

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 603

3143524

BETWEEN

SHIJIANG GU
Applicant

AND

HUI 18 LIMITED T/A SUN
CITY CHINESE RESTAURANT
Respondent

Member of Authority: Rachel Larmer

Representatives: David Kim, Advocate for the Applicant
Mins Chang, Advocate for the Respondent

Investigation Meeting: 27 and 28 April 2022 at Kerikeri

Submissions and Further Information Received: 2 May 2022 from the Applicant
9 May 2022 from the Respondents
30 May 2022 from the Respondents
12 August 2022 from the Applicant
12 August 2022 from the Respondents
15 August 2022 from the Applicant
16 August 2022 from the Respondents
16 August 2022 from the Applicant

Date of Determination: 17 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The respondent and restaurant

[1] Mr Fenhui Su is the sole director and shareholder of Hui 18. The respondent, Hui 18 Limited trading as Sun City Chinese Restaurant (“*Hui 18*”) is a family-owned takeaway/restaurant business in Kaikohe. It has a 20 seat restaurant that offers a buffet and an a la carte menu along with takeaways that included Chinese food, fish and chips and burgers

(referred to as “*the restaurant*” in this determination which, includes the takeaway part of the business).

[2] The restaurant opens seven days a week. The only day of the year it normally closed was Christmas day. However, in 2020 the restaurant was closed for five weeks from 26 March to 26 April 2020 due to Covid-19 Level 4 lockdown.

[3] Mr Su purchased the restaurant in 2019. He and his wife Ms Guifang Liu worked in the restaurant. After Mr Su purchased the restaurant in 2019, Hui 18 employed Jiming Liu to work as a chef. Mr Liu has a work visa that is linked to his employment by Hui 18.

Mr Gu’s employment

[4] Mr Liu recommended the applicant, Mr Shijiang Gu for employment. Mr Su interviewed Mr Gu in January 2020 and then offered him a job as a chef in the restaurant.

[5] The terms of Mr Gu’s employment were negotiated over WeChat. Hui 18 and Mr Gu signed an employment agreement on 20 January 2020. On 5 March 2020 Mr Gu was granted a three-year work visa by Immigration New Zealand (“INZ”).

[6] Mr Gu started work on 11 March 2020 and his last day of work was 29 April 2021. He worked for a total of 59 weeks. Mr Gu did not attend work for five weeks while the restaurant was closed due to the Covid-19 Level 4 lockdown. Apart from then, Mr Gu said he worked six or seven days a week in the restaurant.

[7] Mr Liu and Mr Gu lived with Mr Su and his family in their family home that was located near to the restaurant. They all speak Mandarin, worked together and ate their evening meal together in the restaurant at the end of the working day. Mr Su was the boss, so Mr Liu and Mr Gu did what Mr Su asked them to do. Mr Gu does not speak English.

Mr Gu’s resignation

[8] Mr Gu’s employment agreement did not state how much notice he had to give if he wanted to resign. After returning home from work on the evening of 29 April 2021 Mr Gu resigned by giving two weeks’ notice to Mr Su via WeChat.

[9] Mr Su asked Mr Gu to work for seven weeks before leaving Hui 18. Mr Gu agreed to work a four weeks’ notice period, but he did not agree to continue working for seven more

weeks. That made Mr Su angry, so he told Mr Gu had had to leave the family home. That happened around 11pm to 12am on a dark cold winter night, so Mr Gu had nowhere else to go, and had to sleep in a car that night.

Mr Gu's claims

[10] Mr Gu said his employment agreement did not reflect the reality of his employment. His employment agreement said he would be paid \$52,000 per annum for 40 hours work per week, based on a pay rate of \$25 per hour.

[11] Mr Gu said that from:

- (a) 28 April 2020 to 26 October 2020 he worked 87.5 hours over seven days a week;
- (b) 27 October 2020 to 12 April 2021 he worked 77 hours a week over six days a week;
- (c) 13 April 2021 to 29 April 2021 he worked 87.5 hours over seven days a week;

[12] Mr Gu also said that during his employment he had to work another two hours in the restaurant on his days off, whenever he went to the restaurant to eat dinner on his day off. He was not paid for these two extra hours he worked on his days off because it was used to 'work off' the restaurant food he had eaten for his dinner on his day off.

[13] Mr Gu said he generally worked from 9.30 am until 10.30 pm. He said that during the 13 hours he was at work, he had at most three breaks totalling about 20-30 minutes over the course of the day. He said he was often too busy to eat.

[14] Mr Gu claimed he had been constructively dismissed, had not been given statutory rest breaks while employed, and was owed significant wage arrears.

[15] Mr Gu said Hui 18 had failed to keep or provide wage and time records in breach of s 130 of the Employment Relations Act 2000 (the Act) or holiday and leave records in breach of s 81 of the Holidays Act 2003 (the HA03). It had also breached his employment agreement and minimum code legislation.

[16] Mr Gu claimed Hui 18 had breached sections 6 and 10 of the Minimum Wage Act 1983 (MWA) because it had not paid him at least the minimum wage for all of the hours he had

worked. He had also only received the government subsidy during the Covid-19 lockdowns instead of his usual wages.

[17] Mr Gu claimed he had not been paid his public holiday entitlements, in breach of ss 49, 50, 60 of the HA03. Mr Gu further claimed that Hui 18 had also failed to pay him his annual holiday entitlements, in breach of ss 23 and 27 of the HA03.

[18] Mr Gu sought that penalties be imposed on Hui 18 for breaches of his employment agreement, minimum code legislation and employment standards, and he asked that any penalties that were imposed be paid to him instead of the Crown.

Hui 18's position

[19] Hui 18 denied that Mr Gu had been constructively dismissed. It said he resigned of his own free will to pursue another employment opportunity.

[20] Hui 18 denied it had breached any of its obligations to Mr Gu regarding the payment of his wages, public holiday entitlements, annual leave entitlements or rest break entitlements. It denied breaching any employment legislation.

[21] Mr Su said the restaurant was open from 10.30am to 9.30pm Monday to Friday and from 12pm to 9.30pm on Saturdays and Sundays. He claimed that the two employees (Mr Gu and Mr Liu) each had a two and a half hour break in the afternoon, while Mr Su and his wife continued working.

[22] Hui 18 denied Mr Gu had worked the excessive hours he claimed to have worked. It said Mr Gu had only worked 45 hours per week and was paid \$1,000 per week wages (40 hours x \$25 per hour) with the five overtime hours he worked being offset against his accommodation and food costs.

Authority's investigation

Removal of Mr Su as personally named second respondent

[23] On 4 February 2022 Mr Su was removed as a personally named second respondent. However, Mr Gu indicated that if Hui 18 could not pay any wages/money that was awarded to him, then he would seek to recover it from Mr Su personally, on the grounds Mr Su was a person involved in the breaches of employment standards.

Investigation meeting

[24] The Authority conducted an in-person investigation meeting in Kerikeri. The Authority was assisted by a Mandarin interpreter for the duration of the investigation meeting.

[25] Mr Gu gave evidence in person. He called one witness, a friend of his, Mr Zhao Shengfu. Mr Su gave evidence along with his wife Ms Guifang Liu.

[26] Mr Jiming Liu, who was the other chef Hui 18 employed, also gave evidence. At the time of the Authority's investigation meeting, Mr Liu was still employed by Hui 18 and still lived with Mr Su and his family in their family home.

[27] The witnesses were questioned by the Authority and cross-examined by the other party's representative. Witnesses were assisted by the Mandarin interpreter. The Authority took care to ensure questions were repeated or answers were clarified to ensure that the language barrier did not adversely affect the witnesses' ability to give their evidence.

New documents and additional information

[28] Hui 18 handed up new documents during the investigation meeting.

[29] Further investigation was required after the investigation meeting regarding contradictions and ambiguities in the documentation the parties had provided. This was dealt with by an exchange of emails and documentation.

[30] Both parties filed further information and written submissions after the Authority's investigation meeting.

Withdrawal of rest breaks claim

[31] During the investigation meeting Mr Gu advised the Authority that he was no longer pursuing his claim that Hui 18 had breached s 69Z(d) of the Act, by failing to provide him with rest breaks, on the basis that he was out of time to pursue a penalty for these breaches.

Videos and audio file

[32] Mr Gu provided a number of videos of him in or around the restaurant. These were taken around 9.30am or 10.30pm to show him arriving at, or leaving, work.

[33] Mr Gu also submitted an audio recording (and transcript) of his 29 April 2021 resignation, that included Mr Su telling Mr Gu to leave the family home.

Photos

[34] Mr Gu provided the Authority with a photo that he took at 9.30 am on 29 April 2021, when he claimed to have arrived at the restaurant for work and another photo taken at 10.35 pm that same day, to show that was when he had left work.

[35] Both photos were taken under a clock so the time was visible in the photo. The Authority did not consider the photos to be helpful because they did not prove Mr Gu was working at these times, just that he had been at the restaurant.

Change in Hui 18's representation

[36] Up to and during the Authority's investigation meeting Hui 18 was represented by advocate Mr Gregory Hart.

[37] Hui 18 changed its representative between the Authority's investigation meeting and the filing of its submissions. It was given additional time to file submissions to accommodate its change of representation.

[38] It was therefore Hui 18's new representative who responded to the post investigation meeting queries that had arisen.

Inadmissible new evidence

[39] Hui 18's new representative also attempted to file new evidence after the investigation meeting. This new material was ruled inadmissible by another Authority Member, on the grounds it involved legally privileged communications between the applicant and his advocate.¹ Accordingly, that material has not been seen by this Member.

Payment information

[40] The Authority had to seek further information from the parties about what payments had been made to Mr Gu because the information provided was ambiguous, incomplete and contradictory. Getting clarity on what Mr Gu had actually been paid was challenging.

¹ Member Arthur.

[41] Hui 18 did not report all cash payments it made to Mr Gu during his employment to the IRD. It did not deduct PAYE from cash payments it made to him while he was employed and it did not record the cash payments it had made to Mr Gu.

Ambit of this determination

[42] The Authority has been unable to finally resolve all of Mr Gu's claims in this determination.

[43] It has therefore made factual findings in this determination, based on its view of the currently available evidence, that the parties will need to apply to the next stage of the Authority's investigation in Mr Gu's outstanding claims.

[44] This determination therefore includes findings that:

- (a) Relate to aspects of Mr Gu's wage arrears claim, so the parties can calculate what Mr Gu is owed;
- (b) Determine Mr Gu's unjustified dismissal claim and associated remedies;
- (c) Identify what breaches of Mr Gu's employment agreement, employment legislation and employment standards have occurred;
- (d) Determine Mr Su's involvement in breaches of employment standards;
- (e) Grant Mr Gu leave to pursue Mr Su personally, as the person involved in breaches of employment standards, for wages/money that Hui 18 was ordered to pay Mr Gu for breaches of employment standards, but it was unable to pay him.

[45] It has not been possible at this time to determine the amount of wage arrears Mr Gu is owed or what penalties should be imposed on Hui 18, so those matters will be subject to further investigation, along with costs.

Issues to be determined

[46] The following issues were to be determined:

- (a) Assessment of credibility of the key witnesses;
- (b) Findings on disputed material facts;

- (c) Did Hui 18 keep accurate employment records?
- (d) If not, did s 132(2) of the Employment Relations Act 2000 (the Act) apply?
- (e) Was Mr Gu required to work without being paid?
- (f) What days and hours did Mr Gu actually work?
- (g) What has Mr Gu been paid?
- (h) Was Mr Gu's final pay calculated correctly?
- (i) Has Mr Gu been overpaid, as Hui 18 claimed?
- (j) Was Mr Gu paid his correct public holiday entitlements?
- (k) Was Mr Gu paid his correct annual holiday entitlements?
- (l) Did Hui 18 breach the Holidays Act 2003 (the HA03)?
- (m) Did Hui 18 breach the Wages Protection Act 1983 (the WPA)?
- (n) Did Hui 18 breach Mr Gu's employment agreement?
- (o) What, if any, breaches of employment standards have occurred?
- (p) Should penalties be imposed on Hui 18 for any breaches that have occurred?
- (q) Was Mr Su a person involved in any breaches of employment standards that have occurred?
- (r) Should Mr Gu be granted leave to pursue Mr Su personally for wages/money that Hui 18 has been ordered to pay for breaches of employment standards, but defaults paying?
- (s) Was Mr Gu constructively dismissed, or did he resign?
- (t) If dismissed, was Mr Gu's dismissal justified?
- (u) If not, what if any remedies should Mr Gu be awarded?
- (v) What costs should the successful party be awarded?
- (w) What are the parties required to do now?

Relevant facts

(a) *Mr Gu's work visa*

[47] Mr Gu's work visa was provided to him on 5 March 2020 under the New Zealand Essential Skills Work Visa Approval Scheme. It permitted Mr Gu to work as a cook in Kaikohe for Hui Limited 18 t/a Sun City Chinese Restaurant from 5 March 2020 – 5 March 2023, provided he was paid at least \$21.25 per hour.

[48] When Mr Gu changed employer he had to also change the terms of his work visa.

(b) *Offer of free food and accommodation*

[49] Mr Gu provided the Authority with a WeChat log of the communications he had with Mr Su before he had started work. This include a message from Mr Su to Mr Gu that said “*I provide free accommodation and meals.*”

[50] When Mr Su offered Mr Gu a job Mr Su said: “*\$800 net weekly pay plus free accommodation and meals. Is that okay?*” In another message Mr Su again reiterated:

I offer free accommodation and meals to everybody. As the accommodation and meals are free, we work six days but the annual leave pay will be paid to you. (emphasis added)

[51] In further WeChat messages Mr Su told Mr Gu:

You can eat as much as you want in our restaurant, no problem for meals. You can eat anything. How can I tell you, the working hours, we start at 10.00 am and finish at 10.00 pm. Basically this is the time for the work, take one day off per week. I can pay you annual leave pay, no problem for that. (emphasis added)

[52] Mr Gu's reply to Mr Su noted “*It is so busy for your restaurant, nearly 12 hours*”. Mr Gu then stated that although he worked long hours at his then employer, he currently (meaning at that time) worked 9.5 to 10 hours a day, with his longest work day being 10 hours a day.

[53] Mr Su encouraged Mr Gu to accept the offer of employment by stating:

Free accommodation and free meals. Basically, after you receive the wages here, **you do not need to spend even one cent,** it's true. (emphasis added)

[54] The Authority finds that the offer of free food and free accommodation was a term and condition of employment that Mr Gu accepted, as it had enticed him into accepting the offer to work for Hui 18, based on how much money he thought he could save.

(c) *Offer of annual holiday lump sum payment*

[55] The reference in Mr Su's WeChat message to "*the annual leave will be paid*" and "*I can pay you annual leave*" referred to fact that Mr Su was offering to pay Mr Gu a lump sum annual holiday payment that was equivalent to four weeks' annual holiday for each 12 months he worked.

[56] If Mr Gu worked for 12 months without taking any leave then, instead of him using his four week's annual holiday entitlement under s 16(1) of the HA03 during his second 12 months of employment, Hui 18 would pay Mr Gu four weeks' annual holiday pay in one lump sum, in order to extinguish his paid annual holiday entitlement.

[57] This offer was made to entice Mr Gu to accept the offer of employment by Hui 18 on the basis he knew he could save more easily if he was paid a lump sum after 12 months. It was an easy way for him to ensure he saved a decent amount and it meant that Hui 18 had employees who worked continually without taking any annual holidays.

[58] That arrangement breached s 28A(2)(b) of the HA03 because only one week of accrued annual holiday may be paid out to an employee in each entitlement year.

[59] Despite this arrangement being a breach of HA03, Hui 18 had already paid a lump sum of four weeks' annual holiday payment to Mr Liu. At the time of the Authority's investigation meeting, Mr Liu said he had worked six or seven days a week for three years, without taking any paid annual holiday.

[60] Mr Liu had been paid one lump sum equal to his four weeks' annual holiday and he had expected that lump sum to be paid out to him again at the end of his second and subsequent years of employment.

[61] However, the Authority heard that Mr Liu had not been paid his subsequent expected four weeks' annual holiday lump sum payment because Mr Su had said Hui 18 could not afford to pay Mr Liu at the time. Mr Su had however agreed the second and an subsequent lump sums would still be paid to Mr Liu when Hui 18 could afford it.

(d) *Remuneration, as per employment agreement and job description*

[62] Mr Gu's remuneration was set out in his employment agreement, which stated he would be paid "\$52,000 per annum, with 40 hours of work per week." His job description said "Salary: \$52,000.00 per annum, 40 hours per week."

[63] The reference to "salary" did not appear in Mr Gu's employment agreement. That would have contradicted the condition of his work visa that he be paid not less than \$21.25 per hour, as salaried workers are not paid extra if they work for more than their contractual hours of work.

(e) *Breach of Minimum Wage Act 1983 (the MWA) claim*

[64] Mr Gu claimed that Hui 18 failed to pay him the minimum wage for every hour he worked.

[65] Section 6 of the Minimum Wage Act 1983 (the MWA) requires an employee to be paid for every hour they work at not less than the minimum rate. The minimum wage rate from 1 April 2019 until 31 March 2020 was \$17.70 per hour and from 1 April 2020 to 31 March 2021 was \$18.90 per hour. The minimum wage rate from 1 April 2021 to 31 March 2022 was \$20.00 per hour.

[66] However, in this case the minimum wage rate did not apply to Mr Gu, because it was a condition of his work visa that he had to be paid not less than \$21.25 for every hour he worked. Mr Gu was therefore entitled to be paid more than the minimum wage for every hour he worked.

(f) *Two different pay rates applied*

[67] In terms of his remuneration Mr Gu therefore had two different pay rates:

- (a) He was contractually entitled to be paid his normal salary of \$1,000 gross per week, based on \$25 per hour for the first 40 hours he worked in any week. This was his minimum rate of pay as per his employment agreement.
- (b) If he worked more than 40 hours in any given week, then he was entitled to be paid overtime at the rate of \$21.25 per hour for every hour he worked in excess

of 40 hours per week. This was his minimum rate of pay as per his work visa requirements.

(g) *Mr Gu's time and a half rate for work done on a public holiday*

[68] These two different pay rates also affected Mr Gu's public holiday time and a half entitlements. For each public holiday he worked, Hui 18 needed to determine whether or not Mr Gu had already worked 40 hours as at the date of the public holiday.

[69] If so, then Mr Gu should have been paid time and a half at the rate of \$31.88 per hour (being \$21.25 plus \$10.63 being half of that) for the hours he had actually worked on that particular public holiday.

[70] If Mr Gu had worked less than 40 hours on the day of the public holiday that he had worked on, then he should have been paid time and a half at the rate of \$37.50 per hour for each hour he actually worked on each public holiday (\$25 plus \$12.50 being half of that).

[71] Hui 18 failed to do this exercise to determine Mr Gu's correct pay rate, so it is likely that it did not pay Mr Gu his correct time and a half rate for the work hours he worked on public holidays. The parties will need to do those calculations correctly to determine what Mr Gu is owed.

(h) *The two 10 June 2020 payslips provided to the Authority were contradictory*

[72] During the investigation meeting Mr Su handed up to the Authority Member a payslip dated 10 June 2020, to prove that Mr Gu had been paid out his annual holiday entitlement while employed.

[73] This payslip recorded that on 10 June 2020 Hui 18 had paid Mr Gu \$3,923 "*annual leave this period*" (calculated as \$25 x 156.92 hours), from which PAYE of \$1,402.46 had been deducted. The payslip recorded that the "*annual leave available*" after that payment was 0.00 hours.

[74] The Authority had pointed out that Mr Gu could not be paid out his annual holiday entitlement in that way. Mr Gu had not requested or agreed to it, his annual holiday entitlement had not accrued because he had only worked for three months, and a maximum of one week could be cashed up under s 28A of the HA03.

[75] When the Authority asked the parties for further details about this lump sum annual holiday pay out after the investigation meeting, Mr Gu said he had never been paid it. Hui 18 also said Mr Gu had not been paid out any annual holiday while employed, and it provided another 10 June 2020 payslip that had removed all details of, and references to, the lump sum annual holiday pay out.

[76] The two 10 June 2020 payslips supplied to the Authority covered exactly the same period and they referred to payments made on the same date of 10 June 2020. The second payslip recorded a payment of \$750 gross had been made to Mr Gu, from which PAYE of \$122.82 had been deducted. No explanation has been provided for the fundamental differences in these two payslips.

(i) Payslips failed to record cash payments made to Mr Gu

[77] Mr Gu said that after the Covid-19 Level 4 lockdown Hui 18 started paying him \$750 gross for 30 hours work, from which PAYE of \$122.82 was deducted. This was paid into his bank account. However, Hui 18 also gave Mr Gu a cash payment of \$190 per week to ‘top up’ his wages. No PAYE was deducted from this cash ‘top up’.

[78] Payslips supplied by Hui 18 show this reduced payment into Mr Gu’s bank account was paid for 25 weeks from 6 May 2020 to 21 October 2020. There was no record of the cash payments having been made and no explanation from Mr Su as to why the cash payments had been omitted from Hui 18’s payslips.

[79] Hui 18’s payslips also contradicted information that Hui 18’s representative provided after the investigation meeting, as she said that Mr Gu was paid \$193 cash per week for 24 weeks, ie \$4,632 in total, because there were no cash payments recorded on the payslips.

(j) Incorrect payments and IRD issues

[80] Mr Gu was paid \$820.34 net on 16 December 2020 and 24 December 2020, but these payments were not reported to the IRD. When asked to explain that omission, Hui 18’s representative said these were “*genuine payroll errors*”, so the payments were not recorded with the IRD.

[81] It was unclear whether this explained the inconsistency Mr Gu had identified between what he had been paid and what had been reported to IRD as his earnings in December 2020,

because the figures used were not the same. The parties are therefore invited to address that during the next stage of the Authority's wage arrears investigation.

(k) Payslips and PAYE reporting

[82] According to Mr Gu he was paid \$320 cash per week for 25 weeks over the period 27 April 2020 to 26 October 2020. This consisted of \$190 cash to top up to the \$750 gross he had been paid (with the net amount having been deposited into his bank account (as recorded on the payslips) plus \$130 per week cash for the seventh day he worked. However, Hui 18's IRD reporting did not reflect that.

[83] Hui 18 did not pay PAYE on any cash payments it made to Mr Gu while he was employed.

[84] Hui 18 only reported some of the cash payments it had made to Mr Gu to IRD on 16 March 2022. Different figures have been provided at different times which has made obtaining clarity about this challenging. The Authority has therefore adopted Mr Gu's figures in terms of resolving that conflict.

[85] Hui 18 reported (by email via their representative on 12 August 2022) that Hui 18 had paid \$10,009.75 gross (\$8,776 net) to Mr Gu in February 2022, but he denied being paid anything in February 2022.

[86] No payslip supported that payment and the Authority could not see that payment on the bank account statements it had been given. The only 2022 entry on the bank statement Hui 18 emailed the Authority on 12 August 2022 was reference to a payment of \$8,108.27 made on 2 May 2022. That amount lined up with the payslip dated 4 May 2022 that recorded a payment of \$9,209.75 gross (\$8,108.27 net) had been made to Mr Gu on 4 May 2022.

[87] Hui 18 also gave the Authority a payslip dated 16 March 2022 that said Mr Gu had been paid \$7,024.06 gross on 16 March 2022, from which PAYE of \$2,392.06 had been deducted. Mr Gu did not receive any payments in March 2022, so this payslip must have been the disclosure by Hui 18 to IRD about some of the cash payments it had already made to him in 2020.

[88] The 16 March 2022 payslip recorded that Mr Gu had been paid \$7,024.06 for 280.96 hours at the rate of \$25 per hour in the pay period 7 to 13 March 2022 (ie over a one week

period, almost a year after Mr Gu's employment had ended). That information was obviously not correct.

[89] The net amount reported to IRD by Hui 18 did not line up with the cash Mr Gu said he had been paid. The 16 March 2022 payslip did not explain how the 280.96 hours had been calculated or the dates (days/weeks or even year) those hours of work had been worked by Mr Gu. Mr Gu was not given a copy of this payslip, so he did not see it until it was provided to the Authority as part of its investigation.

[90] Hui 18 acknowledged that the 16 March 2022 payslip did not include any reference to the \$130 cash per week Mr Gu was given when he had worked seven days in a week. There has been no accounting to IRD by Hui 18 of the PAYE on those cash payments.

[91] Mr Gu said he had been paid \$5,000 gross in December 2020 but that Hui 18 had only reported to IRD that he had been paid \$4,000. The Authority has not been able to reconcile these figures from the documents it currently has. It is therefore open to the parties to address this matter again, as part of the continuing investigation in to Mr Gu's wage arrears claim.

(l) Payment recorded in payslip that Mr Gu did not receive

[92] Another payslip in the bundle of documents Hui 18 filed with the Authority recorded that Mr Gu had been paid \$7,359.82 on 23 March 2020, from which \$2,531.04 had been deducted as PAYE.

[93] However, Mr Gu said he never received that payment so did not know why it was recorded as a payment to him by Hui 18. It is possible this 23 March 2020 payslip was a duplicate, but with a different date of the 16 March 2022 payslip. Again this requires further investigation, so the parties are invited to address that during the next stage of the wage arrears investigation.

(m) Final pay payslip and alleged overpayment

[94] Hui 18's representative emailed the Authority on 1 August 2022 saying that Mr Gu had been paid \$9,209.75 gross (\$8,108.27 net) in FYE 2023.

[95] The \$9,209.75 paid on 4 May 2022 was supposedly Mr Gu's final pay, paid a year after his employment had ended, which Hui 18 then claimed had included a \$2,679.75 gross overpayment.

[96] Mr Gu agreed he had received \$8,108.27 on 2 May 2022 (not 4 May), but said he was not given an explanation at that time about what that money was for or how it had been calculated. The Authority finds there were errors in the way Mr Gu's entitlements and therefore final pay had been calculated.

(n) Hui 18 incorrectly reported to IRD that unlawful deductions it had made from Mr Gu's wages was income he had received

[97] Hui 18 apparently reported to IRD in 9 February 2022 that it had paid Mr Gu \$7,375 gross for working five extra hours each week for the 59 weeks he was employed. However, Hui 18 had not actually paid Mr Gu anything for working overtime. Instead Hui 18 had:

- (a) Unilaterally made unlawful deductions for board from Mr Gu's wages;
- (b) Made Mr Gu work two hours to pay for restaurant food he ate on his days off; and
- (c) Made Mr Gu work in excess of 40 hours per week without paying him for the work he did.

[98] Accordingly, Hui 18's report on 9 February 2022 to IRD about what Mr Gu had been paid was not accurate, because he had not received the payments Hui 18 had reported to IRD that he had received.

PAYE and IRD issues that need to be remedied by Hui 18

[99] In 2 February 2022 Hui 18 said it had informed the IRD that it had made cash payments (referring to the amounts that Hui 18 had unlawfully deducted from Mr Gu's wages each week he worked for more than 40 hours over six days for food and board) of \$7,375 gross to Mr Gu. Hui 18 said that the PAYE and ACC earner's levy on that amount was \$1,779.57, meaning Mr Gu had received \$5,595.43 net.

[100] Hui 18's reporting to IRD of cash payments was based on an arbitrary selection of five hours per week, when the Authority finds as a matter of fact (based on evidence from Mr Gu,

Mr Liu and even Mr Su) that Mr Gu (and for that matter Mr Liu) would often work more than 45 hours over a six day period.

[101] Hui 18 breached its PAYE related obligations to Mr Gu in the following ways:

- (a) The additional reporting (disclosure) it did to IRD in 2022 was incomplete, inaccurate and misleading;
- (b) It made cash payments to Mr Gu that it has still not reported to IRD;
- (c) It failed to deduct PAYE from all of Mr Gu's wages;
- (d) It failed to correctly calculate the PAYE it had to pay on Mr Gu's wages;
- (e) It has underpaid Mr Gu's PAYE to IRD;
- (f) It reported to IRD that it had paid Mr Gu wages when it had not – it had actually made unlawful deductions from his wages, thereby causing IRD to charge him PAYE on wages he was never paid.

[102] Hui 18 is legally required to fix the PAYE problems it has created regarding Mr Gu's wages. It will need to do the necessary calculations and then satisfy the Authority that all of Mr Gu's PAYE and associated deductions (such as the ACC earners' levy) have been:

- (a) Calculated correctly; and
- (b) Paid in full to IRD on his behalf.

[103] Any penalties IRD may impose as a result of Mr Gu's PAYE related issues are to be paid by Hui 18 (as it caused the PAYE problems) and not Mr Gu.

Assessment of credibility of the key witnesses

Mr Gu

[104] Mr Gu's evidence that he had worked 13 hour days six or seven days a week (except during the Covid-19 Level 4 lockdown when he did not attend work) throughout his employment was considered unlikely, so was not accepted.

[105] That finding meant the Authority was unable to rely on s 132(2) of the Act or s 83(4) of the HA03 to accept Mr Gu's evidence about the hours, days, and times he worked. However, the Authority had to accept Mr Gu's evidence about the amount of wages he had actually been paid because it was likely more reliable than Mr Su's evidence about that.

Mr Liu

[106] Mr Liu was reluctant to give straightforward answers, and instead wanted to praise Mr Su (what a great boss he was, how happy Mr Liu was, how well Mr Liu was treated by Mr Su). Mr Liu left the Authority with the impression that he was not a neutral witness but was overly concerned to give evidence that matched Mr Su's evidence.

[107] However, careful questioning of Mr Liu resulted in him giving answers that contradicted what he had written in his witness statement. In particular, Mr Liu agreed that he and Mr Gu:

- (a) Often worked seven days a week;
- (b) Would be paid \$130 cash for the seventh day if they worked seven days in a row;
- (c) They were paid \$130 cash for the seventh day regardless of how many hours they actually worked.

[108] Mr Liu agreed that:

- (a) He had not taken any paid annual holiday in the three years he had been employed;
- (b) No records were kept of the overtime hours he or Mr Gu worked;
- (c) He and Mr Gu were not paid wages for any hours they worked in excess of 40 hours a week (apart from the \$130 on the seventh day in a row, described above);
- (d) He had been paid a lump sum payment of four weeks' annual holiday after working for one year;
- (e) Mr Su told him he would be paid another four weeks' annual holiday lump sum payment at the end of his second year of employment, but that payment was not made because Mr Su said the business could not afford to pay him.

Mr Su

[109] Mr Su has attempted to pressure Mr Gu and his advocate Mr Kim from pursuing these Authority proceedings.

[110] Mr Su was happy to support Mr Gu's application for a work visa from INZ despite supposedly knowing Mr Gu had (allegedly) not disclosed prior deportation(s) to INZ. After these proceedings were filed, Mr Su threatened to tell INZ that Mr Gu had not disclosed a prior deportation when applying for his New Zealand work visa and that Mr Gu's wife had failed to disclose that she had also previously been deported from another country for working illegally.

[111] Mr Su claimed Mr Gu's advocate (Mr Kim) was involved in fraud (not disclosing Mr Gu's prior deportation(s) to INZ). Mr Su filed a complaint about Mr Kim's supposed 'fraud' with the Immigration Advisers Authority. Mr Su also apparently complained to the New Zealand Police and INZ about Mr Kim. However, Mr Gu produced receipts to the Authority that proved that Mr Kim had not helped him obtain his work visas.

[112] In terms of resolving material conflicts, the Authority did not accept Mr Su's evidence. Mr Su was responsible for Hui 18 breaching its record keeping obligations and for the inaccurate and misleading information that it had given to IRD. He also fundamentally contradicted what had been put in the Statements in Reply and in his witness statement when he gave his evidence during the investigation meeting.

Findings on disputed material facts

[113] The Authority made findings on the following disputed material facts:

- (a) Employee roster;
- (b) Board arrangements (food and accommodation);
- (c) Work done on days off in exchange for food;
- (d) Cash payments for hours worked on the seventh day in a row.

(a) Employee roster

[114] Hui 18 produced a handwritten "*employee roster*" to the Authority that purportedly set out Mr Gu's and Mr Liu's days, times and hours of work along with the supposed "*board*" arrangements. Mr Su claimed the roster had been pinned up in the restaurant.

[115] Mr Gu said he had never seen the roster before. The roster was the only written record of the board arrangement, and it fundamentally contradicted the offer of free food and accommodation Mr Su had given Mr Gu before he accepted Hui 18's offer of employment. It

also did not reflect the evidence Mr Gu, Mr Liu and Mr Su gave during the Authority's investigation meeting.

[116] The roster stated Mr Gu was to:

- (a) Have Mondays as his day off;
- (b) Work from 11.00 am until 2.30 pm and then from 5.00 pm until 9.30 pm Tuesday-Friday;
- (c) Work from 1.00 pm until 2.30 pm and then 5.00 pm until 9.30 pm on Saturdays;
- (d) Work from 12.00 pm until 2.30 pm and 5.00 pm until 9.30 pm on Sundays;
- (e) Not work from 2.30pm to 5pm each day he worked (this was recorded as his break time).

[117] The roster was similar for Mr Liu, except he started at 10.30am and finished at 1.30pm, he had his break from 1.30pm to 5pm and then he worked from 5pm to 9.30pm. Mr Liu's day off was Saturday.

[118] The roster for Mr Gu also said:

Working more than 5 hours a week will be used to deduct rent and food expenses and water, electricity and internet costs work 40 hours a week. (sic)

[119] For Mr Liu it stated:

Working more than 4 hours a week will be used to deduct rent and food expenses and water, electricity and internet costs work 40 hours a week. (sic)

[120] The evidence given during the investigation meeting about this roster was unsatisfactory. No-one could answer basic questions about it, such as when this arrangement started, where the roster was pinned up, what the "*board*" deductions meant, how they were calculated, and why they occurred.

[121] Mr Liu struggled to explain the board arrangement, which indicated to the Authority he was not familiar with it. What he was clear about was that he and Mr Gu were not paid for working more than 40 hours a week, unless they worked seven days in a row, in which case they were paid \$130 cash.

[122] When questioned by the Authority Mr Su admitted that Mr Gu had worked seven days a week for “*half of his employment*” and that Mr Liu had also often worked seven days a week as well. Mr Liu also said he often worked seven days a week, and when he did so he would be paid \$130 cash regardless of how many hours he had worked.

[123] The Authority accepted Mr Gu’s evidence that he had never seen the roster before and it did not reflect the actual days, times or hours that he or Mr Liu actually worked. The Authority considered it more likely than not that Mr Su had created this roster after Mr Gu filed these Authority proceedings.

(b) The board arrangements

[124] Mr Su gave conflicting evidence about the board arrangement.

[125] In WeChat messages Mr Su told Mr Gu he would get free food and board.

[126] The Statement in Reply (SiR) lodged on 11 October 2021 said Mr Gu:

[w]as provided accommodation in the home of his employer at no cost during the employment. By way of mutual arrangement, he agreed to work extra hours to cover the cost (sic) his accommodation. It was agreed this be calculated at market rate of \$180 per week equating to \$9,360 per year.

[w]as provided with meals which were calculated at \$30.00 per day. By way of mutual arrangement, he agreed to work additional hours to cover this cost.

[127] The Authority finds that the only negotiation and mutual agreement about the board that occurred was that it would be provided to Mr Gu free of charge.

[128] The Amended SiR lodged on 27 January 2022 also said board had been negotiated and that parties had agreed on the market rate of \$180 per week. The Authority did not accept that and noted the only time this figure of \$180 was ever used was in the SiRs, as none of the witness referred to it.

[129] Mr Su also said in his witness statement:

For sometimes working 5 hours overtime a week, these fees are used to pay for the food, lodging, utilities and internet I provide for my employees. All employees are the same.

[130] Mr Su's statement that the employees were treated the same contradicted the roster that said Mr Liu supposedly had to work 4 hours overtime to pay for his board while Mr Gu was required to work 5 hours overtime to pay for his board.

[131] When questioned by the Authority during the investigation meeting, Mr Su acknowledged he had initially agreed to give Mr Gu free board, but said that he (Mr Su) had changed his mind about that after Mr Gu had worked for one week.

[132] Mr Su told the Authority he was unhappy with Mr Gu's performance, because he thought Mr Gu was not a good cook and therefore likely not a qualified chef. Mr Su said that because of Mr Gu's poor performance he (Mr Su) decided to start charging him board.² The Authority noted that did not explain why the roster said Mr Liu also had to work extra hours for his board.

[133] The Authority accepted Mr Gu's evidence that the board arrangement was not communicated to him while he was employed and that it was likely put forward to undermine his wage arrears claim. Hui 18 was not entitled to charge Mr Gu board, because he had not agreed to that.

(c) Work done on days off without pay, in exchange for food

[134] One of the terms of Mr Gu's employment was that he could have free food (any meals and snacks he wanted to eat when he was working). He was also given free food at home (meaning Mr Su's family home in which Mr Liu and Mr Gu both stayed). Mr Gu could also go into the restaurant on his days off to have his meals there for 'free.'

[135] However, the Authority finds that Mr Gu was not in fact provided with "free" food because he had to work for two hours (without being paid) every time he went into the restaurant to eat on one of his days off.

[136] That meant every time Mr Gu had a day off but ate in the restaurant it actually cost him either \$50 in wages (being \$25 per hour x 2 hours) or if he had already worked over 40 hours in a week on his day off, then the food Mr Gu ate at the restaurant on his day off cost him \$42.50 (being \$21.25 per hour x two hours).

² The Authority was careful to double check this evidence with Mr Su to ensure that is what he had meant to say, because it was surprising evidence.

[137] Mr Su in his witness statement said:

Out of compassion for the employees, I let him come back to the restaurant to eat on his days off and free of charge. I didn't ask him to work on his days off. When he went back to the restaurant to eat, **he sometimes took the initiative to help**, and I would tell him that it was his day off and I didn't need his help. As for Gu Shijiang's statement that he worked two hours on a rest day, it is not true. (emphasis added)

[138] Mr Su's reference to Mr Gu working in the restaurant on his day off was responding to Mr Gu's claim that when he had a day off, if he ate at the restaurant, then he had to work two hours to 'pay off' the cost of the food he had eaten. These extra hours Mr Gu worked on his days off were not recorded.

[139] Mr Su and Mr Liu agreed during the investigation meeting that Mr Gu would stay and work in the restaurant on his days off, if he ate in the restaurant. Mr Su told the Authority that he did not want Mr Gu to work on his day off but Mr Gu insisted on doing it and that Mr Su was unable to stop him.

[140] The Authority did not accept that Mr Gu 'helped' out in the restaurant on a voluntary basis on his days off or that Mr Su was unable to stop Mr Gu from doing that.

[141] Mr Su's evidence about that was not considered credible. Mr Gu was tired, overworked and unwell. He was scared of Mr Su and he had very few days off. It was unlikely Mr Gu would insist on voluntarily working on his day off. It was more likely that Hui 18 made Mr Gu work on his days off in exchange for food.

[142] The Authority therefore accepted Mr Gu's evidence that he worked two hours to 'pay off' the food he had eaten in the restaurant on his day off, as he had no other reason to be working in the restaurant on his days off. Each time that occurred, it breached Mr Gu's employment agreement, the terms of his work visa, the Minimum Wage Act 1983 (the MWA) and the WPA.

(d) Cash payments for overtime worked on the seventh day in a row

[143] Mr Su, Mr Liu and Mr Gu all told the Authority during the investigation meeting that Mr Liu and Mr Gu \$130 cash whenever they worked seven days in a row, regardless of how many hours they actually worked on the seventh day.

[144] These cash payments were not recorded and Hui 18 did not pay PAYE to IRD on these cash payments.

[145] The Authority noted that if Mr Gu worked for more than 6.11 hours on the seventh day, then Hui 18 had underpaid him, because he was entitled to be paid not less than \$21.25 for each overtime hour he had worked.

[146] Because the Authority concluded that Mr Gu likely worked either 9.5 hours (on weekdays) or 8.5 hours (on weekend days) then he must have been underpaid every time he worked seven days in a row.³ Hui 18 therefore needs to recalculate Mr Gu's correct overtime pay in accordance with the Authority's findings in this determination.

[147] Mr Gu said he had been paid \$130 per week each time he worked seven days in a row for 26 weeks. Mr Su in his written statement said Mr Gu "*worked overtime eight times in total and I paid him \$130 in cash for each overtime.*" However, that was not accepted, because Mr Su contradicted that evidence during the Authority's investigation meeting.

[148] Mr Su told the Authority that Mr Gu had worked seven days a week for "*about half of his employment*". Mr Su's position about that changed again between the investigation meeting and an email his representative sent the Authority on 16 August 2022, in which he reverted back to the position that Mr Gu had only worked seven days in a row for eight weeks in total over his employment.

[149] Hui 18 therefore claimed on 16 August 2022 that it had only paid Mr Gu cash of \$1,040 (being 8 weeks x \$130 cash per week) during weeks in which he had worked seven days in a row.

[150] The Authority preferred Mr Gu's evidence on this point, because unlike Mr Su's evidence, it was consistent. Hui 18 therefore more likely than not paid Mr Gu \$3,380 cash, without deducting PAYE from his amount, for the 26 weeks during which he had worked seven days in a row.

³ See paragraph [180].

[151] Hui 18 needs to calculate and remit to IRD the correct PAYE and any other deductions (such as the ACC earner's levy) that it should have made on the \$3,380 cash payments it made to Mr Gu during his employment.

[152] In addition, Hui 18 is required to properly calculate the number of overtime hours Mr Gu actually worked while employed, to ensure he is paid for every hour he worked, because the \$130 cash payment would not have achieved that.

Summary of Authority's findings

[153] The Authority's findings are summarised as follows:

- (a) Section 132(2) of the Act was not applied by the Authority because it considered Mr Gu had likely overstated the hours he claimed to have worked;
- (b) Hui 18 breached the terms of Mr Gu's work visa because;
 - (a) He was not paid at least \$21.25 per hour for the hours he worked;
 - (b) He worked in excess of the 40 hours per week that had been reported to INZ via his employment agreement;
- (c) Hui 18 failed to keep accurate employment records;
- (d) The roster was likely created after Mr Gu lodged these Authority proceedings, so cannot be relied on;
- (e) The payslips Hui 18 produced to the Authority were not provided to Mr Gu while he was employed, and may not be accurate;
- (f) Mr Gu received cash payments that were not reported to IRD;
- (g) Hui 18 failed to deduct PAYE on the cash payments it made to Mr Gu, so it did not pay the correct amount of PAYE to the IRD;
- (h) The IRD information is inaccurate due to Hui 18's inaccurate reporting of what Mr Gu was actually paid;
- (i) Hui 18 was not entitled to charge Mr Gu for food or accommodation;
- (j) The board arrangements breached the WPA, the MWA, Mr Gu's employment agreement and the terms of his work visa;

- (k) The board and food arrangements Hui 18 implemented were unlawful deductions from Mr Gu's wages that breached the WPA, so these must be repaid to him;
- (l) Mr Gu's first 'final pay' paid on 6 May 2021 was incorrect and the second 'final pay' he was paid on 2 May 2022 was also incorrect;
- (m) Hui 18's reporting to IRD regarding Mr Gu's earnings was inaccurate;
- (n) Hui 18 failed to calculate Mr Gu's public holiday and annual holiday entitlements in accordance with the applicable sections in the HA03.

Did Hui 18 keep accurate employment records?

[154] Hui 18 failed to comply with its record keeping obligations.

The Employment Relations Act 2000

[155] Section 130 of the Employment Relations Act 2000 (the Act) requires an employer to keep a wage and time record that records the information specified in s 130(1) of the Act. Section 130(1A) of the Act requires the wage and time record to be kept in a written form, or in a formal manner that is easily accessed or converted into written form.

[156] Under s 130(4) of the Act, an employer who fails to comply with the wage and time record requirements may be subject to a penalty.

[157] Section 4B(1) of the Act requires an employer to keep sufficiently detailed records to be able to demonstrate that it has complied with minimum entitlement provisions. Section 4B(2) of the Act provides that the obligation in s 4B(1) of the Act is in addition to the record keeping requirements specified in the Act and any other relevant legislation.

[158] Section 130(1B) of the Act provides that if an employee's number of hours worked each day in a pay period and the pay for those hours are agreed and the employee works those hours (referred to as the "usual hours"), that will comply with s 130(1)(g) of the Act if the usual hours and pay are stated in the wages and time record, or the employment agreement, or a roster, or any other document or record used in the normal course of the employee's employment. That did not apply to Mr Gu's situation.

[159] Under s 132 of the Act an employee may call evidence in support of a wage arrears claim to establish the employer failed to keep or provide a wage and time record as required

by the Act and that the failure prejudiced the employee's ability to bring an accurate wage arrears claim under s 131 of the Act.

[160] Section 132(2) of the Act provides that where the employee relies on s 132(1) record keeping failures by the employer, then the Authority may, unless the employer proves that the employee's claims are incorrect, accept as proven all claims the employee has made about the wages they were actually paid and the hours, days and time worked by the employee.

The Holidays Act 2003

[161] Section 81 of the Holidays Act 2003 (HA03) requires an employer to keep holiday and leave records that record the information specified in s 81(2) of the Act.

[162] Section 81(3A) of the HA03 sets out a similar provision regarding the holiday and leave records as s 132(2) did for wage and time records.

[163] Section 130(1D) of the Act and s 81(3C) of the HA03 both require an employer to record any additional hours worked that need to be recorded to enable it to comply with its obligations under s 4(B1) of the Act.

[164] Section 83 of the HA03 contains a similar provision to s 132 of the Act. Section 83(1) of the HA03 allows an employee to provide evidence that their employer has failed to comply with the record keeping requirements in s 81 and s 82 of the HA03.

[165] If the Authority was satisfied that an employer had failed to comply with the s 81 or s 82 record keeping obligations and that the failure prevented the employee from bringing an accurate wage arrears claim, then the Authority could accept as proven, in the absence of evidence to the contrary, the employee's evidence about the holiday pay or leave pay they actually received and about the annual holidays, public holidays, sick leave or bereavement leave they took while employed.⁴

Summary of record keeping breaches

[166] Hui 18 breached:

⁴ Section 83(4) of the HA03.

- (a) Section 4B of the Act because it failed to keep records to establish that it had complied with Mr Gu's minimum entitlements;
- (b) Section 130 of the Act because it failed to keep wage and time records for Mr Gu; and
- (c) Section 81 of the HA03 because it failed to keep accurate holiday and leave records for Mr Gu.

Did s 132(2) of the Act apply?

[167] The Authority has not completely accepted either party's evidence about the days and hours Mr Gu worked. It has also not relied on s 132(2) of the Act because it was not satisfied Mr Gu's evidence about his hours, days and times worked was entirely accurate.

[168] The reservations about some of Mr Gu's evidence arose due to:

- (a) The Authority was told Kaikohe has a population of around 4,400;
- (b) The restaurant is one of ten in the local area;
- (c) The business did not open during the Covid-19 Level 4 lockdown;
- (d) Business significantly decreased by around 40% during Level 3 lockdown, as only takeaways were offered;
- (e) Business was less than usual during Level 2 lockdowns and the restaurant did not return to normal levels of business until around 22 December 2020; and
- (f) The Level 2 lockdowns in February and March 2021 also disrupted the restaurant's usual operations and therefore its level of business.

Was Mr Gu required to work without being paid?

[169] Mr Gu was required to work without being paid for the work he did when he worked:

- (a) More than 40 hours over six days;
- (b) Two hours on his days off, for food he had eaten in the restaurant on his days off; and
- (c) Seven days in a row, for which he had received \$130 cash.

[170] Hui 18 needs to calculate the total hours Mr Gu worked (as per above) and pay him properly for all of the hours he has worked without being paid.

[171] Hui 18 must also deduct the correct PAYE from these wage arrears and then pay it to IRD. The number of hours Mr Gu worked in excess of 40 hours per week over six days must be calculated in accordance with the factual findings in this determination.

What days and hours did Mr Gu actually work?

Basis of the Authority's findings about the days, times and hours Mr Gu worked

[172] The Authority could not rely entirely on the evidence given by any witness. The findings the Authority made about Mr Gu's days, times and hours of work were based on a careful assessment of:

- (a) The documents provided by each party;
- (b) The WeChat messages;
- (c) The videos, audio, transcript and photos;
- (d) Evidence given by witnesses in their witness statements and during the Authority's investigation meeting;
- (e) The restaurant's likely opening hours;
- (f) The nature of the restaurant's business, including the various a la carte, buffet and takeaway options it offered customers;
- (g) The restaurant's weekly and annual turnover;
- (h) The work that had to be done in the restaurant each day and how that was divided up among the various workers;
- (i) The types of food the restaurant offered and how long each type of food took to prepare (as well as who prepared it, how often they did so);
- (j) The number of workers working each day/week;
- (k) The nature of the specific tasks Mr Gu would have been required to do each day and how long that would likely have taken him;
- (l) How busy the restaurant was likely to be at its peak times and throughout different times of the day;
- (m) The dates Kaikohe was in different levels of Covid-19 lockdowns over the course of 2020 and 2021;

- (n) The impact of the Covid-19 lockdowns on the restaurant's business;
- (o) The location of the restaurant in a town with a population of around 4,400 people;
- (p) The fact the restaurant had nine nearby competitors.
- (q) Consideration of the parties' submissions.

Mr Gu's days off

[173] The Authority finds that Mr Gu did not work:

- (a) Mondays over the period 11 March 2020 to 25 March 2020;
- (b) Mondays over the period 28 October 2020 to 12 April 2021;
- (c) Christmas Day – 25 December 2020.

[174] Contrary to what Hui 18's advocate claimed, Christmas Day 2020 was not a "closedown", as it did not meet the HA03 requirements in s 29 or 32 – 34 of the HA03. It was simply a day the restaurant did not open.

Mr Gu's hours of work during lockdown

[175] In terms of the Covid-19 Level 4 lockdown, although Mr Gu did not attend work from 26 March 2020 to 26 April 2020, he was entitled to be paid as if he had worked his contractual 40 hours over that period.

[176] Any calculation of Mr Gu's total hours of work over the course of his employment must therefore also include these 200 hours (40 hours per week x 5 weeks of Level 4 lockdown).

Hours worked by Mr Gu on his days off

[177] The Authority finds that Mr Gu worked two hours on each of his 'days off' over the course of his employment.⁵ That excluded the days he did not work during the Covid-19 Level 4 closedown period from 26 March 2020 to 26 April 2020.

[178] Mr Gu therefore worked two hours on each day he had off over the following periods:

- (a) 11 to 26 March 2020; and

⁵ To pay for his restaurant food, see paragraphs [135], [136] and [142].

- (b) 28 October 2020 to 11 April 2021.

Periods during which Mr Gu worked 7 days a week

[179] The Authority considered it more likely than not that Mr Gu had worked seven days a week over the following periods:

- (a) 27 April 2020 to 27 October 2020; and
(b) 12 April 2021 to 29 April 2021;

Times and hours Mr Gu worked

[180] The Authority considered it likely that Mr Gu actually worked:

- (a) On average 9.5 hours on weekdays (Mondays to Fridays starting at 10.30am and finishing work at 9.30pm, with 1.5 hours off work during the course of the day for unpaid meal breaks);
(b) On average 8.5 hours for each Saturday and Sunday he worked (starting at 12pm and finishing 9.30pm, with one hour off during the day for unpaid meal breaks);
(c) On average a total of 55 hours per week during the period when he worked six days a week (Monday was his day off);
(d) On average a total of 64.5 hours per week during the period when he worked seven days a week.

[181] The Authority accepted that sometimes Mr Gu would be on the restaurant premises earlier than 10.30am or later than 9.30pm but considered that on such occasions he was likely preparing/eating his breakfast or dinner during those times.

What has Mr Gu been paid?

[182] On 4 May 2022 Hui 18 claimed to have paid Mr Gu a second ‘final pay’ of \$9,209.75 gross. Hui 18 claimed this included an overpayment of \$2,679.75 gross due to the accountant’s error. However, it was clear that this had not been calculated correctly.

[183] The cash payments, the dispute about what was paid and when, the conflicting relevant documentation such as payroll records, payslips, bank statements and IRD print outs and the changes in the payment information provided by the parties over time have made it challenging to determine what Mr Gu was actually paid.

[184] Based on currently available evidence/information the Authority finds that Mr Gu was likely paid the following amounts:

- (a) From 11 March 2020 to 10 March 2021;
 - (a) \$42,879 into his bank account (includes \$2,929 being the \$585.80 per week government subsidy only paid for 5 weeks from 1-29 April 2020); and
 - (b) \$8,730 cash. The Authority has accepted Mr Gu's evidence about the total amount of cash he received, as Hui 18's evidence was considered to be more unreliable than his. Hui 18 has to add the correct PAYE and other deductions to this amount and then pay the correct PAYE (and any other required deductions) to IRD. That total amount (cash + PAYE + ACC earner's levy) will then give this updated total amount;
- (b) From 11 March 2021 to 29 April 2021 - \$7,300 into his bank account;
- (c) Post-employment:
 - (a) His final pay of \$800 gross into his bank account paid on 6 May 2021, being 32 hours work at \$25 per hour;
 - (b) \$8,108.27 net into his bank account 2 May 2022, which the respondents described was his "*final pay*", that had supposedly included his outstanding public holiday entitlements, annual holiday entitlements and alternative day holiday entitlements but had not actually done so.

[185] Hui 18 said that on 16 March 2022 it reported to IRD that it had made \$4,632 in cash payments to Mr Gu in 2020 and it paid \$2,392.09 PAYE on that amount. That is obviously less than the cash payments Mr Gu said he had received.

[186] In terms of cash payments, Hui 18 has clearly failed to deduct and remit to IRD the correct PAYE (and any other deductions) on all of Mr Gu's wages.

[187] Although Mr Gu added 20% to all of the cash payments he had received in an attempt to advise the Authority of his 'grossed up' total earnings, that was not acceptable as it would not have been accurate.

[188] Hui 18 is directed to ensure it has correctly calculated all PAYE and any other deductions that should have, but have not yet, been paid to IRD on Mr Gu's total gross earnings. It must use the Authority's findings in this determination about:

- (a) The days and hours Mr Gu worked;
- (b) The amounts he should have been paid;
- (c) The amounts he has actually been paid;
- (d) The correct calculations that need to be applied under the HA03;
- (e) The unlawful deductions from Mr Gu's wages that need to be repaid to him; and
- (f) Mr Gu's correct HA03 entitlements.

[189] The Authority noted that accurate calculations of the gross pay Mr Gu received are not currently available, so the parties will still need to provide that information.

Was Mr Gu's final pay calculated correctly?

[190] Mr Gu's final pay was not calculated correctly. Hui 18 made two final payments to Mr Gu, both of which were incorrect and inadequate.

[191] Mr Gu's final pay was not calculated correctly. His first 'final pay' did not include his HA03 entitlements. His second 'final pay' did not accurately record his wage arrears or underpaid HA03 entitlements.

[192] Mr Gu's pay period ran from Monday to Sunday. He was paid weekly (in arrears) on Wednesdays. Mr Gu's second to final pay covered the work he did from Monday 19 April to Sunday 25 April 2021 (which was the Anzac Day public holiday).

[193] Mr Gu's last day of work was 29 April 2021. His final pay therefore covered the period 26 April to 29 April 2021. Mr Gu was paid his final pay on 6 May 2021, but it was only for \$800 gross. That was less than he should have been paid.

[194] Mr Gu should have been, but was not, paid:

- (a) Reimbursement for the unlawful deductions Hui 18 had made from his pay;⁶

⁶ See paragraphs [97] and [153].

- (b) The wage arrears he was owed as a result of Hui 18 requiring him to work without being paid for the hours he had worked;
- (c) All of the hours he had actually worked over the period 26 April to 29 April 2021;
- (d) His nine alternative day holiday entitlements;
- (e) His annual holiday entitlement, that was to consist of:
 - (a) Four weeks' accrued annual holiday entitlement, calculated as per s 24 of the HA03; and
 - (b) 8 percent of his total gross earnings over the period 11 March 2021 to 29 April 2021, calculated as per s 25 of the HA03.

Has Mr Gu been overpaid, as Hui 18 claimed?

[195] Mr Gu has not been overpaid.

[196] Hui 18's claims that it had overpaid Mr Gu by \$2,679.75 gross on 2 May 2022 and by \$820.34 on 16 December 2020 and by \$820.34 on 24 December 2020 did not succeed.

[197] Mr Gu has been underpaid, not overpaid, so he will be owed wage arrears because:

- (a) He was not paid for all of the hours he worked;
- (b) Hui 18 made unlawful deductions from his wages that have not been reimbursed to him yet;
- (c) Hui 18 incorrectly reported to IRD that some of the unlawful deductions it had made from Mr Gu's wages was income he had been paid, when that was not correct. It was actually money Hui 18 owed Mr Gu but had not actually paid him, so it should not have told IRD that was wages Mr Gu had received;
- (d) His public holiday entitlements were not calculated correctly;
- (e) His annual holiday entitlements were not calculated correctly; and
- (f) His PAYE has not been calculated correctly, so the PAYE details IRD has for Mr Gu are wrong and will need to be corrected.

Was Mr Gu paid his correct public holiday entitlements?

[198] Mr Gu has not paid his correct public holiday entitlements. Hui 18 must use the following findings to properly calculate what Mr Gu should have been paid, so it can ascertain how much he is owed in public holiday arrears.

[199] The Authority makes the following findings about the public holidays that occurred during Mr Gu's employment.⁷

Public holidays Mr Gu did not work

[200] Mr Gu did not work on the following public holidays:

- (a) Good Friday – Friday 10 April 2020;
- (b) Easter Monday – Monday 13 April 2020;
- (c) Anzac Day – Saturday 25 April 2020;
- (d) Christmas Day – Friday 25 December 2020;
- (e) Auckland Anniversary Day – Monday 1 February 2021.

Public holidays that were 'otherwise a working day' for Mr Gu

[201] As per s 12 of the HA03, the following public holidays were "otherwise a working day" for Mr Gu, so he was entitled to be paid for these in accordance with s 49 of the HA03;

- (a) Good Friday – Friday 10 April 2020;
- (b) Anzac Day – Saturday 25 April 2020;
- (c) Christmas Day – Friday 25 December 2020;

Public holidays that Mr Gu worked

[202] Mr Gu likely worked the following public holidays;

- (a) Queen's Birthday – Monday 1 June 2020;
- (b) Labour Day – Monday 26 October 2020;
- (c) Boxing Day – Saturday 26 December 2020;

⁷ From 11 March 2020 to 29 April 2021.

- (d) New Year's Day – Friday 1 January 2021;
- (e) Day After New Year's Day – Saturday 2 January 2021;
- (f) Waitangi Day – Monday 6 February 2021;
- (g) Good Friday – Friday 2 April 2021;
- (h) Easter Monday – Monday 5 April 2021;
- (i) Anzac Day – Sunday 25 April 2021;

How many hours did Mr Gu work on each public holiday?

[203] Mr Gu likely worked the following hours worked on each public holiday:

- (a) Four hours on 26 December 2020 (the Boxing Day public holiday);
- (b) On average 9.5 hours for public holidays that fell on weekdays;
- (c) On average 8.5 hours for public holidays that fell on Saturdays or Sundays (except for Christmas Day 2020).

Time and a half entitlement for hours worked on a public holiday

[204] Mr Gu was entitled to be paid time and a half for the actual hours he worked on public holiday. Section 50 of the HA03 required Hui to pay him the greater of his relevant daily pay or average daily pay for the time he had actually worked on the public holiday. That did not occur.

Was Mr Gu paid correctly for the hours he worked on public holidays?

[205] During Mr Gu's employment, Hui 18 failed to pay him time and a half for the hours he worked on the following public holidays:

- (a) Queen's Birthday on 1 June 2020;
- (b) Labour Day on 26 October 2020;
- (c) Boxing Day on 26 December 2020;
- (d) Waitangi Day on 6 February 2021.

What did Hui 18 say it had paid Mr Gu for the hours he worked on a public holiday?

[206] Section 55 of the HA03 required Hui 18 to pay Mr Gu his public holiday pay in the pay period the public holiday fell within. That did not occur, so Hui 18 breached s 55 of the HA03.

[207] Although Hui 18 claimed it paid Mr Gu time and a half for the hours he worked on Queen's Birthday on 1 June 2020 and for Labour Day on 26 October 2020, that evidence was not accepted. The payslips Hui 18 gave the Authority did not record that any time and a half payments had been made in the pay periods that related to those two public holidays.

[208] Hui 18 said it paid Mr Gu time and a half, based on him having worked for 8 hours on the following five public holidays:

- (a) 1 January 2021 (New Year's Day);
- (b) 2 January 2021 (Day After New Year's Day);
- (c) 2 April 2021 (Good Friday);
- (d) 5 April 2021 (Easter Monday); and
- (e) 25 April 2021 (Anzac Day).

[209] On 2 May 2022 Hui 18 said it paid Mr Gu wage arrears for two alternative day holidays and time and a half for the work he did on:

- (a) 26 December 2020 (Boxing Day); and
- (b) 6 February 2021 (Waitangi Day).

[210] However, Hui 18 did not explain how it had calculated these public holiday entitlements it had paid, other than by saying it had based the calculations on Mr Gu having worked for 8 hours on each public holiday.

How should Mr Gu's public holiday entitlements have been calculated?

[211] The problem with the public holidays payments that Hui 18 claimed it had made was that it did not calculate them in accordance with s 49 (public holidays not worked) or 50(1) (hours Mr Gu had actually worked on the public holiday) of the HA03. They were also not based on the 'hours of work' findings the Authority has made, so what was paid will be incorrect.

[212] Hui 18 therefore needs to recalculate these public holiday entitlements based on the Authority's findings about the number of hours Mr Gu likely worked on each public holiday and by applying s 50(1) of the HA03.

What was Mr Gu's alternative day holidays entitlement?

[213] Mr Gu was entitled to an alternative day holiday for each public holiday he worked. He was therefore entitled to nine alternative day holidays. Mr Gu did not take any alternative day holidays while employed, so he was entitled to be paid for these nine alternative day holidays in his final pay. That did not occur.

[214] Hui 18 was required to calculate Mr Gu's alternative day holiday as per s 60(2)(b) of the HA03. That did not occur, so Hui breached 60(2)(b) of the HA03.

[215] Hui 18 now needs to recalculate Mr Gu's alternative day holiday entitlements in accordance with s 60(2)(b) of the HA03 and in light of the Authority's findings about the number of alternative day holidays he should have been paid.

Was Mr Gu paid his correct annual holiday entitlements?

[216] Mr Gu has not been paid his correct annual holiday entitlements.

What was Mr Gu's annual holiday entitlement?

[217] Mr Gu became entitled to four weeks' paid annual holiday on 11 March 2021. He did not take any paid annual holiday while employed, so he was also entitled to be paid 8% of his total gross earnings from 12 March 2021 to 29 April 2021.

When should Mr Gu have been paid his annual holiday entitlement?

[218] Section 27(2) of the HA03 required Hui 18 to have paid Mr Gu his annual holiday pay in the pay period that related to his final period of employment (ie his final pay). Mr Gu was not paid any annual holiday pay when his employment ended.

[219] Hui 18 breached s 27 of the HA03 because it failed to pay Mr Gu his annual holiday entitlements when his employment ended

What annual holiday pay has Mr Gu been paid?

[220] Although Hui 18 said it had paid Mr Gu \$5,297.70 on 2 May 2022 it failed to calculate Mr Gu's annual holiday entitlements correctly. Hui 18 said Mr Gu was owed \$4,500 under s 24 of the HA03 based on 4 weeks x 45 hours per week x \$25 per hour. However, that calculation was incorrect.

How should Mr Gu's annual holiday entitlements have been calculated?

[221] Section 24 of the HA03 applied to the calculation of Mr Gu's accrued annual holiday entitlements. Hui 18 was required to pay Mr Gu at a rate based on the greater of either:

- (a) His ordinary weekly pay as at the end of his employment (being 29 April 2021);
or
- (b) Based on his average weekly earnings during the 12 months immediately preceding the end of the last pay period before the end of his employment.

[222] Under s 24 of the HA03 Hui 18 had to do two calculations in order to determine Mr Gu's ordinary weekly pay as at 29 April 2021 and his average weekly earnings during the 12 months before 25 April 2021, being the date of the end of his last pay period before his employment ended on 29 April 2021. That did not occur.

[223] Hui 18 was required to do both calculations so it could work out which was the greater, as the greater amount was then to be applied to the four weeks' annual holidays entitlement that Mr Gu had accrued as at 11 March 2021. That did not occur.

[224] Section 25 of the HA03 deals with the calculation of Mr Gu's annual holiday entitlement for the period from the anniversary of his leave date (being 11 March 2021) to the date his employment ended, (being 29 April 2021). Hui 18 incorrectly calculated that amount as \$630 (being 7 weeks x 45 hours per week x \$25 per hour x 8%).

[225] Because Hui 18 failed to calculate Mr Gu's total gross earnings over this period correctly, that meant the s 25 of the HA03 annual holiday entitlement calculation Hui 18 applied was incorrect.

What annual holiday entitlements should Mr Gu have been paid?

[226] Hui 18 was therefore required to do both annual holiday entitlement calculations (as per ss 24 and 25 of the HA03), and then add them together, to ensure that Mr Gu had been paid his correct annual holiday entitlements after his employment ended.

[227] The parties will need to do these calculations, based on the Authority's findings and as per the requirements of ss 24 and 25 of the HA03.

[228] It is important for Mr Gu's total annual holiday entitlement calculations to include all of his total gross earnings, which includes:

- (a) What he was paid while employed;
- (b) All of the wage arrears that Mr Gu is owed;
- (c) The correct public holiday entitlements (time and a half for hours worked on a public holiday plus nine alternative day holidays), that were not paid but which should have been paid to him;
- (d) Reimbursement of all of the unlawful deductions (for board and restaurant food) that were made from Mr Gu's wages;
- (e) The \$8,730 cash payments Mr Gu received in 2020 plus the PAYE that should have been paid on these cash payments, but which was not paid to IRD on Mr Gu's behalf; and
- (f) Any payments Mr Gu received after his employment ended, which also had to have eight percent applied to them as holiday pay, as per s 25 of the HA03.

Did Hui 18 breach the Holidays Act 2003?

[229] Hui 18 breached the following sections in the HA03:

- (a) S 24(2) – failed to calculate accrued annual holiday entitlements correctly;
- (b) S 25(2) failed to calculate annual holiday entitlements from his anniversary date correctly;
- (c) S 27 – failed to pay Mr Gu his annual holiday entitlements when his employment ended;
- (d) S 49 – failed to pay Mr Gu not less than his relevant daily pay or average daily pay for a public holiday that fell on a day that would otherwise be a working day for him;
- (e) S 50(1) – calculation of public holiday entitlements;
- (f) S 60(2)(b) – failed to pay Mr Gu his alternative day holiday entitlement when his employment ended as he was owed nine alternative day holidays when his employment ended; and

- (g) s 60(2)(b)(i) and (ii) - failed to pay Mr Gu his alternative day holiday entitlements at the rate of his relevant daily pay or average daily pay for his last day of employment in his final pay.

Did Hui 18 breach the Wages Protection Act 1983?

[230] Section 5 of the WPA prohibits an employer from making deductions from an employee's wages without the written consent or at the written request of the employee.

[231] Section 5(1) of the WPA precludes an employer from making a specific deduction in accordance with a general deductions clause in a worker's employment agreement, without first consulting the worker.

[232] The Authority accepted Mr Gu's evidence that there was no consultation with him before Hui 18 unilaterally deducted food (two hours work for restaurant meals he had on his days off) and unspecified board costs (that varied but he was never told what had been deducted or how it had been calculated) before they were deducted from Mr Gu's wages.

[233] Clause 3.5 of Mr Gu's employment agreement said that the employer would make deductions "*Where an employee makes a written request*". There was no written request made by Mr Gu to Hui 18 to deduct food and/or board costs from his wages.

[234] The deductions for food and board costs that occurred were unlawful because they breached s 5 of the WPA and clause 3.5 of Mr Gu's employment agreement. Mr Gu has to be reimbursed for these unlawful deductions. The parties need to use the Authority's findings to calculate what Mr Gu is owed as reimbursement for these unlawful deductions.

[235] There is to be no offsetting of any food or board costs against what Mr Gu is to be paid, because he was offered and accepted free food and accommodation as a term of his employment. He should therefore never have been charged anything for these items.

[236] Section 5A of the WPA prevents an employer from making a deduction that is "*unreasonable*".

[237] The deductions for food and accommodation were "*unreasonable*" because Mr Su had told Mr Gu that one of the terms and conditions of his employment was that he would be given free food and free accommodation. Mr Gu accepted the offer of employment based on that term, so Hui 18 could not unilaterally vary it.

[238] Section 7 of the WPA requires the employer to pay employees wages in money only. Hui 18's attempts to pay Mr Gu in food and accommodation therefore breached s 7 of the WPA.

[239] Section 12 of the WPA prevents an employer from imposing any requirement on how the employee may spend their wages. Hui 18 breached s 12 of the WPA by requiring Mr Gu to work without being paid in return for food and accommodation.

[240] This meant that the two hours Mr Gu worked on his days off, when he ate in the restaurant, had to be paid to him as wages along with all of the overtime he worked in excess of 40 hours per week that was completed by him over a six day period.

Summary of breaches

[241] Hui 18 has breached sections 5, 5A, 7 and 12 of the WPA. Each time Hui 18 failed to pay Mr Gu wages (in money) for hours he worked it breached the WPA, Mr Gu's employment agreement, the terms of Mr Gu's work visa and the MWA.

Did Hui 18 breach Mr Gu's employment agreement?

[242] Clause 2.2 of Mr Gu's employment agreement stated:

An employee's personal work schedule will be as agreed with his/her manager and confirmed by letter. Except as provided in this contract, changes to the employee's work schedule will be by mutual agreement.

[243] Hui 18 breached clause 2.2 of Mr Gu's employment agreement because it changed his work hours and schedule without consulting him.

[244] Because Mr Gu was contractually entitled to be paid for 40 hours per week, any reduction in his working hours, or reduction in his wages, was subject to his agreement or to consultation with him and then the giving of two weeks' written notice of any changes that had been made by Hui 18. That did not occur.

[245] Clause 2.4 of Mr Gu's employment agreement said:

In situations where there is a genuine business requirement to reduce hours of work, efforts will first be made to achieve necessary changes on a voluntary basis by consultation with affected employees. As far as predictable (sic) the personal circumstances of employees will receive consideration. In the absence of agreement, the employer may reduce work schedules by the giving of two

weeks written notice. An employee may take a personal grievance on any large reduction in hours that they believe to be unjustified.

[246] Hui 18 breached clause 2.4 of Mr Gu's employment agreement by unilaterally decreasing his wages during the lockdown without his agreement.⁸ Mr Gu was not consulted about that decrease in his wages, he was not given two weeks' written notice of the reduction to his work schedule or wages and he did not agree to it.

[247] Clause 3 of Mr Gu's employment agreement set out that his remuneration would be \$52,000 per annum, with 40 hours of work per week. Hui 18 breached clause 3 when it failed to pay Mr Gu his normal remuneration during lockdown and by requiring him to work in excess of 40 hours per week without being paid to do so.

[248] Clause 3.1 said that "*The employee's pay in weekly hours will be recorded in his/her personal letter.*"

[249] Hui 18 breached Mr Gu's employment agreement by requiring him to work more than 40 hours per week and by failing to provide him with a "*personal letter*" of his work schedule, as required under s 3.1 of his employment agreement.

[250] Clause 3.3 of the employment agreement stated:

Where the employee's work schedule is varied or his/her responsibilities change for a period of one week or more, his/her pay will be reviewed at the time to reflect the changed circumstances.

[251] Hui 18 breached clause 3.3 of the employment agreement when it failed to review Mr Gu's work schedule and when it changed his work hours from those recorded in his employment agreement.

[252] Clause 3.5 of Mr Gu's employment agreement stated:

Where an employee makes a written request the employer will make certain deductions from his/her pay, and make a corresponding payment to those businesses or organisations.

[253] Hui 18 breached clause 3.5 of Mr Gu's employment agreement by making deductions for food and board that he had not asked for, had not agreed, and had not been consulted about.

⁸ Mr Gu only received the government subsidy of \$595.80 per week for five weeks during the Covid--19 Level 4 lockdown.

[254] Clause 5.5 said Mr Gu would be paid if the public holiday fell on a day that would otherwise be a working day for him. He would also be paid time and a half for the hours actually worked on a public holiday and would receive an alternative holiday of one day when he worked on a public holiday. That did not occur.

[255] Hui 18 breached clause 5.5 of Mr Gu's employment agreement because it failed to pay him his correct public holiday entitlements.

[256] Hui 18 breached clause 7 of Mr Gu's employment agreement, which dealt with termination of employment, because it failed to allow him to work out his notice period after he had given it reasonable notice of his resignation.

What, if any, breaches of employment standards have occurred?

[257] Section 5 of the Act defines "*employment standards*". That definition includes (among other things) the following breaches that have occurred in this case:

- (a) S 64 of the Act, employer must retain signed IEA or individual terms and conditions of employment;
- (b) S 130 of the Act, employer's obligation to keep wage and time records;
- (c) Failure to pay minimum public holiday and annual holiday entitlements in breach of the HA03;
- (d) S 81 failure to keep, and s 82 failure to provide, accurate holiday and leave records under the HA03; and
- (e) S 5 (unlawful deductions) , s 5A (unreasonable deductions), s 7 (wages must be paid in money), and s 12 (employer may not stipulate mode of spending wages) of the WPA.

Should penalties be imposed on Hui 18 for any breaches that have occurred?

[258] The purpose of penalties is to punish and deter wrongdoing by Hui 18 and to deter others more generally from wrongdoing. Penalties are therefore necessary and appropriate. However, the level of penalties to be imposed on Hui 18 will subject to further investigation.

Was Mr Su a person involved in any breaches of employment standards that have occurred?

[259] Mr Su is a person involved in the breaches of minimum standards that have occurred, in terms of the requirement in s 142W of the Act.

[260] Mr Su was the sole director and shareholder of Hui 18 at the time the breaches occurred. He was effectively its mind and controller. It was Mr Su who decided what Hui 18 did and did not do. It was Mr Su who provided documents and information to INZ, IRD and the Authority.

[261] Mr Su also worked alongside Mr Gu, so he (Mr Su) had personal knowledge and direct involvement in all of the breaches that have occurred. Mr Su also aided and abetted all of the breaches that occurred.

Should Mr Gu be granted leave to pursue Mr Su personally for money that Hui 18 has been ordered to pay, for breaches of employment standards, but defaults paying?

[262] Under s 142Y of the Act an employee may recover wages/money from a person who is not the employer if:

- (a) There has been a default in wages or money payable to the employee;
- (b) The default is due to a breach of employment standards; and
- (c) The person from whom the employee wants to recover the wages/money is a person involved in the breach, as per s 142W of the Act.

[263] All of those criteria are met in this case.

[264] The Authority therefore grants Mr Gu leave under s 142Y(2)(a) of the Act to seek to recover from Mr Su personally wages/money that Hui 18 has been ordered to pay Mr Gu for breaches of employment standards, but which Hui 18 was unable to pay him.

Was Mr Gu constructively dismissed or did he resign?

Resignation letter

[265] Mr Gu provided Mr Su with a resignation letter on the evening of 29 April 2021. The English translation of the Mandarin resignation letter states:

Due to that I have been mentally and physically hurt by the intensive workload with excessive hours of work each week, I cannot physically continue the work

with the intensive workload and excessive hours of work. I therefore have decided to resign the job from your restaurant. Based on the employment agreement, I hereby officially provide this written notice to you. As there is no time stated in the employment agreement when I should give you the notice to terminate the employment, I will continue to work for another two weeks for you. 12 May 2021 will be my last day for the work.

Reasons for resignation

[266] Mr Gu told the Authority that he was exhausted. He felt that he had been treated badly by Mr Su and it had got to the point where Mr Gu believed his health was suffering.

[267] The Authority did not accept the respondent's submission that Mr Gu's resignation was a free and voluntary resignation.

Resignation was reasonably foreseeable

[268] The breaches that occurred were so serious that it was reasonably foreseeable that Mr Gu would decide not to continue working in such circumstances, and resign.

Outcome – constructive dismissal grievance succeeded

[269] Mr Gu's resignation was not a free or voluntary resignation but was instead a resignation that occurred at Hui 18's initiative, as a result of its serious and sustained breaches of his employment agreement and employment legislation. It was therefore a constructive dismissal.

Actual dismissal would have occurred if Mr Gu had not been constructively dismissed

[270] Even if Mr Gu had not been constructively dismissed, Mr Su's actions in telling Mr Gu to leave his accommodation immediately (in the middle of the night) because he had not agreed to work a seven week notice period was "*a sending away*" in law. The initiative for Mr Gu's departure had come from Mr Su, not Mr Gu. It was therefore an actual dismissal, even though it would have occurred during the intended notice period.

Was Mr Gu's dismissal justified?

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

[272] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith requirements in s 4 of the Act and each of the four procedural fairness tests in s 103A(3) of the Act.

[273] A fair and reasonable employer is also expected to comply with its contractual obligations and with employment legislation. Failure to so is likely to fundamentally undermine an employer's ability to justify a dismissal or in the case of a disadvantage claim other action.

[274] That is the case here. Hui 18 engaged in multiple breaches of employment standard and of Mr Gu's employment agreement. There was no justification for these breaches to have occurred. Hui 18 acted towards Mr Gu in a manner that was contrary to its good faith obligations in s 4 of the Act, in a manner that was procedurally unfair, and was contrary to minimum code legislation.

[275] Mr Gu has established that his dismissal was unjustified.

What, if any, remedies should Mr Gu be awarded?

Mitigation

[276] The Authority is satisfied that Mr Gu mitigated his loss. He lined up another job before he handed in his resignation because he was not in a financial situation to be out of work for long.

[277] Mr Gu's work visa was tied to his employment with Hui 18 so he had a short period out of work while he arranged for INZ to issue him with a work visa for his new employer. The Authority was satisfied that Mr Gu pursued alternative employment in a timely manner.

Lost remuneration

[278] Mr Gu was out of work from Friday 30 April 2021 until he started his new job on 3 June 2021, when his work visa for his new employer was issued to him. Mr Gu claimed lost remuneration from 30 April – 2 June 2021.

[279] The Authority has decided to base the lost remuneration claim on 55 hours per week work for five weeks. This is calculated at the rate of \$1,000 (normal wage 40 hours x \$25 per hour) plus \$318.75 (being 15 hours per week x \$21.25 overtime rate per hour) x five weeks = \$6,593.75.

[280] Within 28 days of the date of this determination, Hui 18 is ordered to pay Mr Gu \$6,593.75 under s 128(2) of the Act to compensate him for the remuneration he lost as a result of his unjustified dismissal.

Notice pay

[281] Because Mr Gu has been awarded lost remuneration for the entire period he was out of work, his claim for notice pay did not succeed.

Accommodation

[282] Mr Gu's claim for reimbursement of \$620 accommodation costs did not succeed.

Reimbursement of the costs associated with obtaining a new work visa

[283] Mr Gu's unjustified dismissal meant he could not complete his three year visa with Hui 18. Mr Gu incurred the additional and unexpected costs associated with obtaining a new work visa because he had to pay \$1,495 to change his work visa from Hui 18 to his new employer.

[284] Within 28 days of the date of this determination, Hui 18 is ordered to pay Mr Gu \$1,495 to reimburse him for the costs associated with his new work visa.

Distress compensation

[285] Mr Gu gave evidence about the distress, hurt, humiliation and injury to feelings that he had suffered as a result of his unjustified dismissal.

[286] Mr Gu's health suffered and his mood and enjoyment of life was adversely impacted. Mr Gu was financially embarrassed. He felt humiliated and ashamed. He had to change the terms of his work visa.

[287] Mr Gu was thrown out of his accommodation around 11pm-12am during a cold winter night. He had nowhere to go so had to sleep in a car overnight. Mr Gu suffered loss of appetite, sleeplessness and anxiety as a result of his unjustified dismissal. He has been threatened and harassed by Mr Su in an attempt to stop Mr Gu from pursuing his Authority proceedings.

[288] Within 28 days of the date of this determination, Hui 18 ordered to pay Mr Gu \$15,000 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered.

Contribution

[289] Section 124 of the Act required the Authority to consider the extent to which Mr Gu's actions contributed to the situation that gave rise to his personal grievance, and if appropriate to reduce remedies accordingly.

[290] The Authority was satisfied that Mr Gu did not engage in any blameworthy conduct that had been established to the required standard of proof, and that had led to the situation that had given rise to his dismissal grievance. Accordingly, Mr Gu's remedies are not to be reduced.

What costs and disbursements should the successfully party be awarded?

[291] Mr Gu was the successful party, so he will be entitled to a contribution towards his actual legal costs. However, costs will be dealt with at the conclusion of this matter, after all outstanding claims have been resolved.

What are the parties required to do now?

[292] The Authority will conduct further investigation into:

- (a) Wage arrears Mr Gu is owed;
- (b) Outstanding PAYE that must be paid to IRD;
- (c) Penalties that are to be imposed on Hui 18; and
- (d) Costs that Hui 18 is ordered to contribute towards Mr Gu's actual legal costs.

[293] Within 28 days of the date of this determination, Hui 18 is therefore ordered to do the various wage arrears calculations identified in this determination for:

- (a) Hours Mr Gu worked while employed. This is to include:
 - (a) Contractual hours (40 hours per week);
 - (b) Number of hours worked in excess of 40 hours per week over a six day period, for each week he was employed;
 - (c) Number of seven day work weeks he had while employed; and
 - (d) The two hours he worked on his days off (for restaurant food).
- (b) Wages Mr Gu should have been paid, including:
 - (a) Number of ordinary time hours (\$25 per hour);

- (b) Number of overtime hours (\$21.25 per hour);
 - (c) Time and a half entitlements for hours worked on public holidays
 - (d) Public holiday pay for public holiday that was not worked but was otherwise a working day;
 - (e) Alternative day holiday entitlements; and
 - (f) Annual holiday entitlements;
- (c) PAYE that should have been deducted and paid to IRD on Mr Gu's total gross earnings;
 - (d) PAYE that has been deducted and paid to IRD to date on Mr Gu's earnings;
 - (e) Total gross earnings that should have been paid to Mr Gu, had he been paid correctly;
 - (f) Total gross wages that have actually been paid to Mr Gu to date, including identification of:
 - (a) Gross and net wages that were actually paid to Mr Gu while employed by reference to what was paid directly into his bank account and to what was paid to him in cash payments; and
 - (b) Gross and net wages that have been paid to Mr Gu after his employment ended on 29 April 2021 by reference to dates and amounts of payments that have been made to him;
 - (g) Reimbursement of the unlawful deductions that were made from his wages for:
 - (a) Hours he was required to work without pay as "board";
 - (b) Hours he was required to work without pay in return for the food he had eaten in the restaurant on his days off.
 - (h) Analysis of the amount of wage arrears Mr Gu is owed for:
 - (a) Ordinary time wage arrears;
 - (b) Overtime wage arrears;
 - (c) Public holiday entitlements arrears;
 - (d) Annual holiday entitlements arrears;

- (e) PAYE arrears; and
- (f) Any other arrears he is owed.

[294] Mr Gu has 28 days from receipt of this information from Hui 18 to file his response to it. The Authority will contact the parties to discuss the next steps in its investigation of Mr Gu's outstanding claims once this exchange of further wage arrears information has occurred.

Summary of key findings

[295] Hui 18 breached Mr Gu's employment agreement, the Act, the HA03, the MWA, and the WPA.

[296] Penalties will be imposed on Hui 18 for its breaches.

[297] Hui 18's breaches include breaches of employment standards.

[298] In accordance with s 142W of the Act, Mr Su is a person involved in Hui 18's breaches of employment standards,

[299] Mr Gu has been granted leave under s 142Y(2)(a) of the Act to seek to recover from Mr Su personally wages/money that Hui 18 owed Mr Gu for breaches of employment standards, but which it defaulted paying him;

[300] Mr Gu was unjustifiably dismissed.

[301] Within 28 days of the date of this determination, Hui 18 is ordered to pay Mr Gu:

- (a) \$6,593.75 lost remuneration;
- (b) \$1,495 reimbursement of work visa costs;
- (c) \$15,000 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he has suffered as a result of his dismissal.