

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2022] NZERA 497
3154522

BETWEEN	PING DU Applicant
AND	ELEMENTS THERAPEUTIC MASSAGE LIMITED First Respondent
AND	XUAN ZHANG Second Respondent

Member of Authority: Antoinette Baker

Representatives: Rachel Brazil, counsel for the Applicant
No appearance for the First Respondent
No appearance for the Second Respondent

Investigation Meeting: 27 July 2022 at Dunedin

Submissions received: 03 August 2022 from Applicant

Determination: 4 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Du was employed by the respondent, (Elements) as a massage therapist in a massage therapy shop in a city mall (the massage shop). Mr Du came to New Zealand on

holiday and wanted to stay. He gained a New Zealand qualification in massage therapy and obtained employment with Elements. His employment was linked to a temporary work visa to work for Elements in this role.

[2] Mr Du claims Elements breached its obligation to pay him wages for work completed in the final weeks of his employment, public holiday entitlements throughout his employment and annual holiday pay entitlements at the end of his employment. Mr Du claims he was disadvantaged in his employment when he was suddenly not paid wages and when the then director of Elements, the second respondent (Mr Zhang) suddenly stopped communicating with him about this. Mr Du claims compensation for the hurt and humiliation that this caused to him after he says he worked so hard for the business during his employment. Mr Du also asks for penalties related to breaches of employment standards against both respondents.

[3] Elements and Mr Zhang say that Mr Du established the business, retained the company records, controlled management of the business and stopped his own pay.

The Authority's investigation

[4] Neither respondent appeared at the investigation meeting. They did not appear at the two case management conference calls prior to the investigation meeting. A Statement in Reply dated 20 December 2021 was received by the Authority saying that "Xuan Zhang no longer holds any position in the company. Xiaolu Dong is the director of Elements Therapeutic Massage Limited. Cheng Liu is in charge of the daily affairs of the company." I take this emailed communication to show me that Mr Zhang was aware of and received the initiating documents to these proceedings which included him as a respondent personally, and that he was not intending to participate in this investigation.

[5] The statement in reply gave an address for Elements and asked for further communication to be directed to the stated emails, naming Mr Cheng Liu as a contact person. One further email was received from Mr Cheng Liu on 02 January 2022 saying he was willing

to attend mediation. Mediation did not occur because Mr Du would not attend without Mr Zhang attending.

[6] I am satisfied that the Authority continued to send communications about scheduled events to the stated communication channels in the Statement in Reply. In these circumstances I have continued with the investigation and now make a determination based on the evidence before me including what I can best understand from the above-mentioned statement in reply received.

[7] For the Authority's investigation Mr Du provided a written witness statement and other documentary evidence. I asked Mr Du questions at the investigation meeting. There were no other witnesses. Mr Du's counsel provided written submissions on his behalf after the meeting.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[9] The issues requiring investigation and determination are:

- a. Did Elements breach its obligations to pay Mr Du wages, holiday pay and or public holiday entitlements and if so, how much is to be paid?
- b. Should Mr Zhang be held liable as a person involved under s142W(2) of the Act ?
- c. Was Mr Du disadvantaged in his employment by his employer's unjustified actions and should he receive compensation as a result?
- d. Should there be an order for interest?
- e. Are penalties to be ordered?
- f. Should there be an order for Mr Du's legal costs?

Did Elements breach its obligations to pay Mr Du wages, holiday pay and or public holiday entitlements and if so, how much is he to be paid?

[10] The Statement in Reply says that Mr Du established Elements and controlled the company. This claim is inconsistent with Mr Du's name not appearing on the register history for Elements as a director or shareholder; his own confirmation that this was not the case; and the email from Mr Zhang to Mr Du on 22 October 2021 that referred Mr Du to the shop manager in response to his claim for his unpaid wages and holiday pay.

[11] While I will return to the likely seniority of Mr Du in his employment, I find that based on the evidence before me that he did not have control over payments to himself as asserted by Elements. I will consider each of the arrears claims as calculated by Mr Du relying on his evidence and calculations because Element provided no records. I also rely on New Zealand Inland Revenue (IR) records for Mr Du's earnings at the relevant time.

Payment of wages between 6 September 2021 to 5 October 2021

[12] Mr Du's calculation for these four weeks and two days is an arrears of \$9,064.00. I accept this amount of money is owed by Elements to Mr Du and that its non-payment breached the terms of employment and s 131 of the Act.

Claim for time and a half for public holidays worked

[13] Section 50 of the Holidays Act 2003 (HA) includes that an employee is to be paid at least time and a half for working on a public holiday.

[14] Mr Du gave evidence that he worked 19 public holidays and was not paid the extra half time per hour that he worked on those days. I accept this evidence but not the way Mr Du

has calculated what he considers he is owed. This is because Mr Du's calculation includes taking into account the whole-time portion of each public holiday worked. Mr Du has already been paid up to a nominal 8 hours per day worked at his agreed rate based on what was an agreed 40-hour week. None of the public holidays worked were for longer than 8 hours according to Mr Du's evidence of hours worked on each of these days. Mr Du has effectively already been paid what could be described as his ordinary time rate for these days. What remains is the half time component and I accept this to be the total of \$484.02 that Mr Du has calculated. This is the amount I find Elements is to pay Mr Du. The non-payment of this amount is a breach of s 50 of the HA.

Claim for untaken alternate days

[15] Section 56 of the HA says an employee is entitled to a paid alternate day off work when they work on a public holiday that is an 'otherwise working day' for the employee. This can be paid to the employee if it remains untaken at termination under s60(2) HA.

[16] I accept that Mr Du is entitled to be paid for the nine untaken alternate days he claims. Elements is to pay him a total of \$3,792.00 at his ordinary (and contractual) hourly pay at termination. The non-payment of this amount at termination was a breach of s 60(2)(b) of the HA.

Claim for annual holiday pay at termination

[17] Mr Du's uncontested evidence in the absence of records produced by Elements is that he did not take any annual leave during his employment. Pay slips (incomplete) calculate a running accumulation of holiday leave and Mr Du has provided calculations based on this. Section 24 of the HA provides the mechanism to calculate payment for annual holiday leave that remains untaken at termination. The calculation is to pay the employee for the portion of annual holidays not taken at a rate that is the greater of the employee's ordinary weekly pay or

an average of their average weekly earnings for the 12 months prior to termination. This calculation in Mr Du's case would need to include the above arrears payments.

[18] Mr Du commenced working for Elements on 6 October 2018 and finished on 5 October 2021. I will take this as three years resulting in an entitlement of twelve weeks (four weeks per year) under s 16 of the HA.

[19] Based on the evidence before me Mr Du's average weekly earnings for the 12 months preceding termination was \$2,189.76. This is based on total gross earnings for the 12 months prior to termination being \$100,528.00 plus the total gross arrears calculated above (\$13,340.00) divided by 52. Mr Du's ordinary weekly earnings at the time of termination were \$2,060.00 gross. The greater is the average weekly earnings of \$2,189.76 gross. This figure multiplied by 12 is \$26,277.12.

[20] Elements is to pay Mr Du \$26,277.12 for annual holiday pay entitlement at termination. The non-payment of this entitlement was a breach of s24 of the HA.

Should Mr Zhang be held liable as a person involved under s142W(2) of the Act?

[21] Mr Du's employer was Elements. Mr Du confirms this. The individual employment agreements and IR records show Elements as the employer entity.

[22] Mr Zhang was not Mr Du's employer.

[23] It has been submitted on Mr Du's behalf that Mr Zhang should be considered liable under s 142W of the Employment Relations Act 2000 ("the Act") in that he is a person as a director involved in the breach of employment standards.

[24] Mr Du provided evidence why he thinks Mr Zhang should be held personally liable. However, I make this determination according to the way the claim has been presented and not more latterly in the final submissions for Mr Du. The claim under s 142W of the Act was not specified in the Statement of Problem. To bring proceedings against Mr Zhang, Mr Du needed to apply for leave of the Authority under s 142Y(2)(a) of the Act. He did not do this.

[25] Mr Zhang has not participated in my investigation process since the Statement in Reply was lodged. Mr Du believes that Mr Zhang left New Zealand sometime around the time his employment ended. Mr Zhang has not had service of any claim against him under s 142W of the Act. That provision makes a serious inroad into what is otherwise an individual director's protection from the limited liability of a company structure. Parliament shows its intent for this type of claim to be considered carefully by requiring leave to bring such a claim.

[26] I note that Mr Du alleges that Mr Zhang registered him as a director on the register for Elements without his authority and that this shows Mr Zhang was deliberately avoiding his responsibilities to Mr Du. There is nothing on the register showing Mr Du was registered as a director or shareholder of Elements. Elements was at all times Mr Du's employer and not Mr Zhang. Mr Du says further that the current director, Mr Cheng Liu may not be legitimate as a director of Elements because he believes him to have been Mr Zhang's landlord. The Register shows Mr Cheng Liu as the current director. It is for the body administering the Register to consider validity of directors registered. Mr Lui has been registered as the sole director of Elements. I have no reason not to accept the validity of this registration.

[27] Mr Du would have had to consider all of this in any application for leave to bring a claim under s142W of the Act and then to have argued a claim against Mr Zhang under s142W of the Act.

[28] Considering the above, Mr Du's claim against Mr Zhang is dismissed.

Was Mr Du disadvantaged in his employment by his employer's unjustified actions and should he receive compensation as a result?

[29] Whether an employer's action was unjustified must be determined on an objective basis by applying the test set out in s 103A (2) of the Act which is:

...whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[30] Mr Du says that he repeatedly tried to contact Mr Zhang when he was suddenly not paid. I understand from Mr Du and from submissions on his behalf that this lack of response is at the core of what has upset Mr Du. By this action he says he has suffered hurt and humiliation and consequential medical issues.

[31] Mr Du's oral evidence at the investigation meeting was that he was aware that the massage shop business was being sold to a new owner some months before he was suddenly not paid. Mr Du described understanding the option of continuing to work for the new owners. His oral evidence was that he chose not to do so but that after several months living off his savings and battling with the effects of diabetes, he resumed working at the massage shop for the new owners. I take it that Mr Du had to acquire a new working visa to do this work. His temporary work visa to work for Elements expired around the time his employment ended on 5 October 2021.

[32] The fact that Elements was selling the business could not have been a surprise to Mr Du. I accept that the suddenness of having no explanation about his final pay was upsetting for Mr Du. I accept Mr Du's explanation that he felt he had worked hard for Elements and felt humiliated by this sudden action. For Elements not to have paid Mr Du and then not discussed

his queries about this was not what a reasonable employer could have done in the circumstances as they have been put to me. To this extent I find Mr Du has shown he was disadvantaged in his employment.

[33] Mr Du claims compensation for the effect of this disadvantage. He says it had an effect on his health but provided no evidence to support this other than telling me that the diabetes he struggled with after his employment ended was likely linked to poor food and drink choices when working long hours for Elements in the mall. I am not satisfied that this health situation links the employer's unjustified actions of non-communication and non-payment of entitlements at the end of employment.

[34] Mr Du says he worked longer hours than his 40 hours throughout his employment and I understand this meant he felt further aggrieved about what happened at the end. Mr Du did not raise this as an issue with his employer during the employment. He told me this was because Mr Zhang was the boss and culturally Mr Du felt he could not complain. I find this explanation inconsistent with Mr Du's ability to have negotiated what could only be described as a significant pay increase for a massage therapist in August 2020 from \$22.00 gross per hour to \$51.50 per hour. Mr Du gave oral evidence that the increase was because he was "worth it" and that he held no position senior to others in the shop as a result of that increase. The job descriptions attached to Mr Du's employment agreements both before and after the pay increase show responsibilities to other staff. The August 2020 employment agreement shows a direct reporting line to the director of Elements (before this the reporting line had an intermediary manager) and that Mr Du would be "assisting the director running the Dunedin Massage Zone including the booking system and quality of the business."

[35] Standing back and considering what has happened as presented to me I find a modest amount of compensation of \$2,000.00 is to be ordered based on Mr Du's resultant humiliation after Elements through its then director Mr Zhang stopped communicating with him and then did not reward him with his due payments for work done.

Should there be an order for interest?

[36] The Authority has the power to award interest under cl 11 of Sch 2 of the Act. Interest is to reimburse someone when they have been deprived of the use of their money due to non-payment by someone else who is overdue in paying them that money. Interest generally accrues from when the outstanding money became due. Mr Du was due the entitlements I have now ordered when his employment ended on 5 October 2021 with the exception of \$484.02 which represents the unpaid half time rates for the 19 public holidays he worked. Given the small financial difference likely to result from a series of chronological due dates¹, I order that the interest on the \$484.02 accrues from the date of termination.

[37] Accordingly, Elements is ordered to pay interest on the total amount awarded for breaches of Mr Du's employment agreement and statutory entitlements being \$39,617.14. This is to be calculated from 5 October 2021 until the date payment is made in full. The civil debt interest calculator is to be used to calculate this interest.²

Are penalties to be ordered against Elements?

[38] Elements as the employer has been found to have breached s 131 of the Act and various sections in the HA. It is liable to a penalty or penalties.

[39] Section 133A of the Act sets out the need to regard 'all relevant factors' including:

- (a) the object of the Act
- (b) the nature and extent of the breach
- (c) whether the breach was intentional, inadvertent, or negligent
- (d) the nature and extent of any loss or damage suffered by any person or gains made or

¹ Public holiday entitlements fall due as they rise.

² <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

losses avoided by the person in breach

(e) whether the person in breach has taken steps to mitigate the potential adverse effects of the breach

(f) the circumstances in which the breach occurred including the vulnerability of the employee

(g) whether the person involved in the breach has previously been found by the Authority or the court to have been engaged in similar conduct.

[40] The Employment Court has set out guidance when considering whether a penalty is to be awarded in the context of statutory breaches. This includes proportionality to ensure that any final penalties awarded are ‘just in all the circumstances.’³ There is also the need to consider deterrence and to award penalties consistent with similar cases⁴.

[41] It has been submitted that penalties should be awarded based on a “serious and blatant breach” of Mr Du’s minimum statutory entitlements and that Elements has previously been investigated by the Labour Inspectorate.

Object of the Act

[42] Section 3 of the Act says that the object is ‘to build productive employment relationships through the promotion of good faith in all aspects of the employment relationship’ by among other things ‘acknowledging and addressing the inherent inequality of power in employment relationships.’

[43] I have considered the likely seniority of Mr Du in his employment. I refer above to the inconsistency I found between Mr Du’s oral evidence and his pay increase in August 2020 and the wording in his job descriptions. I find that if there was an imbalance of power it would not appear to be the sort of exploitative situation of employees who are subject to (say

³ *Borsboom v Preet PVT Limited* [2016] NZEmpC43 at [151].

⁴ *Lumsden v Skycity Management Limited* [2017] NZEmpC 30.

for example) payments breaching the minimum wage and who are also frightened to engage with their employer about this.

[44] I do not find that this factor supports the ordering of a penalty.

The nature and extent of the breach

[45] There are four areas of employment standards breached which would ordinarily support the order of a penalty or penalties for deterrence.

Whether the breach was intentional, inadvertent, or negligent

[46] Mr Zhang told Mr Du in an email to talk to someone else about his final payments when he eventually responded about the issue of non-payment. Mr Du says he did not know who he was to contact based on this response. I accept that this supports that Elements was likely avoiding its responsibility to pay Mr Du his final payments and that it likely shows a deliberateness. This would support the order of a penalty or penalties.

Whether the person in breach took steps to mitigate the adverse effects of the breach

[47] I accept Mr Du's evidence that no payments have been made to him for the money outstanding.

The circumstances in which the breach occurred including the vulnerability of the employee

[48] For the same reasons I discussed above regarding the Act's objective I do not find Mr Du was likely vulnerable in his employment. Mr Du devoted considerable evidence to having worked longer hours than he was paid for, but he did not raise this as an issue during his employment. Mr Du appears well able to put forward his position and describes being well

educated with what he said were finance qualifications in his homeland China. Again, the negotiating of a significant pay rate in August 2020 shows Mr Du was unlikely to be a person who was unable to sit at arm's length at a table in his employment relationship with his employer, Elements.

[49] I do not find this factor supports the ordering of a penalty.

Past conduct

[50] There is a recently published decision of the Authority⁵ for the same workplace. The Authority found against Elements for breaches of employment standards in a claim brought by the Labour Inspectorate. This would support the order of a penalty.

Other relevant matters and summary

[51] Elements has past conduct, has avoided paying Mr Du entitlements and there was more than one breach of employment standards. On the other hand, Mr Du had at the very least some part in the operational running of the massage shop. While I have found that he was not likely in control of his *own* payments, this determination addresses what was owing to him at termination together with compensation, interest and as follows, costs. In these circumstances I would not order any part of a penalty to be paid to Mr Du.

[52] I have no evidence before me about Element's financial situation but note that the Authority in its recent determination ⁶ did not award a penalty or penalties against Elements for what were multiple breaches for more than one employee at this workplace. This was because it accepted that Elements had ceased trading. The register currently carries a notice

⁵ *Labour Inspector v Element Therapeutic Massage Limited & Ors* 2022 NZERA 415

⁶ See above at note 5 at paragraph [94].

that the New Zealand Companies Office is about to remove Elements from the Register which is consistent with this situation.

[53] Weighing all of the above and in particular the current situation in relation to Elements I decline to order any penalties against Elements.

Should there be an order for Mr Du's legal costs?

[54] The Authority determines costs on its usual notional daily rate⁷ unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

[55] It was submitted for Mr Du that costs be reserved. Given the lengthy period of non-participation by both respondents, I am not going to reserve costs to further extend the time to resolve this matter. Given Mr Du's mixed success but acknowledging the involvement of Mr Du's counsel in two phone conference calls and at the investigation meeting with written submissions to follow, I find it reasonable to apply the notional tariff of \$4,500.00 for a one-day investigation meeting. Mr Du is also to be awarded the filing fee of \$71.56.

Summary of orders

[56] Elements Therapeutic Massage Limited is to pay Ping Du no later than 21 days from the date of this determination:

- a. \$9,064.00 gross for wage arrears under s 131 Employment Relations Act 2000
- b. \$484.02 gross for half time rate entitlement for the hours worked on 19 public holidays under s 50 of the Holidays Act 2000

⁷ The current tariff is \$4,500.00 for preparation and attendance at the first day of an investigation meeting and \$3,500.00 for days thereafter.

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

- c. \$3,792.00 gross for alternate holidays undertaken at termination under s 60(2)(b) of the Holidays Act 2000
- d. \$26,277.12 gross being annual holiday pay at termination under s24 Holidays Act 2003
- e. Interest on the total of \$39,617.14 gross calculated from 5 October 2021 until the date of payment in full to be calculated using the civil debt calculator: <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>
- f. \$2,000.00 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000
- g. \$4,500.00 for costs.

Antoinette Baker
Member of the Employment Relations Authority