

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 584
3148203
3148602
3148861

BETWEEN

ZHONGXIN LU
Applicant in 3148203

ZHENG WANG
Applicant in 3148602

CHAO SUN
Applicant in 3148861

AND

BILLS BUILDING LIMITED
First Respondent

BILL ZHAO
Second Respondent

SUSAN KING
Third Respondent

Member of Authority: Nicola Craig

Representatives: David Kim, advocate for the applicants
Margaret Robins, counsel for the respondents

Investigation Meeting: 3 to 5 May 2022

Submissions and further information received: 11 May and 7 June 2022 from the applicants
19 May 2022 from the respondents

Date of determination: 9 November 2022

DETERMINATION OF THE AUTHORITY

- A. Zhongxin Lu was subject to an unjustified action by Bills Building Limited (BBL) to his disadvantage and BBL is to pay**

him \$6,000 compensation within 28 days of the date of this determination.

- B. Zheng Wang was unjustifiably dismissed by BBL and within 28 days of the date of this determination BBL is to pay Mr Wang the following remedies for his grievance:
 - (a) \$2,400 gross as lost wages; and
 - (b) \$10,000 as compensation.

- C. Chao Sun was unjustifiably dismissed by BBL and within 28 days of the date of this determination BBL is to pay Mr Sun the following remedies for his grievance:
 - (a) \$3,360 gross as lost wages; and
 - (b) \$7,500 as compensation.

- D. For breaches of the Holidays Act 2003 and the Employment Relations Act 2000 a penalty of \$8,000 is imposed on BBL to be paid within 28 days of the date of this determination, with \$6,500 to be paid to the Crown and \$1,500 to Mr Wang.

- E. Leave is declined for claims against Bill Zhao and Susan King to proceed.

- F. Costs are reserved and a timetable set.

What are the employment relationship problems?

[1] Zhongxin Lu, Zheng Wang and Chao Sun (the workers) worked on a building renovation project in Onehunga, Auckland run by Bills Building Limited (BBL or the company).

[2] BBL is owned by Bill Zhao (Mr Zhao). Mr Zhao's mother Susan King has some involvement in the business, as does his father Abe Zhao King (Mr King). BBL was a family based business using mostly family members to complete work until the time these workers commenced.

[3] Mr Lu, Mr Wang and Mr Sun brought a range of claims against BBL, including personal grievances and arrears of wages and holiday payments. Both before and after the proceedings were lodged, BBL made payments to the workers in response to their claims. The company's responses to the claims are set out below.

How did the Authority investigate?

[4] There are some differences between the three workers' issues but there are also substantial overlaps. The Authority discussed the prospect of hearing the three matters together and all the parties were agreeable. The cases proceeded on that basis.

[5] An investigation meeting was held in person from 3 to 5 May 2022. Along with written witness statements, oral evidence was heard under affirmation from Mr Lu, Mr Wang, Mr Sun, Ms King, Mr Zhao and Mr King. The Authority was assisted by an interpreter of the Mandarin language. Submissions were filed after the meeting.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

[7] This determination has been issued more than three months after the date on which the last information was received. When I advised the Acting Chief of the Authority that this would likely be the case, she decided that s 174C(4) of the Act was applicable.

What are the issues?

[8] The issues for determination in this case are:

- (a) Was Mr Wang an employee of BBL?
- (b) Did BBL breach its obligation to provide Mr Lu, Mr Wang and/or Mr Sun with an employment agreement and if so, should it be penalised?
- (c) Were any or all of Mr Lu, Mr Sun and Mr Wang dismissed by BBL?
- (d) If so, were any or all of the dismissals unjustified?
- (e) If personal grievances are established, what remedies (if any) should the workers receive, considering lost wages and compensation for humiliation, loss of dignity and injury to feelings and taking into account any contribution?
- (f) Did BBL breach its obligation to keep and/or provide wages and time records and if so, should it be penalised?
- (g) Are any or all of Mr Lu, Mr Wang and Mr Sun owed money regarding public holidays (worked or taken) and holiday pay on termination or Kiwisaver?

- (h) If payments were not made when they should have been, should BBL be penalised?
- (i) If overpayments were made by BBL to Mr Lu and Mr Wang, should the money be refunded?
- (j) Are Mr Zhao and Ms King persons involved in any breaches regarding public and annual holidays and Kiwisaver and should leave be granted under s 142Y(2)(a) of the Act?

[9] Initially BBL asserted that Mr Sun had not raised his dismissal grievance in time. For Mr Sun, leave was then sought to raise it out of time on the basis that BBL had not given him a written employment agreement. At the start of the investigation meeting BBL advised that it consented to Mr Sun raising his grievance out of time. The leave application therefore did not need to be considered.

[10] At the same time BBL's representative indicated that the company had paid all the amounts of arrears, including holiday pay sought on behalf of Mr Lu, Mr Wang and Mr Sun. However, the workers denied having received those payments and it became apparent there had been a miscommunication and sums indicated as being owing would be paid as soon as possible. Payments were made to the workers on 4 May 2022, in the course of the investigation meeting.

[11] At the investigation meeting Mr Lu mentioned an issue about breaks however, his representative indicated that no claim about breaks was being pursued. The representative also clarified that although different pay rates were mentioned regarding two workers no claim was being made on that basis.

[12] Further, another possible issue was identified by the representative, namely whether the company or individuals were the employer. That was not seriously pursued but will be mentioned briefly below.

What are the parties' backgrounds?

[13] BBL was incorporated in 2016 to provide building services to the family trust, Haohai Family Trust (the Trust). According to Ms King, BBL engaged self-employed contractors such as a labourers, carpenters and electricians, paid on invoice and had no employees except Mr King. As he was a family member, Ms King says it never occurred to them to give Mr King an employment agreement and they did not know every employee should have a written agreement.

[14] Until taking on the workers in this case, the evidence was that Ms King, Mr King and Ms Zhao had very limited employment relationship experience on either side, only at most ever having been employed by a family company and only being the employer of family members.

[15] The Trust engaged BBL to refurbish a two-storey commercial building it owned in Onehunga.

[16] Mr Lu is a migrant who has been in New Zealand about four years. He now has permanent residence. Mr Lu describes himself as a technician or carpenter although it appears he has only undertaken about one year and four months' work in that area. It was hard to get a lucid account from Mr Lu regarding his work experience in this country. This may reflect at least in part the informal nature of arrangements undertaken.

[17] Mr Sun was on an open work visa in the partnership category. He and Mr Lu knew each other previously as they worked at another building site together.

[18] Mr Lu and Mr Sun worked relatively closely together at the Onehunga site. On the other hand, Mr Wang was not known to the other two men prior to working at that site and had a somewhat different work arrangement as described in more detail below.

What was the appointment process for Mr Lu and Mr Sun?

[19] Ms King placed three advertisements in Skykiwi; two for carpenters and one for a labourer. The advertisements are no longer available. At this time there was a shortage of construction workers.

[20] The Skykiwi template allowed limited entries. For example, Ms King recalls the wage options as being minimum wage, above minimum wage or far above minimum wage. Ms King was seeking to appoint contractors but accepts that the template she described sounds like it was intended for employees instead.

[21] Mr Lu phoned Mr Sun about the job when he saw the advertisement. Ms King interviewed them together in around September 2020.

[22] Mr Lu recalled Ms King saying that this was a long term job with BBL having other projects.

[23] Ms King believed she had not mention long term prospects or other BBL projects. However, in her oral evidence Ms King acknowledged that she only mentioned to Mr Lu and Mr Sun that they were being hired for the demolition phase when they started work, rather than at the interview. There seems to have been a prospect of future carpentry work if their skills were sufficient but that turned out not to be the case in BBL's view.

[24] None of those present at the interview gave entirely robust evidence on the discussion about pay and the work.

[25] There is some dispute whether Mr Lu and Mr Sun were hired as carpenters or labourers. However, given their relatively low levels of experience and training I accept that the work they were hired for was the demolition work which required mostly labouring.

[26] Ms King says that BBL wanted contractors but Mr Lu and Mr Sun wanted to be employees. Mr Lu denied this but his answer focused on not being paid in cash. Mr Sun agreed that Ms King had asked them to be contractors.

[27] Ms King says both Mr Lu and Mr Sun wanted to be paid in cash but BBL did not want to do that.

[28] Ms King asserts that there was an agreement that they be paid without annual and public holidays in return for getting a higher hourly rate, with that arrangement being sought by Mr Lu on behalf of both workers.

[29] Mr Lu denies that and says that he was told he was on a higher rate than he actually ended up being paid although, perhaps surprisingly, he makes no claim about this. He says that they wanted to be paid more rather than getting other things.

[30] Mr Sun denies he and Mr Lu asked to be paid in cash but specifies that they requested payment of \$24 after tax, which should include all the entitlements, such as holiday pay. It turns out that in reality they only got paid \$23 an hour after tax, which he found quite surprising. Again, there was no claim about that.

[31] Several factors influence my conclusion on this issue. Both Ms King and Ms Sun gave evidence supporting the agreement being that no holidays will be paid for.

Mr Lu's evidence was not that clear but seemed somewhat supportive, as is a message sent by him in 2021 and a written employment agreement from early 2021.

[32] Further, Mr Zhao reports being told by Ms King that the two men were worried about PAYE and so while the hourly rate was to be \$20, agreement was reached for payment of \$23 per hour which was to include holiday pay.

[33] I conclude that Mr Lu sought an agreement for himself and Mr Sun that no holidays were paid and that was agreed by Ms Zhao on behalf of BBL.

What was Mr Wang's employment status?

The start of Mr Wang's connection with BBL

[34] Mr Wang had worked in carpentry in commercial projects previously. This included with a man I refer to as Mr G. Mr G had not previously been Mr Wang's employer.

[35] Mr Sun had finished at BBL and in January 2021. Ms King placed another advertisement for a carpenter to work on the demolition phase of the Onehunga project. Mr G responded, including indicating that he owned a company. The two agreed that Mr G would invoice BBL for an agreed hourly rate.

[36] Mr G decided he needed an assistant. A message between Mr G and Ms King indicates both would be billed to BBL via an invoice from Mr G's company. It seems that the proposed assistant did not actually start work. Mr G then contacted Mr Wang saying it was a good job with breaks and all the entitlements. Mr Wang understood that Mr G was already working on the site.

[37] Mr G then expressed reluctance to Ms King about proceeding as envisaged with the first assistant, saying his English was not very good and he did not have the ability to deal with the payments. He asked Ms King to arrange the recording of the daily hours and pay directly into the assistant's account. She was eager to get the work moving so agreed.

[38] Ms King's evidence as regards the arrangements was not straightforward. She reports thinking Mr G was going to invoice for his assistant but then as the money was going into Mr Wang's account, she thought Mr Wang would provide the invoices. She then said she thought Mr G would issue invoices for both himself and Mr Wang.

[39] Ms King messaged asking Mr G to arrange for Mr Wang to contact her.

Arrangements once Mr Wang started at Onehunga

[40] On Mr Wang's first day at the Onehunga site, he was picked up by Mr G, taken to the BBL office and introduced to Ms King. Ms King had a discussion with Mr Wang, telling him about the hours, hourly rate and days of work. He was told that the work would be ten hours a day, Monday to Friday. Ms King said Mr Wang's pay would be \$24 before tax. There was no mention of GST or invoices.

[41] Ms King asked Mr Wang for a copy of his immigration visa, IRD number and bank account, which he provided. She did not speak to Mr Wang at all about him being a contractor to BBL or to Mr G.

[42] Ms King advised Mr Wang to do a good job and follow Mr G to do the job together. No one gave Mr Wang an employment agreement.

[43] On the first day Mr Wang was offered lunch but Mr Wang found it too spicy so he and Mr G went out to get lunch. On the second day Ms King advised Mr Wang that they did not provide a free lunch so he had to buy his own. Later a microwave was provided which he could use. By contrast, Mr Lu and Mr Sun were provided with free lunches throughout their time at BBL.

[44] Mr Wang routinely got a lift with Mr G to work. They started work at 7am, signing in via the same book as Mr Lu and previously Mr Sun used. The payments into Mr Wang's account was identified as coming from BBL.

[45] No invoices were received from Mr Wang or Mr G for Mr Wang's work. Ms King did not follow up, as she was not involved with the payment processing. Mr Wang was not aware of Mr G invoicing BBL for Mr G's work.

[46] Mr Zhao calculated and paid what appeared to be wages to Mr Wang, deducting PAYE before making the payments. Mr Zhao and Ms King describe the payments as a mistake, not in the sense of being unintended though. Mr Zhao says he forgot about the fact Mr Wang was a contractor because Ms Zhao was so busy. He simply assumed Mr Wang was an employee and therefore deducted PAYE. Ms King reinforces that evidence.

[47] Later, when preparing with BBL's lawyer and discovering the PAYE deduction, Ms King took the recommendation for BBL's lawyer to pay the holiday amounts and Kiwisaver until Mr Wang's status could be determined.

[48] Mr Wang mainly assisted Mr G on carpentry work but did occasionally work with Mr Lu and others. He regarded Mr Zhao as his boss. At the investigation meeting Ms King's view was that Mr G was Mr Wang's "boss" but she would not accept that Mr G was the employer as such. Mr Zhao reported mostly instructing Mr G about work but on occasions if Mr Wang was there alone, giving Mr Wang instructions directly.

[49] Mr Wang supplied his own tools. Ms King's evidence was that employees would use BBL's power tools whereas contractors were expected to buy their own.

[50] Mr Wang thought that he was employed by BBL. He saw Mr G as introducing him to BBL. Mr Wang saw his job as being to listen to instructions from his employer, whether they were to work to assist Mr G or to do other jobs. Mr Zhao and the site manager (referred to as Mr M) sometimes gave Mr Wang instructions directly, rather than going through Mr G. If Mr Wang had wanted a day off, he would have asked Mr Zhao.

[51] Mr Wang was asked to work at another BBL site in West Auckland which he did for several days. He went with Mr Lu and Mr G.

Legal analysis

[52] There are several possible conclusions, including that Mr Wang was a contractor to BBL, a contractor to Mr G or an employee of one and/or the other.

[53] BBL stressed that Mr G instructing Mr Wang as a significant factor. I do not see the instructions coming through Mr G as necessarily preventing a finding that Mr Wang was BBL's employee although it is a factor to be considered.

[54] Under s 6 of the Act the test is what the real nature of the relationship is.¹

[55] Considering the control test, Mr Wang's work was on BBL's site but was primarily controlled by Mr G. At Onehunga, Mr G and Mr Wang were often working on a different part of the site to that where Mr King and Mr Lu were working. Mr Zhao

¹ The Act, s 6(2).

passed a message that the demolition work was finishing on to Mr G, expecting him to pass it on to Mr Wang, rather than telling Mr Wang himself that he would no longer be needed, as an employer would usually do.

[0] However, Mr Wang was given and did accept instructions from both Mr Zhao and the site manager Mr M on occasions. This included going to work at another BBL site when Mr Zhao required it.

[1] In terms of the integration test Mr Wang was somewhat integrated into the BBL organisation but not as fully as Mr Lu. Other than on the first day, Mr Wang did not receive lunch as Mr Lu did. He largely did not use BBL's tools.

[2] On the other hand, Mr Wang did sign in for work in the same way Mr Lu did, via BBL's sign in sheet. He did not provide invoices and neither did Mr G on Mr Wang's behalf. Rather, in the traditional manner of employment, Mr Wang's hours of work were calculated and paid by Mr Zhao. PAYE was deducted by BBL. The explanation that Mr Zhao was simply mistaken and continued to operate in that manner for over ten weeks is not satisfactory. There were no GST invoices received regarding Mr Wang's work from either Mr G or Mr Wang himself. BBL was itself directly paying for Mr Wang's work and made no attempt to seek invoices for Mr Wang's work.

[3] Regarding the economic reality test, BBL acknowledges that it is hard to see Mr Wang as being in business on his own account. He may have bought some tools but he had no ability to profit more by his actions. His hourly pay rate was set.

[4] In terms of the circumstances surrounding the relationship, important factors are Ms King's involvement in the establishment of the relationship. She wanted Mr Wang to contact her and met with him to discuss arrangements. He provided his account and IRD details.

[5] I am most strongly influenced by Ms King's involvement in the setup of Mr Wang's role and by Mr Zhao's arrangements about recording of hours and payment. The real nature of the arrangement as set up by Ms King and continued by Mr Zhao was an employment relationship. I conclude that Mr Wang was an employee of BBL.

Who was Mr Lu and Mr Sun's employer?

[56] Mr Lu regarded BBL as his employer. He was paid by the company. In early 2021 Mr Lu was intending to buy a property. He sought a certificate from his employer for the bank. A document provided by BBL states Mr Lu was employed by BBL.

[57] Mr Sun regarded BBL as his employer and was paid by the company. Both Mr Lu and Mr Sun were largely instructed by Mr Zhao.

[58] I conclude that BBL also employed both Mr Lu and Mr Sun. **Did**

BBL fail to provide the workers with employment agreements?

[59] I deal with this issue first as it has some impact on the dismissal claims. Mr Lu's situation is somewhat different to the other two, as he was given an agreement during his employment but a question was raised by his representative at the investigation meeting about the operability or validity of that agreement.

Mr Lu

[60] Initially Mr Lu was not offered a written employment agreement. Later when he was looking at buying a property and sought a certificate of employment. Mr Zhao said "*if you want a certificate, we need a contract*". Mr Zhao reports Mr Lu saying that this was his last chance in life to buy property. After Ms Lu's employment finished Ms King checked land records and discovered Mr Lu already owned a property and had actually used the existing property to assist with buying a second. This evidence was not challenged on Mr Lu's behalf.

[61] Unaware of that situation, Mr Zhao saw this as likely Mr Lu's last chance to buy a property given his age and wanted to help. Mr Zhao gave Mr Lu a written employment agreement. Mr Lu signed it but reports not being given a paper or electronic copy. He did not know whether someone signed for BBL. As it turned out the bank did not need an agreement.

[62] The agreement contains the unlawful provision that no payments will be made for holidays. Given that, Mr Lu was not certain whether the agreement was effective. However, there is no real suggestion that it was a sham document. I conclude that the agreement is a real reflection of what the parties agreed, including that Mr Lu was not

to be paid any additional money for holidays. That provision is unlawful but that does not make the whole agreement unlawful.

[63] Despite the later provision of the agreement, Mr Lu was not provided with an employment agreement at the start of his employment as required and BBL thus breached s 63A(2)(a) of the Act.

Mr Sun

[64] BBL accepts that it did not provide Ms Sun with an employment agreement. It breached s 63A(2)(a) of the Act.

Mr Wang

[65] BBL's primary position was that Mr Wang was not its employee. However, if the Authority finds that it was, then it accepts that it breached its obligation under s 63A(2)(a) of the Act to provide him with an employment agreement.

Penalties

[0] Consideration of possible penalties under this head are dealt with below.

What are the grievance claims?

[66] The three employees' dismissal claims are based on different factual scenarios.

What happened with Mr Lu?

[67] The dismissal case for Mr Lu was pursued on the basis that he was told by Mr Zhao on 30 March 2021 that he was being dismissed on two weeks' notice because Mr Lu had asked to be paid for upcoming public holidays.

[68] Mr Lu's witness statement refers to being dismissed in the afternoon of 30 March 2021 with no reason given, after having asked Mr Zhao that he be paid for "*the public holiday*". The dismissal is described as the "*revenge and insult the employer has taken to me*". This did not fit particularly well with other evidence, including that of Mr Lu.

[69] Mr Lu's oral evidence regarding his termination was somewhat confused, with him saying that he was "*not prepared for this*", seemingly referring to being questioned about what happened on the day he was told of his dismissal.

[70] The agreement between Mr Lu and Ms King was that he would (unlawfully) not be paid for public holidays. This is reflected in the written employment agreement and in a WeChat message from Mr Lu. Mr Lu then struggled when questioned to explain why he messaged asking for public holiday payment.

[0] It was not clear from Mr Lu's evidence about 30 March events how many meetings there were that day. Initially he said one, then he indicated two discussions, a few minutes apart. Later he said he approached Mr Zhao in the morning and then Mr Zhao came back to him later in the afternoon. In a fourth scenario Mr Lu described three meetings, including one where Mr Zhao said "*no contract, no holiday pay*". That does not make sense given that there was a written contract.

[71] There may have been some discussion on public holidays initiated by Mr Lu although Mr Zhao was unable to recall it. In any event I do not accept that that was the basis of Mr Zhao's indication to Mr Lu. Rather Mr Zhao told Mr Lu that he was not needed anymore and that he should start looking for other jobs.

[72] BBL asserts that the demolition phase of the project came to an end and Mr Lu was no longer needed. Mr Lu largely did not dispute this although he thought he could undertake carpentry work which was starting at the Onehunga site as the project moved to its next phase or alternatively work at BBL's West Auckland site.

[73] BBL's position is that Mr Lu was informed that he was being made redundant but during his notice period he resigned. The company accepts that although the agreement was essentially for a set period, namely the demolition phase, no fixed term provision to that effect was incorporated into the written employment agreement. The specification of a fixed term is required by s 66(4) of the Act to be in writing.

[74] Also, under that agreement Mr Lu was entitled to four weeks' notice in writing. Mr Zhao acknowledged that he did not give exactly four weeks' notice as he did not stipulate an exact end date for the finish of Mr Lu's employment. Rather Mr Zhao says that three weeks before the end of the demolition phase he gave notice but if Mr Lu was not able to find other work he would continue to employ him until he found another

job. As there was a shortage of construction workers Mr Zhao did not envisage that would take very long.

[6] Mr Zhao says that in April Mr Lu told him that he had found another job with a higher rate of pay and his last day at BBL would be Friday, 16 April. Mr Zhao was agreeable with Mr Lu finished on 16 April. The unusual notice period from Tuesday 16 March to Friday 30 March is more in keeping with Mr Zhao's account of events. partial week. I find Mr Zhao's narration of the events more credible than that of Mr Lu.

[7] Mr Zhao intended to give Mr Lu notice of termination for redundancy. However, BBL did not comply with the contractual obligations in Mr Lu's employment agreement, as it did not give him written notice of termination.

[8] This matter is better considered as an unjustified action by BBL to Mr Lu's disadvantage than an unjustified dismissal.² The work Mr Lu was doing was about to be completed so his role was likely redundant. However, in the absence of a fixed term agreement he was entitled to a fair process. BBL did not undertake the proper consultation process but as it found Mr Lu to be a good worker, had intended to explore what smaller jobs it had available if Mr Lu was not readily been able to find himself suitable replacement work.

[9] Mr Zhao acted without focusing on either the employment agreement, in not giving written notice, or on BBL's obligations to act in a justifiable manner as set out in s 103A of the Act. However, as it turned out a dismissal did not eventuate as Mr Lu was able to find other work and so an agreed date of termination was set.

[10] In conclusion, BBL took unjustified action to Mr Lu's disadvantage by telling him that his employment was going to end in this way.

What remedies should Mr Lu receive?

[11] As Mr Lu has an unjustifiable disadvantage claim I do not consider that he should be awarded lost wages. In any event, he provided no proof of the start of his new employment and the three weeks' wages claimed did not quite fit comfortably with his claim to only have found another job in mid-May. In addition I accept Mr Zhao's

² The Act, s 122.

evidence that he was prepared to allow Mr Lu to continue working until he found another job. No lost wages are awarded.

[12] Mr Lu did suffer some loss of dignity and injury to his feelings when he was told the job was ending without proper consultation. There was some stress when he tried to find other work and had to focus on his financial obligations as the main income earner. He was anxious and upset, as well as losing sleep.

[13] I assess \$6,000 to be an appropriate level of compensation for Mr Lu's grievance, taking into account that the dismissal grievance was not established. I reject any contribution on Mr Lu's part in terms of BBL's decision to make his position redundant.

[14] I order BBL to pay Mr Lu \$6,000 as compensation under s 123(1)(c)(i) of the Act.

What happened with Mr Wang?

[15] Mr Wang was told one evening by Mr G, when sitting in Mr G's car that they did not need to come back to the Onehunga site again and BBL did not want them anymore. No notice was given so Mr Wang never went back to BBL.

[16] Mr Zhao reports telling Mr G about a week before the end of March 2020 that Mr G and Mr Wang would not be needed in three weeks' time. However, it appears Mr G did not pass that message on until the last working day, 16 April.

[17] BBL accepts that if Mr Wang is found to be an employee, he was dismissed without process and without notice. His dismissal would therefore be unjustified.

[18] While there was some suggestion of redundancy, that was not sufficiently established. BBL failed to offer information to Mr Wang or to consult with him. Mr Wang did not understand that the demolition work was finishing around that time. His sense from Mr G was that there were lots of jobs to do, with Mr G encouraging Mr Wang to buy tools for future work with BBL.

[19] Mr Wang's dismissal by BBL was unjustified.

What remedies should Mr Wang receive?

[20] Mr Wang claims two weeks' lost wages at \$1,200 gross per week.

[98] Mr Wang was initially shocked, feeling blank, and empty. This was the first time he had experienced such a thing. He then suffered anxiety and sleepless nights. Mr Wang's dismissal was sudden and I accept that he was distressed.

[99] Mr Wang did not contribute to his dismissal.

[100] BBL is to pay Mr Wang the following as remedies for his grievance within 28 days of the date of this determination:

(a) \$2,400 gross as lost wages; and

(b) \$10,000 as compensation for under s 123(1)(c)(i) of the Act.

What happened with Mr Sun?

[101] Mr Sun had finished earlier at BBL, unrelated to the demolition work finishing.

[102] BBL brought evidence that Mr Sun was somewhat disconnected with the work. He sometimes worked shorter hours than others, starting late and finishing early. There were some family and immigration problems suggested. BBL witnesses also believed Mr Sun took noticeably more time out to smoke than others did, reflecting stress. Mr Sun denied this. The wages and hours summary prepared by BBL indicates Mr Sun sometimes worked fewer hours than Mr Lu.

[103] In late November 2020 Mr Sun's wife became sick. The timing around his departure from the workplace is somewhat uncertain.

[104] Mr Sun indicated that he started work one day but had to leave in the early afternoon to help his wife. The site manager Mr M was present but not Mr Zhao. Mr Sun did not think it was the right thing to do to tell Mr M about his departure as Mr M was a young man and Mr Sun was uncertain about why he had been hired.

[105] Mr Sun phoned Mr Lu telling him that he had left the site because of his wife's illness. Mr Lu told Mr Zhao that Mr Sun could not come into work as there were problems at home. It seems there was no specific mention of sickness as such. Mr Zhao replied that if Mr Sun cannot come into work he needs to ask for leave.

[106] BBL disputes that Mr Sun left early during a work day as his wages and hours record indicate him doing relatively standard daily hours on his last recorded day of

work. Mr Zhao believes Mr Sun did not come in at all on 25 November and that was his first day of absence.

[107] Ms King recalls not being at the Onehunga site on 24 November but when she attended the next day Mr M told her Mr Lu had reported Mr Sun not being able to work at the moment due to family problems. When Ms King asked about how many days off Mr Sun needed, the site manager replied he could not get that information from Mr Sun nor Mr Lu.

[108] Ms King discussed the situation with Mr Zhao and agreed that Mr Sun should be contacted. This was to ask what was happening, see if he needed some time to deal with his family issues and let him know that if he finished with his family issue he was able to come back. They mentioned that if BBL still needed a worker when Mr Sun was able to come back they were happy to give him work. Mr Zhao and Ms King thought a few days might be needed.

[109] Mr Zhao asked the site manager to message Mr Sun that evening asking what was happening, when he was coming back to work or how much more time he needed.

[110] After 10pm on 25 November Mr M texted Mr Sun:

Hi Brother Sun, today Lao Lu told me there is something going on in your family so you cannot come to work for a few days. You see our company is less busy now I would like to ask you to come back to work once we are busy again while you sort out things at home. Thank you of your help.

[111] Mr Zhao accepted that on the 25th when he was discussing with Mr M he was thinking that Mr Sun's employment would finish and then if Mr Sun decided he wanted to come back, the employment would restart. Mr Zhao thought he would terminate Mr Sun's employment because Mr Sun needed more time to resolve his family matters.

[112] As nothing was heard from Mr Sun for a few days, BBL thought he did not want to come back. The following Tuesday, 1 December, the site manager sent a screenshot of a wages payment to Mr Sun and asked him to check it. The manager also asked when Mr Sun would come to collect his tools and return the keys. Mr Sun replied, advising that he had forgotten to take the keys and they were on a work table. He indicated he would come and collect the tools when he had time.

[113] Mr Zhao was critical of Mr Sun failing to communicate himself about his absence. He indicates that if Mr Sun had been in contact himself, indicated his wife

was sick and asked for a few more days off, they would have agreed. I accept that if Mr Sun had indicated that he wanted to come back to work between the 25th and 1st messages BBL would likely have allowed him to do that.

[114] In terms of the parties' perceptions of what happened, Mr Sun thought that the 25 November message indicated that if the company did not get busy again, he could not go back, so he was dismissed. BBL's position is that as Mr Sun did not attend work after 24 November 2020, he was not dismissed.

[115] Would a reasonable person reading the WeChat messages conclude that Mr Sun was dismissed?

[116] Rather than asking about the reason for Mr Sun's departure and how long he needed off, the 25 November message jumped to what was to happen. I accept that Mr Zhao and Ms King were likely well motivated towards Mr Sun. Unfortunately that intent is not well captured in the message, a risk of using text communication rather than talking directly.

[117] Mr Zhao intended the site manager to pass on a message to Mr Sun which indicated that his employment was finishing but that it could restart. A reasonable person would have taken from that message that he was being dismissed.

[118] In terms of the justification for the dismissal, Mr Sun had only been away from work up a day or day and a half. There was no written agreement so no abandonment provision which might have specified after what time the employer could act. Also, there had been a message passed on via Mr Lu although it may not have captured the crux of what was happening. There was no attempt to ring Mr Sun to find out what was happening. The dismissal was unjustified.

What remedies should Mr Sun receive?

Lost wages

[119] Mr Sun seeks nine weeks' wages.

[120] Mr Sun's evidence about mitigation of loss was not solid. He reports trying for many jobs: some were far away, some the pay was not suitable or he did not like their way of paying. He guessed that he had applied for more than five jobs. However, he was unable to provide any specific evidence of where he applied.

[121] This evidence is unsatisfactory. Given the evidence of Mr Sun's family and immigration difficulties it seems likely he was caught up with dealing those issues for some time rather than focusing on applying for other work. Lost wages of four weeks would be appropriate subject to the consideration of contribution below.

Compensation

[122] Mr Sun felt shocked and indignant when he thought he had been fired. He was under financial pressure with few savings and his wife was not earning very much. Mr Sun felt stressed about the family's financial position, particularly as it was near Christmas. There were a few family quarrels with Mr Sun describing himself as sad and miserable. He regrets these moments.

[1] I conclude that Mr Sun's family and immigration problems were a substantial cause of his distress during this period and this should not be compensated for under the grievance remedy. Being without work was however an additional stress factor.

[123] Before looking at contribution \$10,000 would be an appropriate award for Mr Sun

Contribution and conclusion

[124] Mr Sun's failure to communicate with BBL is blameworthy and causative to the dismissal. The decision to use another worker to convey the message about his absence was not ideal, particularly without more specific agreement about what was to be passed on. Unfortunately Mr Sun then failed to respond to the text from Mr M. I accept Ms King's evidence that if he had replied along the lines of "*I just need another day or two*" he would have been able to start back at BBL. Even a reply to the 1 December message may have had similar effect. These failures to communicate were not satisfactorily explained.

[125] I make a 25% deduction from the remedies Mr Sun would otherwise have received. BBL is ordered to pay Mr Sun the following remedies for his unjustified dismissal within 28 days of the date of this determination:

- (a) \$4,480 gross as lost wages; and
- (b) \$7,500 without deduction as compensation under s 123(1)(c)(i) of the Act.

Did BBL fail to keep or provide wages and time records?

[127] BBL's position is that it kept records and provided them immediately on request to the workers' representative.

[128] The company kept sheets identifying when people started and finished work each day. It was able to obtain information from its records about each employee and the wages paid in each period and how they were calculated.

[129] The workers did not identify any particular aspects of the records which were problematic from their perspective.

[130] There may have been some lack of aspects of the requirements in s 130 of the Act, such as identification in the record whether the employees were on individual or collective employment agreements.³ However, in these particular circumstances I do not consider that such breaches would justify the imposition of a penalty.

Is any money owed for public holidays or holiday pay?

[131] After the workers obtained representation, their representative wrote to BBL, the company obtained its own representation. It was advised that it should have paid for public and annual holidays, along with Kiwisaver contributions to employees. Calculations and payments were made. Later in February 2022 the Authority asked for clarification from the workers' representative about what was still seen as being owed. This resulted in further sums being identified. These were paid during the investigation meeting.

[132] There are therefore currently no arrears of wages or other money owing, including under the Holidays Act. Penalties are sought regarding BBL's failure to properly pay the workers regarding holidays and Kiwisaver during and at the end of their employment. These are dealt with below.

Is a penalty warranted?

[133] There are several breaches here involving three employees. BBL argues that its failures were inadvertent and negligent. Although BBL has paid the amounts which were sought, that is not sufficient to negate the imposition of any penalty. BBL should

³ The Act, s 130(1)(e).

have taken steps to inform itself of its employment obligations in New Zealand law. The company appeared sufficiently resourced to seek advice on such matters. There is also free information available on government websites.

[134] This is a case where a penalty is warranted.

What penalty should be imposed?

[135] When assessing what the penalty should be, I have regard to the factors set out in s 133A of the Act, as well as decisions in *Borsboom v Preet PVT Limited*, *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.⁴

[136] The breaches for each of the workers are:

- (a) No employment agreement provided on employment, although Mr Lu was later provided with one;⁵ and
- (b) Non-payment of holiday pay on termination; and
- (c) Non-payment of public holiday pay.⁶

[137] Some consolidation and globalisation should occur:

- (a) The instances involving the three workers are sufficiently similar to regard them as one breach;
- (b) The holiday pay issue covers calculation and payment elements in ss 23 and 27 of the Holidays Act but are really the same issue so should be globalised as one; and
- (c) The failure to pay for public holidays cover a number of days but should be regarded as one breach.

[138] This gets to the point of there being three breaches. With the maximum penalty against a company being \$20,000 per breach, the starting point is therefore a total of \$60,000.

⁴ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

⁵ The Act, s 63A(2)(a) and (3).

⁶ Holidays Act, s 27 (annual holiday payment), s 49 (public holidays) and s 75 (penalty) .

[139] The holidays non-payments concern minimum entitlement provisions and employment standards.⁷ These are important rights. This case also demonstrates some of the difficulties with operating without a written employment agreement.

[140] The breaches were intentional in the sense that BBL decided not to pay holiday and public holiday pay or provide employment agreements to Mr Sun and Mr Wang. I accept that at the time the company was not aware that it had statutory obligations in these regards.

[141] The events occurred over a relatively short period with two of the workers only being employed for around two months and Mr Lu for about six months. Mr Sun for example was only owed for one public holiday. BBL paid wages due and the amounts owing for public holidays and holiday pay were relatively modest. There was a lack of evidence of any effect of non-payment on the workers.

[142] Payments were outstanding for some time after the workers' employment finished. It was after they sought advice and their representative approached BBL that the company moved to seek advice. Once it did however, substantial payments were made relatively promptly, calculated on the basis of legal advice.

[143] There remained some dissatisfaction but BBL's representative faced some difficulties obtaining what the workers still regarded as owing. A further amount was paid during the investigation meeting. BBL pragmatically decided to pay when in some instances there was a financially modest dispute over, for example, what calculation method should be used.

[144] In addition, BBL deserves credit for deciding to pay Mr Wang even though it did not consider him to have been an employee. This ensured he was not out of pocket for as long as if the company had for the outcome of the Authority's process.

[145] Mr Zhao and Ms King both accept that aspects of BBL's practice were unlawful, albeit unintentionally. Earlier employees were family members without written employment agreements. Neither knew a written employment agreement was required or that the parties could not agree to no payment for public or annual holidays. As the person responsible for payments, appropriately Mr Zhao was concerned about deducting the proper amount of tax. PAYE was deducted and transferred to the IRD.

⁷ The Act, s 5.

Mr Zhao did not know that there are restrictions on the incorporation of annual and public holiday leave into a pay rate.

[146] For BBL it was submitted that this was not a case of an employer taking advantage of vulnerable employees. To some extent that is true with Mr Lu and Mr Sun negotiating an arrangement for a higher pay rate without paid holidays, which suited them. They were not dependent on BBL for work visas. Construction workers were in demand. All three were migrant workers however.

[147] Mr Lu and Mr Sun admitted that they knew that their unlawful bargain would not prevent them from suing for holiday payments after their employment ended.

[148] There is no indication of BBL, Mr Zhao and Ms King having been involved in problems with the law. There was evidence that they were conscious of wanting to comply with tax obligations.

[149] There is a need for general deterrence, as it is not acceptable for companies established by those new to employing people in New Zealand to fail to in advance examine their obligations and comply with them. I accept that BBL now appreciates its obligations.

[150] There was no suggestion that BBL was in a financial position which would make it difficult to pay a penalty.

[151] There are significant mitigating factors and BBL's latterly responsible approach sees it penalised much less substantially than would otherwise have been the case. Standing back, looking at that figure, including in comparison to other cases and the total arrears, I conclude that a fair penalty is \$8,000.

Payment of the penalty

[152] Payment is sought of all or some of penalty to the workers. As Mr Lu and Mr Sun had themselves sought an agreement which involved them trading their holiday entitlements for higher wages when they knew this was an unlawful bargain, they should not receive a part of the penalty.

[153] Mr Wang should receive a portion of the penalty. BBL is to pay a penalty of \$8,000 within 28 days of the date of this determination, with \$6,500 being paid to the Crown and \$1,500 to Mr Wang.

What about any overpayments from BBL?

[154] There are two aspects to possible overpayment claims by BBL. The first is whether the company overpaid Mr Lu. The second concerns payments to Mr Wang if he is found to be a contractor.

[155] BBL seeks that Mr Lu refund overpayments said to be made to him whilst he was employed of \$1,233.10, made up from three figures. Mr Lu did not concede that he was overpaid. On the basis of the evidence before me I am not satisfied that this claim is made out.

[156] As Mr Wang was found to be an employee, there is nothing to decide here.

Were Mr Zhao and Ms King involved in breaches?

[157] The workers sought leave to proceed against Mr Zhao and Ms King as persons involved in breaches by BBL of employment standards. However, at the present time there are no arrears or other money outstanding to the workers. The purpose of granting leave under s 142Y(2) of the Act is to enable pursuit of payment from individuals if the company defaults in payment. The company has paid, prior to this determination and there are no orders that it pays wages or other money payable to the employee as described in s 131 of the Act.

[158] Leave is declined regarding Mr Zhao and Ms King.

Costs

[159] Costs are reserved.

[160] The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so a party seeking costs should lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party 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.

[161] If costs are sought, the Authority's starting point would be the daily tariff with consideration of any adjustments.

A handwritten signature in black ink, appearing to read 'Nicola Craig', with a long horizontal flourish extending to the right.

Nicola Craig
Member of the Employment Relations Authority