

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 424
3128955

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| BETWEEN | LILI WANG Applicant |
| AND | HAPPY EATING LIMITED First Respondent |
| AND | YING CAO Second Respondent |
| AND | XIAOLING SUN Third Respondent |

Member of Authority: Pam Nuttall

Representatives: David Kim for the Applicant
Martin Lyttelton and Shenshen Guan for the Respondents

Investigation Meeting: 9-10 February 2022 at Auckland

Submissions: From the Applicant on 15 February 2022
From the Respondents on 18 February 2022, 21 February 2022, 28 February 2022 and 7 March 2022

Further evidence: From the Applicant on 10 March 2022

Determination: 29 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Lili Wang was employed from 17 September 2019 until 17 October 2020 as a pastry chef in a restaurant owned and operated by Happy Eating Limited (Happy Eating).

[2] On 17 September 2020 Ms Wang says that she was unjustifiably dismissed by the third respondent, Xiaoling Sun, acting as the authorised agent of his wife, Ying Cao, the second respondent and sole director and shareholder of Happy Eating. Ms Wang’s account is that the dismissal followed her requests to be paid wage arrears for unpaid hours worked.

[3] Ms Wang claims that for much of her employment she was effectively working 60 hours over 6 days each week, but that she was not remunerated for the full hours that she worked and that the time sheets provided by her employer do not accurately record all of these hours.

[4] Ms Wang also claims that she was not paid full statutory entitlements for annual leave, sick leave, public holidays and paid rest breaks. She seeks wage arrears and payment of other outstanding entitlements, and penalties for breaches of the Employment Relations Act 2000 (the Act) the Holidays Act 2003 (HA) and the Minimum Wage Act 2003 (MWA). Penalties are sought from all three respondents.

[5] These claims are denied by Happy Eating. The company says that Ms Wang worked a rostered 40 hour week with up to 12.5 hours agreed overtime over the fortnightly pay period. It also asserts that Ms Wang left her employment by agreement with her employer and that she was paid annual leave, sick leave, public holidays and paid rest breaks. Breaches of minimum employment standards are denied.

The Authority’s investigation

[6] A preliminary determination in this matter¹ was issued on 10 March 2021 deciding matters as to requested redactions of material said to be prejudicial in the applicant’s statement of problem and associated documents. The Member’s preliminary determination found that some of this material was prejudicial in that it included information about material and events in the mediation process or contained “without prejudice” settlement offers. This prejudicial material was redacted from the file and was not available to me as the Authority Member investigating the substantive issues raised by the applicant. Other material was not found to be prejudicial, and its relevance, reliability and weight have been assessed as part of this investigation.

¹ *Lili Wang v Happy Eating Limited & Ors* [2021] NZERA 96, Member Campbell.

[7] For the Authority's investigation, written witness statements were lodged from Lili Wang, the applicant, Chen Zhao her landlady, Ying Cao, the second respondent and director of the first respondent and Xiaoling Sun, the third respondent, Ms Cao's husband. These witnesses answered questions under affirmation from me and the parties' representatives. An interpreter of Mandarin was available to assist witnesses, where needed, to translate questions asked of them and the answers they gave.

[8] Written witness statements were also received from Martin Lyttelton and Shenshen Guan. Both these persons presented themselves in the investigation meeting as representing the respondents. Mr Lyttelton's statement related to documents derived from a Google app on Ms Wang's phone and put in evidence by her. This is discussed further (below) at [25]-[28]. Ms Guan's statement related to the transcription and translation of a recording put in evidence by the applicant. This is also discussed further (below) at [33]-[37]. Subsequently, much of the material in Mr Lyttelton's statement was presented to the Authority again in the form of closing written submissions. Neither Ms Guan or Mr Lyttelton were questioned by the Member or the representative of the applicant as to the material contained in these statements. These written statements and the material provided in the closing submissions have been considered along with other material provided to the Authority.

[9] On 14 February 2022 I issued a Minute timetabling written submissions and giving directions as to the provision of further evidence, referred to but not provided at the investigation meeting.

[10] Written closing statements were subsequently lodged with the Authority from both parties. Submissions were received from the applicant on 15 February 2022 and from the respondents on 18 February 2022, 21 February 2022, 28 February 2022, and 7 March 2022. Further evidence was provided by the applicant on 10 March 2022.

[11] 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.

[12] This determination has not been issued within the three month period required by s174C(3) of the Employment Relations Act (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.

The issues

[13] The issues requiring investigation and determination were:

- a) Was Ms Wang unjustifiably dismissed?
- b) Was Ms Wang unjustifiably disadvantaged in her employment with the respondent?
- c) If Happy Eating's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - i. Lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and
 - ii. Compensation under s123(1)(c)(i) of the Act
- d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Wang that contributed to the situation giving rise to her grievance?
- e) Is Ms Wang owed arrears of wages by Happy Eating?
- f) Is Ms Wang owed payment for rest breaks by Happy Eating?
- g) Is Ms Wang owed holiday pay by Happy Eating?
- h) Is Ms Wang owed sick leave payments by Happy Eating?
- i) Have there been breaches of the Act, of the HA and of the MWA?
- j) If so, should penalties be imposed for these breaches?
- k) Should either party contribute to the costs of representation of the other party?

What hours did Ms Wang work?

[14] Evidence as to Ms Wang's hours of work was provided to the Authority from a variety of sources. The information included:

- a. Individual employment agreement
- b. Ms Wang's witness statement
- c. Handwritten time records kept by Ms Wang
- d. Information downloaded from Google Local History, an app installed on Ms Wang's phone. This information purported to identify the

location of the phone on specified dates and times and was put in evidence by Ms Wang as corroborating her record of her working hours.

- e. Payroll records and handwritten time sheets provided by the respondent.
- f. Comments about hours worked made by the third respondent in an audio recording of a conversation between Ms Wang and Mr Sun on 21 September. The parties proffered competing versions of the transcription and translation of this recording.
- g. Witness statement of Ms Zhao.

Employment agreement

[15] Ms Wang had worked in the restaurant before the business was purchased by Happy Eating. She negotiated with Ms Cao to continue working there as an employee of the company when it took over the restaurant on 1 July 2019. The employment agreement with Happy Eating was prepared by Ms Wang's immigration agent because Ms Cao had not run a restaurant business previously and did not have her own agreement template.

[16] Ms Wang did not initially proceed with this employment, finding better remunerated work elsewhere, but then discovered that there would be issues with her immigration visa. She contacted Ms Cao on 2 August 2019 to say she still wanted to be employed by Happy Eating and commenced work on 17 September 2019 on the terms and conditions previously agreed and signed in June 2019.

[17] The individual employment agreement specified an hourly rate of \$21.25 (gross) or NZ\$ 44,200.00 (gross) annually based on a 40 hour working week. Overtime was stated to be by agreement between the parties. Ms Wang and Ms Cao also negotiated an arrangement not recorded in the employment agreement. In addition to the \$1,416.58 net fortnightly (\$1,700 gross) which was paid into Ms Wang's bank account, a net cash payment of \$200 was to be made to Ms Wang each fortnight. The parties gave conflicting evidence as to what this cash payment covered. It was Ms Cao's testimony that this cash payment was for up to 12.5 hours of overtime per fortnightly pay period and that the overtime would be recorded and revisited if the 12.5 hours per fortnight were exceeded. Ms Wang's evidence was that the cash payment was for a further 20 hours worked each week.

Ms Wang's witness statement

[18] Ms Wang's witness statement claims that she worked the following hours:

From the time I started to work [on 17 September 2019] to 25 March 2020, I worked 6 days a week except Monday. Every day, I started to work between 8am and 9am and finished work between 9pm and 9:30pm...I also had 1.5 to 2 hours afternoon break per day...Based on the above I worked at least 10 hours per day... I worked 40 hours per week from 28 April 2020 to 14 May 2020 but I worked 60 hours per week again from 15 May 2020 to 17 August 2020. From 18 August 2020 to 30 September 2020, the working hours for me became irregular.

[19] In support of these claimed hours of work Ms Wang produced handwritten records that she said she had kept in a notebook throughout her employment and also, from 3 March 2020, documents derived from a Google app, Google Local History, installed on her cell phone.

[20] Initially, the records Happy Eating produced indicate very regular 40 hour shifts from 10am-2pm and 4pm- 8pm over 5 weekdays from Tuesday to Saturday with some overtime, mostly as earlier starts, up to a total of 12.5 hours in a fortnight.

[21] From 2 February 2020 this roster was varied to spread the 40 hour week over 6 days from Tuesday to Sunday with a similar pattern of overtime hours. The roster was disrupted by the covid lockdown from 24 March 2020, then resumed on 28 April 2020. From 12 August 2020 when Auckland was again subject to a level 3 lockdown, the rostered work pattern as recorded by Happy Eating became more erratic. Happy Eating's records reflect the written terms of the agreement between the parties.

[22] The reliability of these various records of hours worked was contested.

Ms Wang's handwritten record in a notebook

[23] Was this a contemporaneous record? Ms Wang's evidence in response to questioning by respondents' counsel was that:

Sometimes when I got home in the afternoon I kept a record. Sometimes after two or three days I used the google for the record keeping.

[24] From 3 March 2020, when the documents based on the google app began to be generated, there is also a discernible difference in the pattern of recording in the handwritten record. Times are less frequently "rounded up" to the nearest hour or half-

hour and many of the entries recording a specific minute value eg 9.03, 8.41, 7.39, correspond to the time recorded in the google app record.

[25] Sporadic reliance on the google location records to compile the handwritten record reduces the weight it can be accorded as an independent and contemporaneous document providing evidence of hours worked.

The google app records

[26] From 3 March 2020 to 29 September 2020 Ms Wang provided google location records of her movements derived from an app, Google Local History, installed on her cell phone. Many of the times and distances provided relate to Ms Wang walking between her home and workplace. These records are relied on to support Ms Wang's account of the hours she worked in the restaurant.

[27] These google records were scrutinised by the respondents' representatives and a detailed analysis was presented in the witness statement and written submissions referred to above at [8]. These submissions are not expert evidence, and neither are they sworn testimony. However they do raise credible objection to the consistency of the google records with the distances "on the ground" between Ms Wang's home and her workplace. The respondents' explanation of these discrepancies is that the google records have subsequently been edited to show times different from those originally generated.

[28] This material was presented in documents available to both parties before the investigation meeting and also subsequently presented again in written submissions from the respondents. It was not responded to in the applicant's written submissions and no other material in rebuttal was presented in relation to these objections to the accuracy of the google records. In the absence of any further reliable evidence as to the credibility of the google app records, I am unable to exclude the possibility that these records may have been edited.

[29] Consequently, I am unable to accord them any significant weight in endeavouring to assess the hours Ms Wang worked.

Happy Eating's time records

[30] Ms Wang's testimony is that no wage and time records were kept during her employment and that "in response to my request and to match what they have wanted to tell, they simply fabricated one." In support of this contention, evidence is advanced that the time sheets provided to Ms Wang on 27 October 2020 wrongly record days on which she worked. For the most part, this evidence comprises reference to the google app records to show that she was not working on days when the google locator shows her in the vicinity of the restaurant or vice versa.

[31] However, for two of the days on which the records are said to be inaccurate different evidence is provided. On 25 December 2019, when the timesheets record Ms Wang as working, she has provided photos of herself at the beach with other employees. On 22 August 2020, when she is recorded as working, there are WeChat text messages with a friend and a photo showing Ms Wang apparently resting in bed.

[32] In rebuttal, Ms Cao's evidence is that the timesheets were instructions to the accountant for payroll purposes and that the record of 8 hours ordinary time work and 1.5 hours overtime were instructions to pay Ms Wang this amount for the Christmas Day holiday. The second day, 22 August 2022, was described as being recorded to ensure payment for sick leave. The records are insufficiently detailed to confirm this account and distinguish a payroll instruction to pay a day not worked from payment for an ordinary working day.

[33] It would appear that there were no contemporaneous payslips or other notification to Ms Wang of hours worked or wages paid. It was not possible to verify payment of the cash portion of Ms Wang's wages from any documentary evidence. A summary of hours worked and wages paid, and handwritten time sheets for some of the weeks worked, were provided in the common bundle of documents for the investigation meeting and these records match the amounts paid into Ms Wang's bank account. They are also congruent with detailed information as to Ms Wang's working hours provided in a letter from Happy Eating's representative to Ms Wang's representative on 8 October 2020.

The audio recordings

[34] Ms Wang also relied on an audio recording of a conversation between herself and Mr Sun on 15 September 2020 to support assertions that she had been working 60 hours a week. Prior to the investigation meeting the transcription and translation of this

recording was contested between the parties. Both parties proffered their own versions of the translation in the common bundle of documents. Ms Guan provided explanation and analysis in the statement referred to in [8] above comparing the two translations in some detail.

[35] However, in the investigation meeting I asked Ms Wang to identify exactly which parts of the recording she relied on to support her account that she had been working for 60 hours a week. She identified three short passages only.

[36] These three passages occurred in the context of what appeared to be an attempt at negotiating a reduction in hours for two staff members in order to retain them both in work. I have carefully compared the two proffered versions of the transcription and translation of these passages. While there does seem to be reference to 60 hours worked it is unclear to me that this is a conclusive reference to the prevailing situation. In the context it is uncertain as to whether this is a hypothetical illustration of how to calculate the reduction in hours or a specific proposition based on actual hours currently worked. Given that by the time of the recorded conversation Ms Wang's hours had become irregular during the covid 19 level 3 lockdown in Auckland in August 2020 I am not convinced that any mention of hours worked referred to a stable and on-going situation. I did not find that the transcripts of the recording assisted me in establishing the hours which Ms Wang had worked.

[37] A further recording was referred to in the investigation meeting. A Minute of the Authority issued subsequent to the investigation meeting on 14 February 2022 required the applicant to provide this recording to the respondents. The respondents were directed to provide the Authority with a transcript and independent translation so that the Authority could consider evidence in a form acceptable to the respondents. The respondents declined this opportunity to present the Authority with their own transcript and translation. Subsequently the applicant provided a transcript and translation of the recording which is dated by the applicant as being made on 21 September 2020.

[38] I did not find that the transcript and translation of this recording assisted me in determining the hours Ms Wang had worked either. I could not locate meaningful context for various figures mentioned in the translated dialogue and was unable to draw useful conclusions from the comments made. However both recordings did provide me with commentary about the extent of wage arrears which Ms Wang was seeking at the time she was still employed.

[39] A submission from the respondents alleged that further recordings existed but that the applicant had not supplied these because they did not provide evidence favourable to the applicant's position. As set out in the Member's Minute of 14 February 2022, the representative for the applicant, in the investigation meeting, had denied the existence of any further recordings touching the matter before the Authority. The representative for the applicant was directed to urgently seek instructions from the applicant as to whether the existence of any further such recordings may have been overlooked by the applicant's representative. The Authority and the respondents were notified that the applicant's instructions were that there were no further recordings.

Witness statement of Chen Zhao

[40] Ms Wang lived in Ms Zhao's house from June 2019 to 11 November 2020. Ms Zhao gave evidence that Ms Wang worked six days a week. She described Ms Wang generally leaving the house before 8am during her initial period of work at the restaurant but leaving between 8am and 9am in 2020. Ms Wang returned to the house for the afternoon break around 3.30pm and left again before 5pm. Following the April 2020 covid lockdown, Ms Zhao states that the afternoon break time became irregular. She says Ms Wang returned home in the evening between 8.30pm and 9.30pm or later. She stated that the house was about 5-10 minutes' walk from the restaurant.

[41] I found Ms Zhao to be a credible and sincere witness who would not be drawn into elaborating on the general account in her written statement. However, because this is a generalised overview, the times it sets out do not always overlap with Ms Wang's claims and it cannot be inferred that these times always apply throughout the entire period of Ms Wang's employment. This evidence is also open to the objection that it describes Ms Wang's movements to and from the house but cannot pinpoint her arrival at the workplace or the time she commenced a shift.

[42] However, the witness statement of Ms Cao seeks to support such objection with an account of Ms Wang and other staff relaxing on the restaurant premises, watching TV, using the wi-fi and freely using restaurant supplies for lunch or dinner in break times and before and after work. Since Ms Wang lived within walking distance of her workplace and the evidence that she returned home for the afternoon break is uncontested, this seems to be an inherently unlikely scenario and is denied in the applicant's legal submissions. I did not accept that discrepancies between the apparent records of the timing of Ms Wang's movements and Happy Eating's records of her

working hours could be accounted for by this account of staff relaxing on the restaurant premises.

What wage arrears did Ms Wang claim while she was employed?

[43] There is a discrepancy between the wage arrears Ms Wang raised with her employer while she was employed, and claims made subsequent to her employment. During her employment, some of the wage arrears that Ms Wang claimed were not paid to her appeared to relate to the arrangement that some of her remuneration would be paid in cash. In her written witness statement Ms Wang says that “the cash [payment of \$100 per week] was not paid all the time. 12 weeks were not paid from February 2020 to October 2020.” A text or social media message was sent to Ms Cao for Ms Wang on 16 September 2020 which reads “[m]ore than \$300 was short for my wage”.

[44] I asked Ms Wang about these wage arrears claims in the investigation meeting. It seems that the claim on 16 September was for a shortfall of about \$300 which related to underpayment following the August covid lockdown. Another wage arrears claim is referred to in one of the audio recordings. When asked about this in the investigation meeting Ms Wang responded that this shortfall related to a period before the August lockdown. She had been asked to come into the restaurant on a Monday to make more dumplings because business was very good and the demand for dumplings was high. She wanted to do some other things on Monday, which was her day off, so had agreed to come to the restaurant earlier than usual each day to make the dumplings. She calculated the actual hours that she worked amounted to seven hours.

[45] It seems that making a claim for payment of about \$300 in wage arrears is the event which Ms Wang says precipitated her dismissal. Ms Wang was clear in her oral evidence to the Authority that she did not raise claims for any larger amounts of wage arrears until after she was no longer employed by Happy Eating and had sought employment advice.

Discussion

[46] Happy Eating provided Ms Wang with a detailed response to her wage arrears claim on 8 October 2020 and provided time sheets on 27 October 2020. These responses are to wage arrears claims amounting to just over \$19,000. Happy Eating has provided wage and time records based on the 40 hour week agreed to in the employment

agreement and the undocumented arrangement, acknowledged by Ms Wang to pay an extra amount in cash of \$100 per week net to cover overtime.

[47] Given that this information was provided in a timely fashion when requested, there is no statutory discretion under s132(2) of the Act to accept that Ms Wang has proved her claims as to the hours, days and time she has worked. I have carefully reviewed the evidence set out above and considered the information provided to me by Ms Wang in response to my questions in the investigation meeting. On the balance of probabilities I find that Ms Wang has not established that her evidence and records of hours worked provides a more reliable account than the records provided by Happy Eating.

Was Ms Wang provided with paid rest breaks?

[48] Failure to provide paid rest breaks is alleged by the applicant. However during the investigation meeting, Ms Wang did refer to having meal breaks in the morning at times, even though it was not every morning. This appears to contradict other evidence provided by Ms Wang that she never got rest breaks, not once. On the balance of probabilities I find it more likely than not that opportunity to take rest breaks arose during the working day.

Was Ms Wang owed sick leave, public holiday pay and annual leave?

[49] Ms Wang had not received time and a half payment for each public holiday worked nor taken a day in lieu of these public holidays. These public holiday arrears were paid in her final pay on 17 October 2020. She also received two days sick leave payments and four weeks of annual leave payments on this date.

[50] Ms Wang claims that she is still owed arrears in payment of these entitlements because she has calculated the amounts owed to her on the basis of her claim to an entitlement to be paid wages for 60 hours worked per week.

[51] Since I have found that Ms Wang has not established a claim to be paid for 60 hours worked per week, these other claims for arrears of sick leave, public holiday pay and annual leave also fail.

Have there been breaches of the Act, of the HA and of the MWA?

[52] The claimed breaches of these statutes are also founded on the claim to an entitlement to be paid wages for 60 hours worked per week. Since I have found that Ms Wang has not established a claim to be paid for 60 hours worked per week, there are no grounds to find any legislative breach nor any grounds to award penalties against any of the respondents.

Was Ms Wang dismissed

[53] Ms Wang claims to have been dismissed on 17 September 2020 by Mr Sun, acting as the agent for his wife Ms Cao, the sole director and shareholder of Happy Eating. The fact of the dismissal is denied by Ms Cao and Mr Sun.

[54] Evidence of events on 17 September 2020 and subsequent days relies on the witness statements of Ms Wang and Mr Sun and their response to questioning in the investigation meeting. Comments made in the audio recording, said to have been recorded on 21 September 2020, may also be references to these events. However given the provenance and contested provision of this recording I have been unable to place any significant weight on its contents. Even if a translated transcription of this recording had been admitted by consent, much of the dialogue is elliptical in nature and requires relevant context to be meaningful to a third party. Without verifiable contextual evidence I was not able to rely on this transcript to assist me in my determination.

What happened according to Ms Wang's account?

[55] Ms Wang's account is that the sequence of events leading up to her dismissal began with her text message to Ms Cao on 16 September 2020: "More than \$300 was short for my wage." Ms Cao came to the restaurant and they talked. Ms Wang's translated response to my questioning was that when she [Ms Cao] arrived she was angry with a long face...didn't talk for about 10 minutes. Then she came to the kitchen and asked what pay is not paid to you. She was very angry and she said I'm not going to do the calculation for your pay and I will ask the accountant to do the calculation... Then she said I will give you some cash and I said if I knew this I wouldn't ask about the pay. She said the money paid to the card [Lili's bank account] is one portion. When I saw her being angry I dare not to say anything - I said such a little money. Such a small thing that can make you angry and I was trying to comfort her at the time.

[56] It seems that the shortfall in pay being discussed here was about \$300 according to Ms Wang's calculations and that the underpayment was in respect of the wages paid

into Ms Wang's bank account. The pay period seemed to relate to the level 3 lockdown in Auckland in August 2020 and Ms Wang accepted that the restaurant was open fewer hours but was insisting she had not been paid for all the hours she had worked in that period.

[57] Ms Wang said that on 17 September 2020, just after the lunch break she was asked by Mr Sun, Ms Cao's husband, to go outside. He was talking to her and saying to her that she was dismissed and no longer to be employed. He said to her that she had asked for the pay from his wife and his wife was very upset. She did not want to see Ms Wang and did not want her to work any longer in the restaurant. Ms Wang said she asked three times if they did not want to use her to confirm this was correct.

What happened after this?

[58] Ms Wang did not return to work for several days. After a few days Ms Wang says she was asked to return to work by Mr Sun. In response to my questions, Ms Wang clarified that this was Mr Sun's idea and that he said he needed to discuss this with his wife. There were phone calls and at least one face to face meeting between Ms Wang and Mr Sun. On 21 October it seems that there was a discussion which took place in Mr Sun's car outside Ms Wang's residence and that this is the interaction which was recorded and produced in translation by the applicant. Ms Wang told me that in this conversation Mr Sun said that his wife did not agree to her going back to work in the restaurant.

[59] At some point, perhaps shortly after this conversation, Ms Wang posted a video clip on a social media app saying that she had been dismissed. As a result of some further interaction Ms Wang returned to work at the restaurant. She seems to have believed that she was required to work out a notice period until 17 October 2020. She said she very much wanted this job and needed it for her visa. She says she went back to work the notice period because she thought the boss wanted me to go back so I went back. She says that: "I thought my visa was with them". Ms Wang had become very stressed and obtained medical certificates stating that she was unfit to work from 1 October 2020 until after the end of the notice period.

[60] In her written witness statement, and to the Authority, Ms Wang also said that she had been threatened. The written witness statement says the threats were that:

he [Mr Sun] would make me to have the chance to receive the money but no chance to spend it. Furthermore, he also said he would make me unable to find any new job if I continued to demand money from them. Truly as told by [Mr Sun], on 1 October 2020 after I officially left, he published a negative message in a Wechat group for restaurant owners In Auckland to damage the chance for my job seeking.

[61] The message posted on this Wechat group on 1 October 2020, was included in the common bundle of documents produced for the investigation meeting and reads (as translated):

Li* Wang, a Chinese pastry chef who holds a work visa with us, is making trouble. Pay attention, bosses, I just let you know in advance that you shall take your own consequence yourself if you employ her.

[62] On 28 September 2020 Ms Wang's witness statement says that she authorised David Kim to send a demand letter to have the outstanding wages paid and to inform Ms Cao and her husband that the employment relationship would terminate on 17 October 2020. This document was not available to me, but an attachment signed by Ms Wang was lodged with the Authority on 15 February 2022. It states that Ms Wang was informed on 17 September 2022 by Mr Sun on behalf of Ms Cao that the employment between Happy Eating and Ms Wang would be officially terminated on 18 September 2020.

What is Mr Sun's account of what happened?

[63] Mr Sun's written witness statement says that:

Due to the pressure from Covid and the lockdowns, [Ms Cao] was feeling very stressed...During this time, she had some disagreement with [Ms Wang], and [Ms Cao] had found it difficult to talk to [Ms Wang], so [Ms Cao] asked me to help her to speak to [Ms Wang], when they both had this disagreement over shift hours.

The main reason I became involved is because of [Ms Cao], as her mood had become (sic) so bad that she had to see a doctor, even a psychiatrist, and she still has needed treatment up until now...

I then went back to [Ms Wang] for her to come back to work, which she did for a couple of days, but then she stopped coming to work again and we received a doctor's certificate placing her off work for sick leave.

Everyone was stressed with the effects of the Covid lockdown. Unfortunately, [Ms Wang] did not understand the stress that [Ms Cao] was under, with running the business and the loss of revenues.

[64] However under questioning by the Authority, Mr Sun was less able to furnish a coherent account of events. He appeared to evade a direct answer to some initial questions related to a conversation about hours of work, then appeared unable to recall events on the 17 September 2020 and was pre-occupied with looking through his witness statement and addressing what he perceived as questions relating to an audio recording. Eventually he was able to focus on a conversation which Ms Cao had asked him to have with Ms Wang. He insisted that he was just talking to Ms Wang as a friend, but also agreed that he was talking to Ms Wang on behalf of Ms Cao. I asked the translator to assist with explaining the concept of delegating and acting on behalf of someone else. I was unable to clarify whether Mr Sun had addressed the question of Ms Wang leaving her employment with Happy Eating.

[65] When questioned as to whether he had asked Ms Wang to come back to work, Mr Sun provided contradictory responses. He said that his wife had told him to tell Ms Wang to come back to work. He also insisted it was his idea to find Ms Wang to sort things out, saying it was all his own decision to go to find her, he was not asked by his wife. Mr Sun denied having made threats to Ms Wang or having warned other bosses against her.

[66] A short break was taken at the end of Mr Sun's testimony. Following the break Mr Sun asked to clarify his evidence and read from written notes he said he had made during the break. In respect of the threats made against Ms Wang he said that he could have said something under the influence of alcohol. As for the Li Wang referred to in the Wechat group, Mr Sun said this was not Lili Wang but Wang Li, the baker, not the same person...a specialist in bakery stuff.

[67] In response to my enquiries as to where Wang Li worked, I was told he worked in the restaurant of a friend. However Mr Sun did not know the real name of this friend – he called him Brother Qiang. The restaurant was apparently in Dominion Road, but Mr Sun struggled to tell me whereabouts in Dominion Road it might be situated.

[68] I was not drawn to the sudden appearance of these two shadowy figures. I did not find that they had clarified Mr Sun's evidence or served to make his evidence more credible.

[69] I find that I must attach greater credibility to Ms Wang's account than that of Mr Sun. Weighing the two accounts provided, I find on the balance of probabilities that

Ms Wang was dismissed by Mr Sun, acting as the delegate of Happy Eating on the authorisation of Ms Cao. I also find that Ms Cao did not authorise that dismissal to be retracted.

Was Ms Wang's dismissal unjustified?

[70] Once the fact of a dismissal has been established, the Act requires that an employer must justify a decision to dismiss an employee. In doing so the Act requires the Authority to objectively assess whether the employer's actions and the way it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This means that the employer must have a substantive reason for dismissing the employee which would meet this objective test. It also means that establishing the existence of this reason and reaching a decision to dismiss must follow a fair process which complies with s103A(3) of the Act.

[71] Raising concerns about underpayment of wages, even if these concerns may be unfounded or misconceived, cannot be a reason for dismissal. The reactive nature of the dismissal, in a stressed and fraught environment means that no fair process appears to have been followed. Consequently the dismissal is unjustified.

Was Ms Wang unjustifiably disadvantaged

[72] The claim for unjustified disadvantage appears to have been related to claims of unpaid wage arrears and does not seem to have been pursued in the applicant's closing written submissions. Accordingly I do not find that Ms Wang was unjustifiably disadvantaged.

Remedies?

[73] Ms Wang has not provided an IRD summary of earnings and evidence of positions applied for as directed in the Member's Minute of 14 February 2022 and has elected not to pursue a remedy for lost wages under s123(1)(b) of the Act.

[74] Ms Wang has quantified compensation sought under s123(1)(c)(i) of the Act at \$15,000 but has not provided evidence of the effects of the unjustified actions on her under any of the three heads of compensation in this section. The statement of problem seeks a global award of compensation for both dismissal and disadvantage so that some of the actions for which compensation is sought are not applicable to a dismissal

grievance. Given the paucity of evidence on which to base an assessment of compensation, I have awarded \$4,000 because of the absence of any fair process being followed.

Contribution?

[75] I find that Ms Wang has not contributed to her dismissal by any blameworthy actions on her part.

Costs

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

[77] If they are not able to do so and an Authority determination on costs is needed Ms 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 Happy Eating Limited 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.

[78] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[79] 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

Pam Nuttall
Member of the Employment Relations Authority

² <<https://www.era.govt.nz/determinations/awarding-costs-remedies>>.