

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 248  
3125054

BETWEEN	NIANHUAI YU and YULAN LUO Applicants
AND	JOE AND ZHOU LIMITED First Respondent
AND	YANSHAN ZHOU Second Respondent
AND	GEE LON JOE Third Respondent

Member of Authority:	Peter Fuiava
Representatives:	David Kim, advocate for the Applicants Puhan Zheng, counsel for the Respondents
Investigation Meeting:	2-3 August 2021 at Hamilton and 9 March 2022 by audio-visual link
Submissions received:	30 May 2021, 8, 21 June 2021, 15, 27, 30 July 2021, 18, 24 August 2021, and 28 February 2022 from the Applicants 27 May 2021, 11, 28 June 2021, 21 July 2021, 19 August 2021, and 14 February 2022 from the Respondents
Determination:	15 June 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Yu and Mrs Luo are a married couple from China who allege that they were exploited by their former employer, Joe and Zhou Limited, a company that trades as a Chinese restaurant in Hamilton (the restaurant). In particular, the applicants allege that they worked 66 hours per week but were only paid for 40 hours by the restaurant's two company directors and owners, Yanshan Zhou, and her husband, Gee Lon Joe.

[2] In addition to the applicants' claim for wage arrears, penalties are sought against the respondents for various breaches of the Employment Relations Act 2000 (the Act), the Minimum Wage Act 1983 (MWA), the Holidays Act 2003 (HA) and the Wages Protection Act 1983 (WPA).

[3] This employment relationship problem turns on credibility and as will become clear, I have found the applicants' narrative of migrant exploitation not to be credible. For this reason, most of their claims have been dismissed. However, I have found Mr Yu's claim of outstanding overtime wages to have been made out but not for the reasons he advanced. From the outset of this investigation, the respondents have never denied that the restaurant failed to provide Mrs Luo with a written employment agreement. The company therefore anticipates that a penalty will be imposed as a result.

#### **Interim non-publication order withdrawn**

[4] Before the Authority turns to consider the substantial merits of the case, it records here that Mr Kim, the applicants' representative, initially sought a non-publication order for the applicants on the ground that the present proceeding could affect their ability to find future employment in their local Chinese community. The application was granted on an interim basis pending the Authority's substantive determination.

[5] On 24 August 2021, Mr Kim formally withdrew his application for a permanent non-publication order. While this brings the interim non-publication order to an end, had the Authority been required to determine the matter, it would have dismissed the application not only because of the principle of open justice, which is a principle of fundamental importance, but also because of the applicants own conduct which included intimidating Xuegang Chen, one of the respondents' witnesses, and the applicants disclosure of their personal grievance to their employer's business neighbours in an effort to find other witnesses when the investigation meeting had already concluded.

#### **Witness Interference**

[6] On 17 May 2021, the Authority held a case management conference with Mr Kim and Ms Zheng, the respondents' counsel, in order to progress matters to an

investigation meeting. During that teleconference, counsel disclosed Mr Chen's name as one of the respondents' witnesses which the Authority did not record in its minute of the meeting. Shortly after the conference call however, Ms Zheng advised the Authority that the applicants had visited Mr Chen at his rented accommodation in order to dissuade him from giving evidence.

[7] In a second minute of the Authority (2 June 2021), I found that the applicants had interfered with a party's witness and indicated that I would be imposing a penalty for obstructing or delaying the Authority's investigation pursuant to section 134A of the Act. However, given the outcome of this determination, rather than impose a penalty against the applicants, I shall take this as a factor to be considered in favour of the respondents if the Authority is required to make a costs determination.

### **Relevant Background**

[8] On 2 April 2018, Mr Yu messaged Mrs Zhou on WeChat, a Chinese social media platform, how much his salary would be if he were to work for her. Mrs Zhou's recorded response was "\$850 before tax, tax is about \$140ish, it is around \$710 after tax". Mr Yu queried further whether Mrs Zhou was looking to hire a second person, namely his wife who had recently obtained a visa and would soon be joining him in New Zealand. Mrs Zhou stated that she was willing to employ Mrs Luo but that she would need to do all sorts of things like washing the dishes and clean the toilet.

[9] At 10.52 am on 9 April 2018, Mr Yu messaged Mrs Zhou on WeChat to confirm his decision to "transfer" to her business to which she agreed. Later that same evening, Mr Yu provided her a work visa application form from Immigration New Zealand.

[10] On 10 April 2018, Mr Yu's immigration advisor messaged Mrs Zhou on WeChat. The agent had been given Mrs Zhou's WeChat account, presumably by Mr Yu, and asked whether she needed any help with his work visa application. The advisor asked whether she had an employment agreement for him or whether she wanted the advisor to prepare one for her. Mrs Zhou's response was: "You prepare."

[11] When the agent asked further about Mr Yu's salary, Mrs Zhou stated that he would be paid \$850 per week before tax. She confirmed also that his position was that

of a Chinese Cuisine Chef. The advisor subsequently drafted the employment agreement which Mrs Zhou signed and provided back to Mr Yu.

*Mr Yu's individual employment agreements*

[12] During the course of Mr Yu's employment with the restaurant (from 10 April 2018 to 22 March 2020), he held two individual employment agreements at different times with the business. The first employment agreement was signed by Mr Yu and Mrs Zhou on 10 April 2018 (the first agreement) and required him to work 40 hours per week. As for remuneration, he was to be paid \$44,200 per annum (\$21.25 per hour) with overtime and public holiday work to be paid at the rate of time and a half or \$31 per hour.

[13] In May 2018, Mrs Luo arrived in New Zealand as the partner of a work visa holder.

[14] In December 2018, Mr Yu informed his employer of his intention to apply for a Work to Residence visa. To that end, his immigration advisor drafted a second individual employment agreement for him which he and Mrs Zhou signed on 9 January 2019 (the second agreement). That agreement stated that Mr Yu was to be paid an annual salary of \$45,760 (\$880 per week) and that overtime would be paid at the rate of \$22 per hour.

[15] On 15 January 2019, Mrs Luo commenced employment as a full-time kitchen assistant for the restaurant. As stated above, she was not provided with an employment agreement.

[16] Mr Yu and Mrs Luo kept their own personal time records of their work hours which for Mr Yu covered a period of approximately 23 months – 1 May 2018 to 22 March 2020 – and Mrs Luo, a period of some 13 months – 15 January 2019 to 23 February 2020.

[17] The applicants' time records show that the couple generally started work at 10.30 am in the morning and finished work at around 10.30 pm most evenings. Excluding one hour for rest and meal breaks, the applicants' time records suggest that the couple individually worked 11 hours per day six days a week for 66 hours per week.

[18] On 23 February 2020, Mrs Luo's employment ended as a result of her previous work visa expiring and the financial impact of what would become the COVID-19 pandemic in New Zealand.

[19] On 22 March 2020, Mr Yu's employment with the restaurant came to an end because of a downturn in the restaurant's business because of the pandemic.

[20] On 30 June 2020, Mr Yu was granted a three-year Essential Skills work visa by Immigration New Zealand. It is understood that Mrs Luo holds a concurrent work visa as his partner.

[21] On 18 August 2020, Mr Kim raised a personal grievance with the respondents on the applicants' behalf.

[22] On 21 January 2021, the applicants lodged their statement of problem with the Authority. The respondents' statement in reply was lodged on 2 February 2021.

### **The Authority's investigation**

[23] The investigation meeting took place over the course of two days in early August 2021. The applicants' witnesses comprised of Mr Yu, Mrs Luo and the couple's son, all of whom gave evidence under affirmation. For the respondents, Mrs Zhou, Mr Joe, Liangcai Li, a former employee of the couple, and Mr Chen, gave evidence under affirmation and were questioned on that evidence by the Authority and both representatives. At the end of the investigation meeting, the representatives made oral closing submissions.

[24] However, the Authority required further clarification from Mrs Zhou concerning her wages and time record for Mr Yu that showed that he worked 48 hours per week for the restaurant, which did not reconcile with the hours he was required to work under his two employment agreements, both of which stated that he was required to work 40 hours per week only.

[25] Further written submissions were provided by Mr Kim and Ms Zheng and a submissions hearing was subsequently held via audio-visual link with the representatives on 9 March 2022.

[26] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[27] As permitted by s 174E of 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**

[28] The issues requiring investigation and determination are:

- (a) Do the respondents owe unpaid wages to the applicants?
- (b) Are the applicants owed public holiday pay or annual leave?
- (c) Have the respondents breached the Act, the MWA, the HA, or the WPA?
- (d) What penalty should be imposed against the respondents for any established breaches of the above legislation?

### **Mr Yu's case**

[29] Mr Yu claimed that he worked six days a week for a total of 66 hours per week and that he did this consistently throughout his employment. However, he says that instead of being paid the hours he worked, he was paid on the basis of 40 hours of work per week. He further claimed that the restaurant under paid him for public holiday and overtime work, paying him his ordinary rate of \$21.25 per hour and not time and a half or \$31 per hour as required by the first agreement.

[30] As stated previously, Mr Yu had two employment agreements with the restaurant, the first of which stated the following:

- |                         |  |
|-------------------------|--|
| <b>1. Position:</b>     | Chinese Cuisine Chef   |
| ...                     |  |
| <b>4. Hours:</b>        | 40 hours per week  |
| <b>5. Remuneration:</b> | NZD\$44,200 per annum (\$21.25 per hour), overtime and<br>and working for public holidays will be paid 1.5 times<br>(NZ\$31/h) |
| ...                     |  |

[31] The second agreement was signed some nine months later on 9 January 2019. That agreement relevantly stated:

## **6 Hours of Work**

### **6.1 Full Time Hours of Work**

The Employee's hours of work shall be **40** within **6** days.

...

### **7.1 Weekly Salary**

The Employee shall be paid annual salary **\$45,760 (gross) (i.e. \$880/week)**.

...

### **7.3 Overtime**

The Employee may be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform his duties. Where extra hours are performed the Employee shall be entitled to an overtime payment at a rate of \$22 per hour.

...

[32] One noticeable difference between the two employment agreements was that, unlike the first agreement, the second agreement did not provide for the payment of overtime and working public holidays at the rate of \$31 per hour. That provision did not survive the second agreement.

[33] Mr Kim submitted that the purpose behind the second agreement was for Mr Yu to apply for a work to residence work visa. When that visa application was declined, the first agreement subsequently became the only valid employment agreement between the parties.

[34] However, the wording of Mr Yu's employment agreements with the restaurant does not support such an interpretation. There is no term or condition that says if Mr Yu's work to residence visa application was unsuccessful that the first agreement would recommence. The opposite however appears to be the case, namely that the second agreement extinguished the first. Clause 14.2 of the second agreement states that it constituted the whole and entire agreement between the parties. Any previous agreement or understanding between the parties no longer applied.

[35] Mrs Zhou stated that none of the employment agreements were valid because she and Mr Yu had reached a purely oral agreement that he would work for her for initially \$850 gross per week. Ms Zheng points to the WeChat communications between the pair as evidence of the parties' understanding.

[36] Mrs Zhou further stated that the inclusion of an overtime rate of \$31 per hour in the first agreement was never mentioned by Mr Yu or discussed with her at any time. However, the difficulty for Mrs Zhou is that she accepts signing the first agreement. As an experienced and mature business woman, Mrs Zhou can reasonably be expected to have read and understood what she was signing which included the payment of overtime and public holiday work to Mr Yu at the rate of \$31 per hour. If this was not her intention, she should not have signed the document which I find to be a valid and binding agreement on the parties.

*Mr Yu owed wages under first agreement*

[37] For the reasons given above, I find that the first agreement to be a valid and binding contract. It follows that the restaurant was required to pay Mr Yu \$31 per hour for every hour of overtime and public holiday worked while the first agreement remained extant.

[38] In his amended statement of problem of 8 June 2021, Mr Yu stated that he worked a total of 98 weeks for the restaurant during which time he purportedly worked 66 hours per week. Mr Kim calculates the amount owing in overtime wages to Mr Yu to amount to \$78,988 (26 hours overtime per week x \$31 per hour for overtime work x 98 weeks of work).

*Mr Yu's personal time record is unreliable*

[39] In support of Mr Yu's claim that he is allegedly owed \$78,988 in overtime work was his personal time record which spanned some 25 pages and covered the period from 1 May 2018 to 22 March 2020. It is observed that each page comprised six columns that recorded: the date, start time, lunch, dinner, break and finish time. Time was recorded at five-minute intervals. For the reasons that follow, I find Mr Yu's personal time record to be unreliable.

[40] Mr Yu admitted that he had not shown Mrs Zhou or Mr Joe his personal time record during the entirety of his employment with them. The first time the couple was aware of its existence was when Mr Yu had submitted it to the Authority in support of his statement of problem.

[41] It may be that, as a work visa holder, Mr Yu may have been reticent to provide the couple with a copy of his personal time record whilst he still worked for them and was dependent on their support for future work or resident visa applications. However, it has not been demonstrated that Mrs Zhou or Mr Joe were not willing to support him in that regard, especially when the WeChat communications between Mr Yu and Mrs Zhou show that she was nothing but supportive of his ongoing employment and visa status in New Zealand.

[42] I have observed a number of inconsistencies with Mr Yu's personal time record which affects its reliability and veracity. On 14 May 2018, Mr Yu recorded in his notebook that he had worked that day, stating that he started work at 10:30 am, lunched at 13:30 – 13:45, ate dinner at 15:45 – 16:05, had a break at 16:05 – 16:30 and finished work that evening at 22:20. However, all this was incorrect as Mr Yu did not in fact work that day. He had instead requested to take the day off to meet Mrs Luo who had arrived in New Zealand.

[43] When this discrepancy was put to Mr Yu, he claimed that he had not taken the day off but had changed his shift instead. He further stated that, when recording time in his notebook, he would keep to his normal practice of recording 11 hours per day for each day worked. The explanation calls into question the accuracy of Mr Yu's personal time record when he is in the habit of recording 11 hour days irrespective of his being at work or not.

[44] The above example was not an isolated or inadvertent error. Mr Yu's personal time record purportedly had him at work on 9 November 2018 at 10:30, lunching at 14:40 – 14:55; eating dinner at 16:00 – 16:15; having another break at 16:15 – 16:30 and finishing work at 23:05. However, this entry was incorrect in all respects as Mr Yu had taken 9 November 2018 off from work to attend a practical driving test. When I put the discrepancy to Mr Yu for further comment, he gave the same response that he had merely changed his shift and that he recorded an 11 hour work day because that was his habit.

[45] On 22 July 2019, Mr Yu claimed that he had started work at 10:30, lunched at 14:30 – 14:45; dined at 16:10 – 16:25; had another break at 16:25 – 16:30 and finished work at 22:30. However, Mr Yu neglected to mention that the restaurant was

closed from 11.00 to 14.30 because Mr Joe had taken the entire staff out for lunch to celebrate his purchase of a new car. There was no record of that lunch in Mr Yu's personal time record which portrayed the day as a normal 11 hour work day when that was not the case. In my view, this was a day like no other. This was a special occasion which stuck in the minds of staff, including Mr Li, who commented on the day. For Mr Yu not to record this unique event in his time record casts considerable doubt on its veracity, genuineness and reliability.

[46] In an attempt to bolster Mr Yu's claim regarding the hours he worked for the restaurant, he and Mrs Luo called their teenaged son to give evidence. The son claimed that his parents each worked nearly 70 hours per week and that this was the truth. However, I do not regard the son as an impartial or independent witness from his parents. In any case, his evidence is not determinative.

[47] The same cannot be said of the respondents' witnesses Mr Li and Mr Chen. Mr Li was the restaurant's former head chef who had left the business in October 2019 to start a business of his own. He now operates a sushi and takeaway business in Hamilton. I found Mr Li to be a credible and independent witness.

[48] It was Mr Li's evidence that he worked 40 hours per week and that staff at the restaurant worked two sessions each day; a morning session that started from 10.30 am to 2.30 pm, and an evening shift from 4.30 pm to 9.30 pm. The restaurant did not trade between 2.30 pm – 4.30 pm and staff were free to go home or stay during that time to have a meal or rest. As to the restaurant's trading hours, Mr Li stated that these were from 11.30 am to 2.30 pm and 5 pm to 9 pm that same day. During daylight savings time, the restaurant would stay open until 9.15 pm.

[49] Mr Li's evidence as to staff work times and the restaurant's trading hours was corroborated by the respondents' second witness Mr Chen, who I found to be equally credible. When I asked whether the applicants had been exploited by Mrs Zhou and Mr Joe in that they had been forced to work from 10.30 am to 10.30 pm, Mr Chen stated that this was impossible as they were not machines and that no one worked between 2.30 pm and 4.30 pm. Staff were free during that two-hour period to do as they pleased.

[50] When I consider the inconsistencies in Mr Yu's personal time record and the evidence of Mr Li and Mr Chen, whose evidence I find to be internally consistent and credible, I find that Mr Yu did not work 66 hours per week at the restaurant. Rather, for most weeks, he worked 48 hours per week comprising eight-hour days over a six day work week.

*The first respondent's wages and time record*

[51] It is observed that the restaurant's wages and time record for Mr Yu was casually maintained by Mrs Zhou. After the first six weeks of his employment, she sporadically recorded the number of hours each day in a pay period for him as required by s 130(1)(g) of the Act. In addition, there were gaps in the time and wages record which Mrs Zhou filled in by using an ellipsis between dates. This casualness and lack of attention to detail leaves her business at risk. Despite its shortcomings, it is these imperfections which add to the record's credibility as Mrs Zhou could have filled in the gaps before the investigation meeting, which is when the record was provided to the Authority, but she did not. When considered cumulatively with Mr Li and Mr Chen's evidence, I find Mrs Zhou's wages and time record to be a more accurate record of Mr Yu's actual work hours.

*Wage arrears under first agreement*

[52] For the reasons given above, I find Mr Yu's first and second employment agreements with Joe and Zhou Limited to be valid and binding contracts. However, the agreements applied at different times with the first agreement being effective from 10 April 2018 until it was replaced by the second agreement on 9 January 2019. The second agreement ended with Mr Yu's last day of employment on 22 March 2020.

[53] The first agreement required the restaurant to pay Mr Yu \$31 per hour for overtime work and public holiday work. The Authority was provided with Mrs Zhou's wages and time record for Mr Yu which showed that for the 39 week period covered by the first agreement, he consistently worked 48 hours per week, which corroborates the oral testimony provided by Mr Li and Mr Chen as described above.

[54] As eight of Mr Yu's 48 hours of work per week was overtime work, the first agreement which Mrs Zhou signed, required her company to pay Mr Yu the applicable

overtime rate. If this was not her bargain, Mrs Zhou should not have signed the agreement, but she did. It follows that Mr Yu is owed \$9,672 in overtime wages (8 hours overtime per week x \$31 per hour for overtime work x 39 weeks).

*Wage arrears under second agreement*

[55] Mr Yu's second employment agreement became effective on 9 January 2019 and remained valid until his last day of employment some 14 and a half months later. That agreement stipulated a \$22 per hour rate for overtime. If Mr Yu did not intend to be bound by this agreement, which his immigration advisor had drafted, he should not have signed it, but he did. Similarly, if Mrs Zhou did not wish to pay Mr Yu overtime, she should not have signed the second agreement which stated that he was required to work 40 hours over a six-day working week (see [31] above).

[56] It follows that any hours worked over 40 hours was overtime work for which the restaurant had explicitly agreed to compensate Mr Yu at the rate of \$22 per hour. I disregard Mr Yu's claim of an overtime rate of \$31 per hour and discount completely his claim of having worked 66 hours per week for the restaurant. However, I am satisfied that, for most weeks covered by the second agreement, he worked 48 hours per week. I find that, under the second agreement, Mr Yu is owed \$10,560 in overtime wages by the restaurant (8 hours overtime per week x \$22 per hour for overtime work x 60 over 40-hour weeks of work).

*Interest owed*

[57] I find that Mr Yu is owed total overtime wages of \$20,232 (\$9,672 under the first agreement + \$10,560 under the second agreement). Pursuant to clause 11 of the Second Schedule to the Act, the Authority may, if it thinks fit, order interest on any judgment amount. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. As Mr Yu has been deprived of the use of what is owed to him, the Authority orders that Joe and Zhou Limited pay interest on \$20,232 from 22 March 2020 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator and payment of that amount is to be made no later than 4pm 13 July 2022.<sup>1</sup>

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<sup>1</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator).

*No public holiday pay owing*

[58] In the applicants' statement of problem, it was claimed that Mr Yu never received any public holiday pay from his employer and that the respondents required him to pay \$130 in cash to pay for his public holidays. However, there are two difficulties with this claim. First, Mr Yu's calculation of unpaid holiday pay is based on his working 11 hour days which has been debunked. Second, there is no supporting evidence from Mr Yu of the alleged \$130 weekly payments which cannot be traced back to his personal bank statements or personal time record.

[59] While it has not been demonstrated that Mr Yu made cash payments of \$130 per week to his employer, I find that he is still owed a modest amount for working on a public holiday. Under the first agreement, the restaurant was required to pay him \$31 per hour for public holiday work. During the period of the first agreement (10 April 2018 to 9 January 2019), Mr Yu worked three public holidays: 4 June 2018 (Queen's Birthday), 22 October 2018 (Labour Day) and 1 January 2019 (New Year's Day).

[60] Mrs Zhou's wages and time record shows that Mr Yu was paid \$170 (gross) for working each of the above public holidays. However, this was the equivalent of Mr Yu working his ordinary hourly rate at the time of \$21.25 and not \$31; a shortfall of \$9.75 per hour. It follows that, under the first agreement, Mr Yu is owed an additional \$234 by his employer (8 hours per public holiday worked x \$9.75 per hour x 3 public holidays worked).

[61] Under the second agreement, which applied from 9 January 2019 until Mr Yu's last day of employment on 22 March 2020, it is common ground that he worked a total of nine public holidays during this period. For the reasons given above, Mr Yu was not entitled to a public holiday rate of \$31 per hour under the second agreement. However, he was entitled to time and a half of his then ordinary rate of \$22 per hour. While Mrs Zhou's wages and time record for the period of the first agreement is sporadic, the wages and time record covering the period of the second agreement contains more information, especially with respect to payments for public holiday work. I can account for eight of the nine public holidays worked by Mr Yu and I am satisfied that he has been properly remunerated by the restaurant for these days.

[62] There is only one public holiday payment outstanding which relates to 27 January 2020 (Auckland anniversary). Ms Zheng advises that the restaurant has recently direct credited that payment into Mr Yu's account and a screen shot of that electronic payment was provided to the Authority and Mr Kim. With that payment, I find that Mr Yu is not owed any public holiday pay under the second agreement.

*No annual leave owing*

[63] Mr Yu claims that he is owed annual leave. Mrs Zhou says that there is no annual leave owing because on 20 May 2019, he was paid his holiday pay in cash. This comprised four cash payments of \$850 (net). No receipt was kept for these payments three of which Mr Yu claims he never received. However, as Mr Yu has previously admitted to receiving cash payments for annual leave more than once, I am satisfied that Mrs Zhou has made the above cash payments to him.

[64] Mr Yu is not owed annual leave arising from his second year of employment with the restaurant because the restaurant's bank statements show that he was paid his annual leave entitlements over four consecutive weeks from 30 March 2020 to 20 April 2020. In fact, as Mr Yu's employment ended before his second year, it appears that he has been overpaid annual leave.

*Paid meal breaks provided*

[65] Mrs Zhou's wages and time record for Mr Yu show that he worked eight hours per day and that he was paid for the entirety of the shift, including any time taken for a rest or meal break. As such, the suggestion that both he and his wife were not provided with a paid meal break is not made out.

*Other claims*

[66] Mr Yu claims further that he was made fun of by Mr Joe and was forced to change a pot of oil without protective gloves. I accept that Mr Joe is known by his staff, including Mr Li, to be someone who says jokes in the workplace. It appears that Mr Yu has taken some of Mr Joe's humour the wrong way. Even so, I am not satisfied that Mr Joe has bullied, intimidated or verbally abused Mr Yu. The contention that the present case is an example of migrant exploitation is not supported on the facts as found.

Further, after hearing from Mr Li and Mr Chen, I am satisfied that Mr Joe has provided Mr Yu with the required protective equipment for his role.

[67] Mr Kim sought penalties against the respondents for various breaches of minimum employment standards under the MWA, HA, WPA and the Act. However, penalties cannot be awarded because Mr Yu did not work the hours he alleged for his wages to fall below the applicable minimum wage. There was only one HA breach which was a one-off minor error which has since been rectified.

[68] The claim for a penalty under the WPA and for a breach of s 130 of the Act have not been made out either. While Mrs Zhou's wages and time record for Mr Yu is not perfect, this is not a case of an employer failing to keep or produce an employee's wages and time record. Finally, I do not consider it appropriate to award a penalty for a breach of an employment agreement when a sufficient remedy, which includes an award of interest, has been provided.

[69] Mr Yu claimed that he was also unjustifiably dismissed by the restaurant when it terminated his employment. The respondents explain that it dismissed Mr Yu because of the financial impact of the COVID-19 pandemic had on its business, especially on visiting tour buses to the restaurant which fell sharply after New Zealand closed its international border as part of its public health response to the pandemic.

[70] In any event, it has not been necessary for me to consider Mr Yu's unjustified dismissal claim because it is time barred under s 114 of the Act. Mr Kim's personal grievance letter of 18 August 2020 came well outside the 90-day time limit for Mr Yu to have raised a personal grievance of unjustified dismissal when his employment ended on 22 March 2020, some five months prior. The respondents do not consent to this grievance being raised now at this late stage.

### **Mrs Luo's case**

[71] Mrs Luo was employed as a kitchen assistant by the restaurant from 15 January 2019 to 23 February 2020. However, she was not provided with a written employment agreement which the respondents accept was a shortcoming on their part.

[72] Mrs Luo provided the Authority with a personal time record that followed the same format as her husband's time record. Mrs Luo accepted that she had never shown her personal time record to either Mrs Zhou or Mr Joe and that she had previously asked Mrs Zhou to pay part of her wages in cash and the remainder by electronic bank transfer, which Mrs Zhou did.

[73] Mrs Luo claimed that she worked 11 hour days six days a week. However, her personal time record contained inconsistencies. For example, it records her having worked 11 June 2019, which is a day the respondents say that she had requested, and had been given the day off. Mrs Luo did not deny that she was absent from work that day. When I put this inconsistency to her for further comment, Mrs Luo stated that she had simply changed shifts. However, that explanation does not sufficiently explain why she could not have simply marked the day in question as a day she had been absent from work.

[74] Mrs Luo further recorded herself being at work on 22 July 2019. She claimed that she started the day at 10.30 am, took lunch at 2 pm to 2.15 pm, had dinner at 4.10 pm to 4.25 pm and took another break at 4.25 pm to 4.30 pm. However, there was no record made by Mrs Luo that Mr Joe had taken the entire staff out for an early lunch that day. Mrs Luo displays the same pattern of recording being at work when she was not. Of particular concern was her admitting to not completing her personal time record immediately after a shift. She stated that when she was tired, she completed her notebook the following morning or the following week. This calls into question the contemporaneity and accuracy of her notetaking.

*No outstanding overtime wages or public holiday pay owing*

[75] Cumulatively considered, I find the evidence of Mr Li and Mr Chen and the documentary evidence provided of Mrs Zhou's wages and time record and the restaurant's bank statements to be more credible than Mrs Luo's personal time record. I find that she worked eight hour days six days a week like her husband for which she has been compensated. Mrs Luo has not demonstrated that she worked 11 hour days six days a week for a total of 66 hours per week.

[76] It follows that there has been no breach of minimum wage or public holiday pay entitlements for Mrs Luo. Her claims for compensation for unjustified disadvantage

for allegedly not being paid correctly and for a penalty for a purported breach of the MWA have not been established.

[77] I found Mrs Luo not to be a witness of candour. When I asked whether she had any personal savings with which to financially support herself after her employment ended, she stated that she had very little saved in her bank account. However, Mrs Luo's New Zealand bank statements showed that she had a term deposit of \$30,000 that had recently matured on 30 January 2020.

[78] Rather than accept that she may have been mistaken, Mrs Luo attempted to explain away the term deposit by stating that she needed to save \$50,000 to pay a debt and that her mother-in-law in China, who was sick with diabetes and required dialysis, was staying in a rest home that cost \$2,000 per month. While this may all be true, it was Mrs Luo's initial response that she had very little by way of personal savings. Moreover, according to her own bank statements (14 April 2020) a copy of which was provided to the Authority, I put to Mrs Luo that she had two term deposits totalling some \$80,000 in her personal bank account. In explanation, Mrs Luo stated that she had to pay for her son's tertiary education. While this may also be true, the shifting nature of Mrs Luo's evidence meant that I could not regard her as a credible witness.

[79] However, that being said, Mrs Luo's claim for a penalty under s 65 of the Act for her employer's failure to provide her with a written employment agreement is established. In assessing the quantum of this penalty, I have considered the relevant factors set out at s 133A of the Act and looked at the range of penalties awarded in similar cases. Based on this I conclude that the appropriate penalty is \$1,250. This is to be paid directly to Mrs Luo in compensation for not being provided with a notice in lieu provision of two weeks for termination of employment. Such a provision may have been part of an employment agreement had she been provided with one.

[80] Another area where the respondents acknowledge that a mistake has been made concerns Mrs Luo not being paid two weeks' annual leave. I am satisfied that the non-payment was an oversight and not intentional. Two weeks annual leave amounted to \$1,476 (gross) which Ms Zheng advises the respondents paid on 16 August 2020 shortly after the investigation meeting.

[81] As the error has been rectified and was inadvertent, penalties which are punitive in nature, do not arise. However, even so, it is appropriate that Mrs Luo be awarded interest on \$1,476 for the loss of use of monies to which there is an established entitlement. Interest is to be calculated using the civil debt calculator and shall apply from 21 February 2020 to 16 August 2021. Payment of interest is to be made no later than 4 pm 13 July 2022.

### **Orders**

[82] While I have found in favour of the applicants, it should be noted that the clear majority of their claims have been dismissed. Had Mrs Zhou not signed Mr Yu's employment agreements, it is unlikely that he would have succeeded in the way that he has. The Authority makes the following orders which are to be paid no later than 4 pm Wednesday 13 July 2022:

- (a) Joe and Zhou Limited to pay Nianhuai Yu \$20,232 in unpaid overtime wages.
- (b) Joe and Zhou Limited to pay Nianhuai Yu interest on the sum of \$20,232. Interest is to be calculated from 22 March 2020 to the date of payment and the Ministry of Justice civil debt interest calculator is to be used to calculate interest.
- (c) Joe and Zhou Limited to pay Nianhuai Yu \$234 in wage arrears for working a public holiday.
- (d) Joe and Zhou Limited to pay a penalty of \$1,250 for breaching s 65 of the Act. Payment is to be made directly to Yulan Luo.
- (e) Joe and Zhou Limited to pay interest on \$1,476 (gross) to Yulan Luo using the civil debt interest calculator.

### **Costs**

[83] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[84] If they are not able to do so and an Authority determination on costs is needed the applicants may lodge, and then should serve, a memorandum on costs no later than 4 pm Wednesday 13 July 2022. From the date of service of that memorandum the respondents would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[85] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>2</sup>

Peter Fuiava  
Member of the Employment Relations Authority

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<sup>2</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108]. See also [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).