

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 324
3121339

BETWEEN	PENG WANG Applicant
AND	BOTANY VEHICLE SERVICE 2004 LIMITED First Respondent
AND	JIE BAI Second Respondent

Member of Authority: Robin Arthur

Representatives: May Moncur, advocate for the Applicant
Cherie Holland, counsel for the Respondent

Investigation Meeting: 24 and 25 February 2022

Determination: 14 July 2022

DETERMINATION OF THE AUTHORITY

- A. Peng Wang was unjustifiably dismissed by Botany Vehicle Service 2004 Limited (BSV).**
- B. In settlement of his personal grievance for unjustified dismissal BSV must pay Mr Wang the following sums within 28 days of the date of this determination:**
- (i) \$2,880 in reimbursement of lost wages; and**
 - (ii) \$13,500 as compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Mr Wang's claims seeking orders for wage arrears and penalties are declined.**

D. Costs are reserved with a timetable set for memorandum from the parties if an Authority determination of that issue is needed.

Employment Relationship Problem

[1] On 27 May 2017 Peng Wang, who is a Chinese national, began his employment as a painter in the car repair and panel beating business operated by Botany Vehicle Service 2004 Limited (BVS). His visa conditions said he could only work for BVS.

[2] On 21 March 2020 BVS director Jie Bai gave Mr Wang an “employment termination” letter. The letter said Mr Wang’s employment would end on 4 April 2020. It also said Mr Wang would get paid the two weeks up until 4 April but not have to work if he “signed and returned resign document”.

[3] Mr Wang asked Mr Bai to sign the typed letter he was given but Mr Bai refused. Because Mr Bai refused to sign the letter Mr Wang said it was “not valid” and returned to work. He carried on working as normal in the following days.

[4] On 25 March 2020 the business closed due to the declaration of a state of national emergency and the provisions put in place by the government to respond to the Covid-19 pandemic.

[5] On 1 April 2020 Mr Wang sent Mr Bai a WeChat message saying he had received some advice to “ignore” the dismissal letter because Mr Bai had not signed it. His message ended: “Let me know when you get back to work”. Mr Bai sent a one-word response: “Received”.

[6] During the weeks of lockdown which followed other BSV employees received payments funded by the Covid-19 wage subsidy. Mr Wang did not.

[7] When the country moved down to Covid-19 Alert Level 3 BSV reopened its business on 28 April 2020. Mr Wang learned from other BSV employees that the business was reopening and turned up for work.

[8] In the following days Mr Wang continued to work on his usual six-day work roster at BSV’s premises. He received his usual pay for that work.

[9] On 9 May 2020 Mr Bai told Mr Wang his days of work were to be reduced to three days a week. In a WeChat message exchange Mr Wang asked for those three days

to be Monday, Tuesday and Wednesday. In his reply Mr Bai said Mr Wang “need[ed] to follow the company’s arrangement if you want to stay”, so his days of work would be Thursday, Friday and Saturday.

[10] In a further WeChat exchange on 19 May Mr Wang said he was applying for a new visa and “I will leave after I am granted my visa”. Mr Bai’s reply said Mr Wang was “already dismissed by the company”, so Mr Wang did not need to come to work. He also wrote that he had given Mr Wang enough time since Christmas 2019 to seek a new job.

[11] On 23 May Mr Bai told Mr Wang not to come back to work at BSV. He had a final payment prepared for Mr Wang which included a further three weeks’ pay.

[12] In his application to the Authority Mr Wang asked the Authority to find BSV had acted unjustifiably in dismissing him, had failed to pay him properly for hours worked and for leave and public holidays, and both BSV and Mr Bai were liable to penalties for breaching Mr Wang’s employment agreement and his statutory rights.

[13] In reply BSV said it had acted justifiably in decisions to end Mr Wang’s employment, both on 21 March and on 23 May 2020. It said Mr Wang was properly paid for all hours worked and denied breaching his entitlements to sick leave and annual leave. It also denied either the company or Mr Bai were liable to penalties for the alleged breaches.

The Authority’s investigation

[14] Written witness statements from Mr Wang, Mr Bai and a BSV supervisor, Chen Liang, were lodged for the Authority’s investigation. Those witnesses attended the investigation meeting and, under affirmation, answered questions from me and the parties’ representatives. The representatives also gave closing submissions.

[15] 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. This determination has been issued outside the

usual statutory period as the Chief of Authority decided exceptional circumstances existed for the delay.¹

The issues

[16] The following factual and legal issues arose from Mr Wang's application for investigation and determination:

- (a) When was Mr Wang dismissed?
- (b) Was Mr Wang's dismissal, how it was decided and carried out, what a fair and reasonable employer could have done in all the circumstances at the time?
- (c) If BVS was found to have acted unjustifiably (by disadvantaging and/or dismissing Mr Wang), what remedies should he be awarded, considering:
 - Lost wages; and
 - Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Wang that contributed to the situation giving rise to his grievance?
- (e) Was Mr Wang owed any arrears of wages for unpaid hours of work, and/or sick leave and/or annual leave and public holiday pay?
- (f) If so, what orders for payment of arrears should be made?
- (g) If Mr Wang is owed arrears of wages, is BSV liable to a penalty for breach of the statutory requirements for payment of those amounts and, if so, what penalty should be imposed?
- (h) If any breach of Mr Wang's employment agreement was established, did Mr Bai aid and abet that breach and, if so, should a penalty be imposed on Mr Bai under s 134(2) of the Act?
- (i) If any breach by BSV of the Holidays Act 2003 is established, was Mr Bai involved in that breach and, if so, should a penalty be imposed under s 75 of that act?
- (j) Should either party contribute to the costs of representation of the other party?

¹ Employment Relations Act 2000, s 174C(4).

Deterioration of the employment relationship

[17] While the first two years of Mr Wang's employment with BSV seems to have gone smoothly, the workplace relationship deteriorated during 2019.

[18] In part this arose from tensions over a bill Mr Wang got from Inland Revenue in April 2019. The bill was for a shortfall in the income tax BSV had paid to IRD on Mr Wang's earnings in previous years. IRD calculated he owed around \$2,200.

[19] This shortfall occurred because of errors in calculations made in the payroll system BSV used at the time. Other BSV employees also received demands from IRD to pay for shortfalls in the PAYE income tax deducted in BSV's payroll system.

[20] While other employees then paid those amounts to IRD, Mr Wang took the view that BSV should pay his bill. He considered BSV was responsible for the debt because it had not, as his employer, deducted the correct amount in the first place. He did not accept explanations Mr Bai and the company's accountant offered. They told him BSV's admitted error had resulted in him getting paid more net pay than he was due and he was liable to pay the IRD debt from those additional funds.

[21] In December 2019 Mr Bai agreed to Mr Wang's request to pay his IRD debt. In his evidence Mr Bai said he agreed to do so because he wanted his staff to be happy and he did not want Mr Wang's discontent about the issue to affect other employees. Company records show the payment was made to IRD on 20 January 2020.

[22] Meanwhile some other tensions arose or continued between Mr Wang and other employees, including with the paint area supervisor Mr Chen.

[23] Mr Chen felt Mr Wang was reluctant to follow his instructions and to co-operate with other employees. One example he gave in his evidence concerned use of one of two spray rooms used for painting work. He and other workers considered that Mr Wang monopolised use of one of those rooms in a way that hampered their ability to get through their work on other cars.

[24] Another example concerned an incident in December 2019 when Mr Chen and Mr Wang had a heated argument and other staff present stepped in to physically separate them. Mr Chen had asked Mr Wang to clean a spray gun in a designated area for cleaning tools rather than in front of the painting workshop. Mr Wang, in his

evidence, said Mr Chen had “verbally attacked” him for no reason while Mr Chen, in his evidence, said the argument happened because Mr Wang swore at Mr Chen and had “a very bad attitude to him”.

[25] Following that incident Mr Chen stepped down as supervisor. Mr Bai then appointed Mr Wang as the supervisor. Mr Bai said he did so because he thought giving Mr Wang more responsibility would give him “an opportunity to improve”. A few weeks later, however, Mr Wang stopped carrying out the supervisor role and returned to his original painter position.

[26] On 28 December 2019 Mr Bai called Mr Wang to a meeting. The two men had different accounts of their discussion in that meeting.

[27] Mr Bai said he talked to Mr Wang about what appeared to be a change in his attitude to his work and not co-operating with other workers. Mr Bai referred to complaints from other workers about how Mr Wang’s use of one spray room affected their work and their view that Mr Wang took easier work for himself and left them the more complex jobs. Mr Bai said he also talked to Mr Wang about the importance of using a WeChat group set up for workers in the business to both take photos of car number plates and to type the plate number into an accompanying message. This was the system BSV used to collect information it needed to send to an insurance company which provided some of its repair and panel beating work. The requirement to record details in this way became relevant in later issues.

[28] Mr Bai said Mr Wang told him he was not happy working at BSV and they had discussed the possibility of Mr Wang resigning.

[29] Mr Wang said he could not remember clearly what was discussed in the meeting but said Mr Bai had not talked to him about the issues referred to in his evidence. Instead Mr Wang said Mr Bai had told him “to find another job and not to come back to work after two weeks”.

[30] Shortly after that discussion Mr Wang successfully renewed his work visa in an application supported by BSV. The conditions of that visa, in effect from 17 January 2020, still required him to work only for BSV.

[31] In early March 2020 another instance of conflict between Mr Wang and other workers arose over uploading photos of cars to the work WeChat group and manually entering the license plate number of the vehicle. Having the plate number in the text messages made it easier for the office administrator to search for information to be sent to the insurance company. If the workers in the workshop provided only a photo of the car number plate, the administrator could not search for its electronically but had to manually scroll through many hundreds of photos.

[32] When Mr Wang was reminded about the requirement to include the plate number in the WeChat text, he questioned why providing the photo was not enough. In the message exchange that followed the office manager said other employees were typing the plate number manually and asked “why it’s so difficult for you to do so”. She wrote that if Mr Wang had time to write messages questioning the policy, he should have time to type the plate numbers. The exchange continued:

Office manager: We are not discussing with you. It’s the company requirement. You need to follow the company’s rule if you still work in this company. Otherwise, you could choose to leave.

Mr Wang: Does your words count? Let me know when you want me to leave then I will leave.

[33] Mr Bai’s evidence was that this incident was one of his reasons for giving Mr Wang the letter on 21 March terminating his employment. His other reasons were that two staff had left BSV around that time, telling him that they did not want to work with Mr Wang and Mr Wang had made an error in work done on a car.

[34] Mr Bai said he subsequently did not include Mr Wang in applications made for wage subsidies for BSV employees during the national lockdown because Mr Wang had already been dismissed by that time.

[35] Mr Bai said he had allowed Mr Wang to return to work when the business reopened on 28 April because he felt sorry for him. He said he reduced Mr Wang’s days of work in early May because the effects of the Covid pandemic meant there was not enough work for all employees and, “since the company had already given him a dismissal letter”, Mr Wang would not be working at BSV for much longer anyway.

[36] Mr Bai said Mr Wang responded to that change by threatening to report him to Immigration New Zealand, IRD and the insurance company that supplied work to BSV.

This contributed to Mr Bai's decision to tell Mr Wang on 23 May that his employment at BSV was at an end. In doing so he relied on the reasons he had for issuing his letter on 21 March telling Mr Wang that his employment with BSV was terminated. In his oral evidence Mr Bai summarised those reasons as being about Mr Wang not getting some work done, other staff leaving because they did not want to work with Mr Wang, not following orders and not working as part of a team with other employees.

Two acts of dismissal

[37] From that account of what happened, it was clear there were two acts of dismissal – the first occurred on 21 March 2020 with the issuing of a letter of termination, the second occurred on 23 May 2020 when Mr Bai told Mr Wang not to come back to work.

[38] On both occasions, what Mr Bai did on behalf of BSV failed to meet the statutory test of justification, that is whether his actions were what a fair and reasonable employer could have done in all the circumstances at the time. On Mr Bai's own account of what he did, and why he did it, BSV had not given Mr Wang the required opportunities to be told of the company's concerns and to have a reasonable opportunity to respond to them before any decisions were made.

[39] For example, Mr Wang was not given a fair opportunity to respond to the complaints made about him by other staff – including by Mr Chen, by the office manager who had the WeChat exchange over the vehicle plate numbers and by the employees who were said to have left BSV's employment because they did not like working with Mr Wang.

[40] While Mr Bai could legitimately raise concerns of conduct and performance, Mr Wang was not given an adequate opportunity to seek advice or representation or to comment on the information Mr Bai was relying on before the disciplinary consequence of dismissal was imposed. This meant Mr Wang was also denied the opportunity that a fairly conducted disciplinary meeting about his performance could have provided – that is the setting of clear steps against which his conduct could be measured before, if he did not meet such standards, further disciplinary action up to and including dismissal could justifiably be carried out.

[41] And, while it was clear that BSV intended to dismiss Mr Wang on 21 March, the employment relationship effectively continued when the company acquiesced to Mr Wang continuing to work (and paying him for that work) after 21 March until the 25 March lockdown and then by allowing him to come back to work from 28 April when the lockdown was lifted and the business reopened.

[42] BSV submitted the employment relationship in that period should be treated as being casual only from 28 April rather than resuming on its previous permanent and ongoing basis. The evidence did not establish any such change was negotiated and agreed with Mr Wang as the basis on which he resumed work in April. This meant BSV was obliged to act fairly and reasonably in seeking to reduce Mr Wang's days of work from 9 May and in, again, taking steps to end his employment on 23 May. For reasons already given, it failed to meet that standard on this second occasion.

[43] As a result Mr Wang had established a personal grievance for unjustified dismissal. He was entitled to an assessment of remedies to address that grievance.

Remedies

Lost wages

[44] Mr Wang got another job in his field of work and experience three weeks after his employment with BSV ended in late May. BSV said it paid him for a three week notice period after his dismissal on 23 May so there was, in effect, no loss of remuneration for him in that period. Mr Wang's bank statements show wage payments made to him in June 2020 by BSV which appear to be for that notice period, so no award of lost wages needed to be made for those weeks.

[45] However there was a loss of wages for the earlier period where BSV treated Mr Wang as having been dismissed from 21 March 2020. Mr Bai said he applied in late March for wage subsidies for other employees but did not include Mr Wang in that application because he considered he had already dismissed Mr Wang. As a result Mr Wang was not paid any wages during the lockdown period, to his disadvantage compared with other employees. Rather than treat wages for that period as a wage arrears matter, it is appropriately regarded as a matter for remedy by reimbursement for wages lost by an employee as a result of a grievance under s 123(1)(b) of the Act. During that period of lockdown he was not able to mitigate that loss by working elsewhere, even if he could lawfully have done so under the terms of his tied visa.

[46] He was paid for two weeks up to 4 April, following the 21 March termination letter, so his loss was for the usual working days between 6 and 25 April, effectively three weeks. The amount claimed for those weeks was not specified in Mr Wang's statement of problem, written witness statement or oral evidence. Taking his hourly rate of \$24 at that time and allowing for a 40-hour week (which is a discount on the additional hours worked on Saturdays), the relevant amount for a three week period was \$2,880. This is the amount awarded in reimbursement of wages lost in that period, which BSV must pay Mr Wang within 28 days of the date of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[47] Mr Wang gave evidence of being upset by the two occasions when BSV told him his employment was being terminated. He described himself as being under a lot of stress and anxiety over his income and his future as a result of the company's actions. As a worker whose ability to work in New Zealand was, under the terms of his visa at that time, tied to working only for BSV, Mr Wang was in a particularly vulnerable position. It increased the distress he experienced due to the company's unjustified actions. Weighing the circumstances of his case with the range of awards made in similar cases, an appropriate award of compensation for the humiliation, loss of dignity and injury to feelings Mr Wang suffered is \$15,000. Subject to the deduction applied for contributory conduct, this compensation is awarded under s 123(1)(c)(i) of the Act and must be paid to Mr Wang within 28 days of the date of this determination.

Contributory conduct

[48] Under s 124 of the Act the Authority must consider whether any remedies awarded for a personal grievance should be reduced due to any blameworthy conduct by Mr Wang that contributed to the situation that gave rise to his personal grievance.

[49] Mr Wang did not contribute to BSV's failures to properly conduct disciplinary processes and fairly make its decisions to dismiss him. However, on the evidence examined at length in the Authority investigation meeting, there was no doubt that some blameworthy behaviour by Mr Wang had contributed to the situation giving rise to his grievance, specifically in relation to not following some company procedures and how he behaved towards supervisors. If BSV had conducted a fair process, it more likely than not could have reasonably concluded disciplinary action in the form of warnings should be imposed for Mr Wang's conduct on those occasions. To mark that

blameworthy conduct, the distress compensation award is reduced by ten per cent to \$13,500. This reduction is not imposed on the lost wages component of the remedies.

Wage arrears claims

[50] Mr Wang's application included an extensive claim for arrears of wages said to arise from shortcomings in payments made for some of his ordinary working hours, sick leave, public holidays and annual leave. Conclusions on those claims can be expressed relatively briefly.

Additional hours

[51] Mr Wang said there was a period of about 30 weeks from the beginning of his employment when he was required to start work at 8am rather than that starting time of 8.30am set in his employment agreement. He said he worked that additional half hour but was not paid for it.

[52] Close scrutiny of BSV time records, showing the time at which Mr Wang clocked in on days during this period, did not support his claim. Rather those records showed he usually arrived at work some time between 8 am and 8.30 am but did not establish he started work before 8.30 am. His claim for wage arrears on that ground is declined.

Sick leave

[53] Mr Wang said he was not paid for four days on which he was entitled to sick leave. Mr Bai, in his evidence, admitted the company's sick leave policy had not complied with statutory requirements in the earlier part of Mr Wang's employment but BSV wage records also showed that Mr Wang was later paid for sick leave for those four days. Mr Wang's claim for wage arrears on that ground is declined.

Public holidays

[54] Mr Wang said he was not properly paid for public holidays he worked. BSV's pay records showed he was paid for those days, including the half-time pay loading.

Annual leave

[55] Mr Wang said he was not paid holiday pay for the period from 1 January to 23 May 2020. BSV's pay records show Mr Wang was paid holiday pay he was due. Mr Wang's claim for wage arrears on that ground is declined.

Claims for penalties and findings of involvement in breaches declined

[56] Because of the findings made about Mr Wang's wage arrears claims, it was not appropriate to impose penalties on BSV for breaches of employment standards or for Mr Bai either aiding or abetting or being involved in such breaches. It was clear there were some inadequacies in how BSV's payroll system operated in the earlier years of Mr Wang's employment and BSV had operated an informal policy regarding sick leave which did not match the statutory requirements. There was, however, no sufficient reason to disbelieve Mr Bai's evidence that those shortcomings had since been addressed and not repeated. Mr Wang's claims for orders on those grounds is declined.

Costs

[57] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Wang may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum BSV 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.

[58] 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.²

Robin Arthur
Member of the Employment Relations Authority

² See www.era.govt.nz/determinations/awarding-costs-remedies..