that she explains she worked on weekends, and after hours in the evenings.

[63] Better Chance replies that they operated a "time off in lieu" system, whereby when employees needed to work outside normal hours for example to attend special community events which might be held at the weekends. In addition, Better Chance has provided a chat message between Ms Li and the office manager showing that Ms Li left early on one particular afternoon in recognition of working late earlier in the week. Ms Li has claimed for three hours work in relation to this particular date.

[64] Ms Li has set out the hours and days she says she worked as unpaid overtime, and provided supporting evidence including photos of herself at the events described. Better Chance has no wage and time records, but says Ms Li could have taken time off in lieu.

[65] Section 132 of the Act provides that, where an employer has failed to keep or produce a wages and time record in respect of an employee as required by this Act; and this failure has prejudiced the employee's ability to bring an accurate claim for wages or other money payable to the employee, then the Authority may accept as proved all claims made by the employee in respect of:

- a. the wages actually paid to the employee; and
- b. the hours, days, and time worked by the employee.

[66] I accept the evidence of Ms Li as to the work she did for Better Chance, and the hours she claims she worked (with the exception of the three hours claimed where Better Chance is able to produce documents showing Ms Li requested and was granted paid time off in lieu). This work was part of her normal duties. I do not understand Better Chance denies the hours Ms Li says she worked, with the one exception already noted. Rather, Better Chance says that it should not have to pay her for this work because she could have taken paid time off in lieu.

[67] In addition, Better Chance raises the concern that this claim was a late claim. This is a wages claim, and Ms Li has raised her claim within the 6 year limitation period applying to the recovery of wages⁴, so nothing flows from this.

[68] In these circumstances, it is my view that Ms Li worked as claimed, and was not paid for her work. This is not denied, and in any case, the employer has not kept wage and records which would suggest otherwise. Ms Li is entitled to be paid for 70.5 hours of work⁵, at the rate of \$18.90 per hour. Better Chance is ordered to pay the sum of \$1,332.45 gross to Ms Li for unpaid wages. Holiday pay is also payable on this sum

⁴ See section 11 of the Wages Protection Act 1983.

⁵ Being the 73.5 hours claimed, less the three hours which Better Chance were able to show had been taken as time in lieu.

at the rate of 8%. Better Chance is ordered to pay holiday pay of \$106.59 gross to Ms Li.

[69] Ms Li claims compensation for hurt and humiliation resulting from her dismissal of \$25,000, as set out in the statement of problem. Ms Li and her husband gave eloquent evidence of the impact her dismissal had on her physical and mental health. I particularly note that Ms Li attributed her dismissal to discrimination over her pregnancy, and suffered mental health impacts accordingly, yet at the investigation meeting it became clear that Mr Chen had simply wanted Ms Li to leave, and subsequently employed his wife at a higher hourly rate. Ms Li did not know any of this at the time. In my view, Ms Li has suffered hurt and humiliation as a direct result both of her dismissal and the way it was carried out. Better Chance is ordered to pay to Ms Li the sum of \$25,000 in hurt and humiliation.

[70] Ms Li claims that she has not been paid holiday pay on the termination of her employment. Better Chance replies that Ms Li's employment ended on 31 March 2020. However, Mr Chen asked Ms Li to sign a further fixed term agreement for one month, ending on 26 April. This period was to be her holiday pay. Mr Chen explained that this was because he believed funders did not want to pay for employees on leave, so the purpose of this final fixed term agreement was to create a paper trail that suggested work.

[71] Ms Li signed the fixed term agreement as asked. Better Chance also points to an annual leave form for 4 weeks leave for Ms Li at this time also. During the period from 30 March until 26 April, Ms Li continued to work for Better Chance, performing a variety of tasks from home. Better Chance says that these tasks were "hand-over" tasks which Ms Li had to do anyway, and that these were simple tasks that could have been completed before Ms Li went on leave. Therefore, no annual leave is owing to Ms Li.

[72] I find that Ms Li worked during the last month of her employment. She gives evidence of this. Better Chance accepts that Ms Li did perform work, although this work was only "simple". There is no dispute that Ms Li was paid as normal during the last month of her employment up until 26 April 2020, and was not paid any annual leave on the termination of her employment.

[73] The Holidays Act 2003 requires that holiday pay is to be paid when an employee's employment comes to an end⁶. Time that an employee spends working is not annual leave. It is no excuse to say that the work was "simple" or that it should have been completed at an unspecified other time. Ms Li was still working. Therefore, the time that Ms Li spent working for Better Chance up to 26 April 2020 does not count towards the annual leave balance that still remains owing to her.

[74] Ms Li claims for 4 week's unpaid annual leave, which she calculates as being \$3,024⁷. As already indicated, Better Chance has advised the Authority that it does not have wage and time or holiday and leave records, and Mr Chen was not able to give any indication of what annual leave entitlements Ms Li might have accumulated during her employment. This means that any other assessment of Ms Li's annual leave claims cannot realistically be made.

[75] Section 83 of the Holidays Act 2003 provides that, where the Authority is satisfied that an employer has failed to keep holiday and leave records, and that this failure prevented the claimant from bringing an accurate claim, the Authority may accept as proven statements made by the employee about leave payment made and leave actually taken.

[76] Better Chance accepts that it failed to keep compliant holiday and leave records. This lack of records has prevented Ms Li from bringing an accurate claim for leave that might be potentially owing to her, particularly in view of my discomfort with Mr Chen's attempts to conceal the taking of annual leave – which is a statutory entitlement - by the use of a short fixed term contract, and his view that performing "easy" or "simple" work should equate to annual leave. In my view, Ms Li's claim for unpaid annual leave of 4 weeks is reasonable, and I accept this claim.

[77] This means Ms Li's claim for holiday pay is made out. Better Chance is ordered to pay to Ms Li the sum of \$3,024 gross for unpaid holiday pay.

⁶ Section 27 of the Holidays Act 2003.

⁷ I note that this is calculated consistently with Ms Li's other wage claims, on the basis of a 40-hour week, at Ms Li's hourly rate of \$18.90 gross.

Penalties

[78] Ms Li claims for penalties in respect of what she says are breaches of the duty of good faith, and breaches of the Holidays Act 2003.

[79] Ms Li's claim for penalties for breaches of the Holidays Act 2003 stems from Better Chance's failure to pay annual leave due on termination of employment. I have already found this breach is made out.

[80] Ms Li's claim for penalties for breaches of good faith is set out in written submissions filed after the investigation meeting. The difficulty with this claim is that Ms Li's representative previously advised that the claim for breach of good faith in the statement of problem was withdrawn. My view is that it would not be appropriate to consider an award of penalties in circumstances where the applicant has withdrawn that claim.

[81] I have already found that Better Chance was in breach of section 27 of the Holidays Act 2003 by failing to pay Ms Li her annual leave at the end of employment. Section 75(2)(a) of the Holidays Act 2003 provides that this is a failure to comply with the Act that renders an employer liable for a penalty. Better Chance is a charitable trust, and is therefore liable to a penalty not exceeding \$10,000, as set out in section 75(1)(a) of the Holidays Act 2003.

[82] The failure is a single one – failure to pay statutory entitlements at the time these became due.

[83] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,⁸ *A Labour Inspector v Prabh*⁹ and *A Labour Inspector v Daleson Investment*.¹⁰ Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

⁸ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

⁹ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

¹⁰ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

[84] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arise in circumstances *involving a distinct power imbalance*.¹¹ That would appear the case here.

[85] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question¹², or failed to take reasonable steps to fulfil their legal obligations.¹³ Here the evidence leads to a conclusion the failure is deliberate given the explanation by Mr Chen that he did not keep compliant records, did not know how much leave Ms Li might be otherwise owed, and required her to sign a fixed term agreement to cover the duration of her final month of employment during which she worked.

[86] With respect to severity I note the judgement of the Court in *Preet* suggests failures to pay proper entitlements should be assessed at 80%.¹⁴ There is no argument from either party for an alteration either way from this starting point though I note the loss is monetary and relatively minor. This factor suggests a reduction should be applied.

[87] There is no evidence of similar previous conduct by Better Chance and finally I have to be cognisant of issue such as consistency and proportionality. That, when combined with a perusal of recent penalties would also suggest 80% would lead to an improperly high figure.

[88] Having weighed these factors I conclude the respondent should be required to pay a penalty of \$4,000. The final issue is then to whom the penalty should be paid and here I note Ms Li has had to bring this matter to receive her minimum entitlement to paid annual leave. She should therefore share in the penalty and I consider half appropriate.

¹¹ *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

¹² *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

¹³ *El-Agez v Comprede Limited*, TT 4121553, at para 18

¹⁴ See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

Costs

[89] Ms Li has asked for an award of costs in her favour, in the sum of \$8,000. The investigation meeting ran for one and a half days, so this is an uplift of \$1,750 compared to the Authority's daily tariff. The justification for this uplift is said to be the significant amount of preparatory work done, as well as Better Chance's failure to provide wage and time records and the evidence about the employment of Mr Chen's wife that only came to light during the investigation meeting.

[90] Better Chance makes no targeted submissions as to costs, but does say that it "already" has financial difficulties.

[91] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days¹⁵.

[92] The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

[93] The investigation meeting in this matter ran for one and a half days. The first day was held in person, and the second half day was held via zoom. The applicant attended together with her representative and witness, and Mr Chen appeared for the respondent, together with his representative, and three other witnesses. Applying the daily tariff would give an award of \$6,250.00.

[94] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Employment Relations Act 2000 (the Act). The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*¹⁶ as confirmed in *Fagotti v Acme and Co Limited*¹⁷. The key principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful parties conduct.

¹⁵ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

¹⁶ [2005] 1 ERNZ 808.

¹⁷ [2015] NZEmpC 135 at 114.

[95] Ms Li has not put forward any compelling argument as to why there should be departure from the normal daily tariff rate. The investigation meeting ran smoothly and its duration was not prolonged taking into account the number of witnesses and the issues involved, despite the lack of records kept by Better Chance. Although the submissions refer to “significant” preparatory work done on behalf of the applicant, there is no indication that this was caused by any particular actions by Better Chance, leaving aside the underlying substantive claims themselves.

[96] I am not persuaded that there is any reason to depart from the normal tariff approach. Accordingly I order Better Chance to pay to Ms Li the sum of \$6,250 towards costs, together with the filing fee of \$71.56.

Summary of Orders

[97] Better Chance is ordered to pay the following sums to Ms Li within 28 days of the date of this determination:

- a. Ten weeks lost remuneration, being \$7,560.00 gross;
- b. Holiday pay on this sum, being \$604.80 gross;
- c. Unpaid wages for 70.5 hours work, being \$1,332.45 gross;
- d. Holiday pay on this sum, being \$106.59 gross;
- e. Compensation for hurt and humiliation, being \$25,000 without deduction;
- f. Unpaid holiday pay on the termination of employment, being \$3,024.00 gross;
- g. A penalty of \$4,000 without deduction, with half payable to the Crown account, and half payable to Ms Li.
- h. Costs of \$6,250.00.
- i. The filing fee of \$71.56.