

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 399  
3137115

BETWEEN RUILIANG CHEN  
Applicant

AND JERRY KITCHEN & BATH  
LIMITED  
First Respondent

AND YU FANG  
Second Respondent

Member of Authority: Rachel Larmer

Representatives: David Kim, advocate for the Applicant  
May Moncur, advocate for the Respondents

Investigation Meeting: 21 June 2022 at Auckland

Submissions Received: 23 June 2022 from the Applicant  
23 June 2022 from the Respondent

Date of Determination: 19 August 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

*The parties*

[1] The first respondent Jerry Kitchen & Bath Limited is a family business that has been owned and operated by Mr Fang and his wife since 2018. It sells kitchen and bathroom products and offers related installation services to its customers.

[2] The second respondent, Mr Yu Fang is the director of the first respondent.

[3] Mr Ruiliang Chen was employed by the first respondent from 5 to 14 October 2020. The parties agreed at the outset that Mr Chen would be employed on a trial basis to assess his suitability to carry out handyman and general labouring duties for the first respondent's business.

*Offer of a trial period*

[4] Mr Chen had been trained as a Chinese chef but he had wanted to make a change and work in the building industry or related areas. Mr Fang was initially hesitant to offer Mr Chen employment (with the first respondent) because he had no previous relevant experience.

[5] Mr Fang expressed concern about Mr Chen not having relevant experience, so the parties agreed there would be a 90 day trial period during which Mr Fang could assess Mr Chen's suitability for the role.

[6] Mr Fang signed a standard employment agreement that contained a 90 day trial period provision for his wife to pass on to Mr Chen to sign. However, his wife failed to pass it on to Mr Chen, who therefore did not sign the written employment agreement that contained the trial period before he started work. However, Mr Fang did not know that.

*The dismissal*

[7] Mr Fang believed the first respondent could end Mr Chen's employment during the trial period if he was unsuitable for the role because he (Mr Fang) thought Mr Chen had signed the employment agreement he (Mr Fang) had signed.

[8] After Mr Chen had worked for ten days, Mr Fang concluded that Mr Chen was unsuitable for the role and that he was not going to be able to be trained to the required standard. Mr Fang on behalf of the first respondent therefore dismissed Mr Chen in accordance with what Mr Fang believed was the trial period provision in Mr Chen's employment agreement.

*Mr Chen's claims*

[9] Mr Chen claimed his dismissal was unjustified, he had been unjustifiably disadvantaged because he had not been paid the minimum wage for the hours he had worked, and that he was owed wage arrears.

[10] Mr Chen said he had not been given an employment agreement and he had not been given paid rest breaks while employed, in breach of s 69ZD of the Employment Relations Act 2000 (the Act).

[11] Mr Chen also sought penalties be imposed for breaches of the Minimum Wages Act 1983 for not paying him the minimum wage, the Holidays Act 2003 (the HA03) for not paying his correct annual holiday entitlements when his employment ended, and the Act for failing to provide him with a written employment agreement and for failing to provide him with paid rest breaks.

[12] Mr Fang did not find out until after Mr Chen raised a personal grievance for unjustified dismissal that his wife had not obtained a signed copy of the employment agreement from Mr Chen.

[13] After becoming aware of that mistake (failure to obtain signed employment agreement) the first respondent accepted that it had ended Mr Chen's employment in a procedurally unfair way. It therefore acknowledged that Mr Chen's dismissal was procedurally unjustified.

[14] However, the first respondent said it had good reasons for dismissing Mr Chen and that he had contributed to the situation that gave rise to his dismissal.

[15] Mr Fang told the Authority that when he and his wife purchased the business in 2018 they obtained employment documentation from their lawyer and accountant to ensure they were operating the first respondent in accordance with its legal obligations. That included receiving an employment agreement template that the first respondent had used for all of its employees.

[16] Mr Fang said that the situation with Mr Chen was a one off error because all other employees had written employment agreements.

[17] The first respondent also operated a fingerprint time recording system to keep an accurate record of the days, times and total hours employees worked. The payroll payments made to employees were based on the fingerprint time recording records. It was clear from that Mr Chen had been paid more than the minimum wage for the hours he worked.

## **Authority's investigation**

### *In person IM*

[18] The Authority held an in-person investigation meeting and was assisted by a Mandarin interpreter. Both parties were represented by advocates who attended the investigation meeting.

[19] Mr Chen gave evidence in support of his claims and Mr Fang gave evidence for the respondents. For health reasons Mr Chen's daughter gave evidence by Zoom while Mr Chen and Mr Fang appeared in person.

[20] The parties provided further evidence regarding the fingerprint recording records after the investigation meeting. The parties also filed submissions.

### *Post IM information*

[21] The parties advised the Authority that as a result of the information obtained during the investigation meeting, and from the fingerprint time recording records, they had now agreed on the amount of wage arrears Mr Chen was owed. The first respondent had also arranged to pay that to Mr Chen before the parties filed their submissions on 23 June 2022.

[22] It appeared that the error in the calculation of Mr Chen's wages occurred because he had not used the fingerprint punch card machine to record his attendance and work hours for every day or for all of the time he had actually worked.

### *Partial settlement of claims*

[23] The first respondent paid Mr Chen \$342.09 wage arrears plus \$27.36 being 8% holiday pay on that wage arrears amount. On that basis Mr Chen withdrew his wage arrears and unjustified disadvantage claims, as he accepted he had been paid more than the minimum wage for the hours he had worked.

## **Issues**

[24] The following outstanding issues were to be determined by the Authority;

- (a) Does the Authority have jurisdiction over claims Mr Chen made against the second respondent?
- (b) Was Mr Chen's dismissal justified?

- (c) If not, what remedies should Mr Chen be awarded?
- (d) Should any remedies Mr Chen may be awarded be reduced under s 124 of the Act, on the grounds of contribution?
- (e) Did the first respondent fail to provide Mr Chen with paid rest breaks?
- (f) What if any penalties should be imposed on the respondents?
- (g) Should some or all of any penalties that may be imposed be paid to Mr Chen personally instead of the Crown?
- (h) What if any costs and disbursements should the successful party be awarded?

**Does the Authority have jurisdiction over the claims against the second respondent?**

[25] Mr Fang was joined as a personally named second respondent because in the absence of an employment agreement Mr Chen initially was not clear about who had employed him, whether it was the first respondent or the second respondent. However, in his witness statement and evidence to the Authority, Mr Chen confirmed that he had been employed by the first respondent.

[26] Mr Chen's statement of problem sought penalties against Mr Fang personally as the named second respondent, but those penalty claims were based on Mr Fang personally being Mr Chen's employer.

[27] Mr Chen was not personally employed by Mr Fang. Mr Chen's employer was the first respondent. The penalties Mr Chen claimed in his Statement of Problem may only be imposed on his employer. There were no claims made in the Statement of Problem against Mr Fang personally (as opposed to penalty claims being made against him in case he was the employer).

[28] On that basis the Authority did not have before it any claims against Mr Fang personally that were capable of determination because Mr Fang and Mr Chen were never in an employment relationship.

[29] Accordingly, the Authority does not have jurisdiction over the claims Mr Chen has made against Mr Fang personally.

## **Was Mr Chen's dismissal justified?**

### *Justification test*

[30] Justification is to be objectively assessed in accordance with the justification test in s 103A(2) of the Act. This requires the Authority to objectively assess whether the employer's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Mr Chen was dismissed.

[31] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith requirements in s 4 of the Act and each of the four procedural fairness tests in s 103A(3) of the Act. Failure to do so is likely to fundamentally undermine an employer's ability to justify a dismissal or in the case of a disadvantage claim other action.

### *Good faith*

[32] The first respondent failed to comply with its good faith obligations under s 4(1A)(c) of the Act to provide Mr Chen with access to information and an opportunity to comment on it before it made a final decision to end Mr Chen's employment.

### *Procedural fairness*

[33] The first respondent did not;

- (a) Appropriately investigate its concerns about Mr Chen's suitability for the position, in breach of s 103A(3)(a) of the Act;
- (b) Adequately raise its concerns with Mr Chen, in breach of s 103A(3)(b) of the Act;
- (c) Give Mr Chen a reasonable opportunity to respond to its concerns that he was unsuitable for his role, in breach of s 103A(3)(c) of the Act;
- (d) Genuinely consider Mr Chen's explanation because he was not given a reasonable opportunity to address the first respondent's concerns, in breach of s 103A(3)(d) of the Act.

[34] The first respondent's failure to follow a fair and proper process regarding the concerns it had about Mr Chen's unsuitability for the position and/or its view that he lacked the physical capacity to undertake core elements of the role meant that it failed to comply with any of the four procedural fairness tests in s 103A(3) of the Act.

*Dismissal was procedurally unjustified*

[35] The first respondent's dismissal of Mr Chen was procedurally unjustified because it failed to comply with its good faith obligations or any of the four procedural fairness tests in s 103A(3) of the Act.

*Substantive justification*

[36] Mr Chen had caused \$1,000 worth of damage to the kitchen cabinets in his first nine days of work. He also was unable to cope with the physical requirements of the role in terms of moving cabinets around or assembling them. His work was substandard and he was unable to meet the required throughput.

[37] As a small business the first respondent did not have the resources to be able to train Mr Chen for a role he was also physically unsuited for.

[38] The evidence therefore established that the first respondent had good reasons on reasonable grounds for concluding that Mr Chen was unsuitable for the role and could not be trained to meet the requirements of the role.

[39] The Authority was satisfied that even if a fair and proper process had been used by the first respondent that still would have resulted in Mr Chen's employment being ended because he did not meet, and was unable to meet, the core requirements of the position as it involved moderately heavy lifting Mr Chen was unable to do.

[40] The Authority therefore finds that Mr Chen's dismissal was substantively justified in that the first respondent had good reasons for concluding that he was unsuited to the role and could not be trained to do it to the required standard.

[41] Mr Chen's dismissal was therefore substantively justified.

**What remedies should Mr Chen be awarded?***Lost remuneration*

[42] Because Mr Chen's dismissal was procedurally unjustified, but otherwise substantively justified, he is not entitled to an award of lost remuneration.

*Distress compensation*

[43] Mr Chen is entitled to an award of distress compensation in recognition of the hurt, humiliation and distress he suffered as a result of his procedurally unjustified dismissal.

[44] Mr Chen gave evidence to the Authority that he was shocked, hurt and upset to lose his job and that his dismissal had caught him off guard. Mr Chen felt a lot of worry about his mortgage and personal loan repayments, it affected his self-worth, his appetite, sleep and general wellbeing.

[45] Mr Chen's dismissal put him and his wife in an embarrassed financial position because they had depleted their savings during the Covid lockdowns. Mr Chen lost the ability to maintain his daily expenses at the level he had prior to his dismissal, so his daughter helped out with food and daily items.

[46] The first respondent is ordered to pay Mr Chen \$10,000 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his procedurally unjustified dismissal.

**Should remedies be reduced under s 124 of the Act on the grounds of contribution?**

[47] Section 124 of the Act requires the Authority to consider whether Mr Chen's actions contributed to the situation that gave rise to his dismissal grievance, and if required to reduce remedies accordingly.

[48] Mr Chen did contribute to the situation that gave rise to his dismissal grievance because he caused \$1,000 of damage during his first few days of work. That was blameworthy conduct.

[49] The Authority considered that this blameworthy conduct had already been addressed by the finding that Mr Chen's dismissal was substantively justified, because he did not have the physical capacity to do the work required of him, he did not meet the requirements of the role and the first respondent did not have the time or resources available to be able to train him to the point where he would do so.

[50] Mr Chen has only been awarded distress compensation because the finding of substantive justification prevented him from recovering lost remuneration. Mr Chen has therefore already suffered the financial consequences of his blameworthy conduct. A further reduction to the award of distress compensation was not necessary or appropriate.

**Did the first respondent fail to provide Mr Chen with paid rest breaks?**

[51] Mr Chen agreed he was a heavy smoker. The evidence established Mr Chen would regularly take time out during his working day to smoke. Mr Chen was able to do that whenever he wanted to have a cigarette during normal working hours.

[52] The Authority was therefore satisfied that Mr Chen self-managed his time to provide himself with regular rest breaks, during which he would smoke cigarettes. Accordingly, Mr Chen's claim that he was not provided with rest breaks did not succeed, so there is no issue as to penalties.

**What penalties if any should be imposed on the first respondent?***Mr Chen not given written employment agreement*

[53] The first respondent's failure to give Mr Chen a written employment agreement was a one off mistake. Mr Fang believed that his wife had provided Mr Chen with his employment agreement but she had not done so.

[54] Mr Chen was aware that he had been engaged on a trial period basis while his suitability for the position was going to be assessed because it was not clear at the pre-employment stage that he would have been able to do the job required of him. Mr Chen told Mr Fang at the pre-employment stage that he would happily move on if he was unsuitable for the role but asked to be given a chance to prove himself.

[55] Normally the Authority would impose a penalty for the failure to provide an employment agreement. However, in this case the first respondent has already been financially affected by its mistake because it has had to pay \$10,000 distress compensation to Mr Chen, even though the parties had verbally agreed on a trial period before Mr Chen accepted the offer of employment.

[56] The mistake has been an expensive one. As well as distress compensation the first respondent has to contribute towards Mr Chen's legal costs as well as pay its own legal costs.

[57] The Authority considered that the usual punishment and deterrence objectives associated with imposing penalties did not require a penalty to be imposed for this particular breach. Mr Fang expressed remorse for the mistake and apologised for the oversight to Mr Chen. It is unlikely this error would occur again.

*Annual holiday pay not paid correctly*

[58] The first respondent paid Mr Chen \$1,528.86 gross in his final pay. That included 8% annual holiday pay based on the hours the first respondent believed Mr Chen had worked.

[59] As it turned out, after investigation, Mr Chen was entitled to \$27.36 more annual holiday pay than he was paid in his final pay. The difference in the amount paid was due to there being a genuine dispute about the number of hours that Mr Chen had actually worked.

[60] It was unclear until the evidence was tested during the investigation meeting, the fingerprint punch card machine data was reviewed after the investigation meeting and reviewed alongside emails that referred to Mr Chen's actual working hours, that the dispute about how many hours Mr Chen had actually worked resolved. As soon as that happened, the first respondent paid Mr Chen the extra \$27.36 holiday pay he was owed.

[61] The "Employee Payee Summary Report" on which the final pay was based shows that the annual holiday was calculated in accordance with the hours of work that had been recorded as per the fingerprint time recording machine.

[62] The Authority accepted Mr Fang's evidence that at the time the final pay payment was made the first respondent believed it had paid Mr Chen correctly for the hours that he was recorded, as per the fingerprint time recording machine, as having worked.

[63] The Authority did not consider it necessary to impose penalties to punish or deter the first respondent from not paying Mr Chen the \$27.36 annual holiday pay arrears he should have been paid in his final pay. It occurred because Mr Chen had not used the fingerprint machine to clock in and clock out correctly each day he had worked. This was therefore a one off situation that the first respondent addressed as soon as the disputed hours issue was resolved.

*Summary*

[64] The Authority declined to impose penalties on the first respondent for its failure to provide Mr Chen with a written employment agreement or the failure to pay him his full annual holiday entitlements when his employment ended. The reasons for these breaches were unusual and did not require penalties be imposed.

[65] Accordingly, Mr Chen's penalties claims do not succeed.

**What costs should be awarded?**

[66] Mr Chen as the successful party is entitled to a contribution towards his actual legal costs.

[67] The Authority adopts its usual notional daily tariff based approach to costs. This matter involved a half day investigation meeting, so the notional starting point for assessing costs is \$2,250, being half of the one day notional daily tariff of \$4,500.

[68] The Authority is not aware of any factors that should result in the notional starting tariff being adjusted, so the first respondent is ordered to pay Mr Chen \$2,250 towards his actual costs and to reimburse him \$71.56 for his filing fee.

[69] The first respondent is ordered to pay Mr Chen \$2,321.56 towards his actual costs and disbursements.

**Summary**

[70] Within 28 days of the date of this determination, the first respondent is ordered to pay Mr Chen;

- (a) \$10,000 distress compensation under s 123(1)(c)(i) of the Act;
- (b) \$2,321.56 towards his actual costs and disbursements.

**Rachel Larmer**  
**Member of the Employment Relations Authority**