

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 91  
3111755

BETWEEN            JIEPENG LI  
                                 Applicant

AND                    NZ YOYO TRAVELLING  
                                 LIMITED  
                                 First Respondent

AND                    LIN WANG  
                                 Second Respondent

Member of Authority:    Rachel Larmer

Representatives:        Paul Young, advocate for the Applicant  
                                 Xiang Gao, for the First Respondent  
                                 Second Respondent, in Person

Investigation Meeting:    29 November 2021 and 6 December 2021 by Zoom

Submissions and Further    10 December 2021 from the Applicant  
Information Received:      17 December 2021 from the Respondent

Date of Determination:    16 March 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Mr Li worked as Chef for the first respondent from 13 September 2019 until 9 December 2019. He was dismissed during his trial period because his cooking skills and teamwork were deemed unsatisfactory. Mr Li claimed his dismissal was unjustified.

[2]     Mr Li also claimed he was owed wage arrears. He said he had not been paid correctly for all of the hours he had worked, had not received public holiday entitlements for working

on a public holiday, had not been paid the correct amount of annual holiday pay and that his final pay did not include everything he was owed.

[3] Mr Li also claimed that the first respondent's deduction of a meal allowance from his wages breached the Wages Protection Act 1983 (WPA), so was an unlawful deduction. Mr Li sought penalties be imposed on the first respondent for not paying him correctly and for record keeping breaches. No penalties were sought against the second respondent.

### **Respondents' position**

[4] The respondents said the Authority did not have jurisdiction to investigate Mr Li's dismissal grievance, because he was dismissed pursuant to a valid trial period provision in his employment agreement and he had not raised his dismissal grievance within 90 days of his employment ending.

[5] The first respondent admitted it had not paid Mr Li his annual holiday pay when his employment ended because it knew he had left New Zealand and it was waiting for him to confirm the bank account it should be paid into. After Mr Li provided that confirmation on 30 June 2021, then the first respondent paid him the \$833 annual holiday pay it agreed he was owed that same day.

[6] Until it took legal advice, the first respondent had not understood that Mr Li was entitled to public holiday entitlements under s 50 and s 56 of the Holiday Act 2003 (the HA03) for working on a public holiday. It is now aware of that obligation.

[7] The respondents disputed the hours Mr Li said he had worked and pointed out inaccuracies in the records he had created in support of his wage arrears claim. The respondents said they kept accurate records of Mr Li's working hours, recorded at the time he worked.

[8] The respondents said Mr Li verbally agreed to have a meal allowance of \$20 a day deducted from his wages. That arrangement benefited Mr Li because it allowed him to eat unlimited restaurant food instead of having to bring his own food to work with him.

### **Authority's investigation**

[9] The Authority's investigation meeting was conducted during the Covid-19 lockdown last year by Zoom. The investigation meeting was held on two consecutive Mondays, 29

November and 6 December 2021. The Monday investigation meetings were held to accommodate the first respondent's business commitments and a later than usual start time of the investigation meetings had been scheduled to accommodate the time zone difference for Mr Li, who attend via Zoom from China.

[10] All other attendees were based in Auckland and participated by Zoom from here. Mr Young participated as Mr Li's advocate. The respondents had been represented by counsel up to the Authority's investigation meeting. They then represented themselves during the Authority's investigation meetings.

### **Issues**

[11] The following issues are to be determined:

- (a) Did the Authority have jurisdiction over all of the claims Mr Li was seeking to pursue, namely;
  - (i) Claims against Ms Wang personally, as the second respondent;
  - (ii) Unfair bargaining allegations;
  - (iii) All of the penalty claims he has made;
  - (iv) Rest break allegations;
  - (v) His dismissal grievance.
- (b) Was Mr Li owed wage arrears, and in particular;
  - (i) What was his hourly rate?
  - (ii) Was he owed unpaid public holiday entitlements?
  - (iii) Which party's record of the hours Mr Li worked was more likely to be correct?
  - (iv) How many hours did he actually work?
  - (v) What had he been paid by the first respondent?
  - (vi) Was he owed annual holiday pay arrears?
- (c) Did the first respondent breach the Wages Protection Act 1983 (WPA)?
- (d) Did the first respondent breach the Holidays Act 2003 (HA03)?

- (e) Should penalties be imposed for any breaches that have occurred?
- (f) What if any costs and disbursements should be awarded to the successful party?

## **Background facts**

### *The respondents*

[12] The first respondent owns and operates a Chinese food restaurant in Pakuranga, Auckland under the trading name Chef Gao's Homemade Cuisine ("the restaurant"). At the material time Ms Wang was the Restaurant Manager and her husband Xiang Gao, who the restaurant was named after, was the Head Chef.

[13] During the time Mr Li worked at the restaurant Ms Wang was the sole director and shareholder of the first respondent. She is no longer a director or shareholder of the first respondent because the restaurant was sold to one of its employees, Suzhen Tan. Since 2 January 2021 the new owner Ms Tan has been the first respondent's sole director and shareholder.

### *Recruitment of Mr Li*

[14] Mr Li was living in China when he hired a recruitment agent to help him obtain work in New Zealand. Mr Li paid the recruitment agent, who was also based in China, and she put him in touch with Mr Gao.

[15] The respondents wanted to recruit someone from China because the restaurant needed a Chef who was familiar with cooking the particular Chinese food the restaurant specialised in. Mr Li met Mr Gao and Ms Wang online in March 2019 and he did a cooking demonstration on video before he was offered employment.

### *Work visa*

[16] Because Mr Li lived in China, he needed a work visa to be able to lawfully work in New Zealand. The first respondent therefore made an offer of employment that was subject to Mr Li obtaining the necessary work visa. That meant there was a delay of six months between Mr Li being offered the job and actually starting work at the restaurant.

[17] On 28 August 2019 Immigration New Zealand (INZ) issued Mr Li with a 36 months' work visa that started from that date. The terms of the work visa only permitted Mr Li to work as a Chinese Chef in Auckland for the restaurant the first respondent owned and operated.

#### *Key dates*

[18] Mr Li was offered employment on 14 March 2019. He accepted that offer on 26 March 2019 and obtained a three year work visa on 28 August 2019. Mr Li arrived in New Zealand on 12 September 2019 and he started work for the first respondent at its Chinese restaurant on 13 September 2019.

[19] In mid-October or November 2019 Mr Li was informed that his performance (cooking and teamwork) was unsatisfactory. He was also advised that if these matters did not improve then he would be dismissed during the trial period. The parties agreed to review the situation on 8 December 2019. This warning that his ongoing employment was at risk was recorded in writing.

[20] Mr Li subsequently undertook a cooking test on 8 December 2019, that was deemed unsatisfactory. That resulted in Mr Li being given notice on 8 December 2019 of his dismissal under the trial period provision in his employment agreement. He was expected to work out his notice but Mr Li's last day of work was in fact 9 December 2019.

[21] Mr Li decided not to work out his notice period because he returned to China (for urgent family reasons) on 12 December 2019. Mr Li did not inform the respondents that he would not be working out his notice and/or that he had left New Zealand.

#### *Offer and acceptance of employment*

[22] The first respondent offered Mr Li employment as a Chef on 14 March 2019 by sending him an individual employment agreement that had been signed by Ms Wang on behalf of the first respondent.

[23] The employment agreement contained (among other things) a 90 day trial period provision, an employment problem resolution clause that required personal grievances to be raised within 90 days, along with acknowledgement and declaration clauses.

[24] Under clause 15.2 of the employment agreement Mr Li acknowledged that he had been advised of the right to take independent advice on the terms of the employment agreement, he had been provided with a reasonable opportunity to do so, he had read and understood the terms of employment and their implications, and he had agreed to be bound by the terms in the employment agreement and by the employer's policies and procedures.

[25] What appeared to be Mr Li's signature was recorded under the clause 16 declaration that appeared immediately under the acknowledgement clause. The declaration had Mr Li's name ("I, Jiepeng Li declare ...") immediately before the signature.

[26] Mr Li accepted the offer of employment on 26 March 2019 by authorising his recruitment agent to sign the employment agreement and return it to the first respondent. Mr Li never told the respondents it was not his signature on the employment agreement and there was nothing to indicate that he had not personally signed it. Mr Gao also said that it was Mr Li, not his recruitment agent, who had returned the signed employment agreement to the first respondent.

#### *New signature page*

[27] That issue arose for the first time during the Authority's investigation, when Mr Li argued he was not bound by the employment agreement because he had not signed it personally. The respondents had also queried where a second signature page, not signed by them but signed by Mr Li only, had come from because they had never seen it before. The signature was also different from the version they had received back from Mr Li as acceptance of the offer of employment.

[28] Mr Li's explanation and conduct regarding the new signature page was unsatisfactory. He simply produced it without explanation. When pressed to explain it, Mr Li claimed the signature page he had signed and dated 3 September 2019 invalidated the trial period in the employment agreement. Mr Li's advocate argued the new signature page meant Mr Li had previously been employed by the first respondent, so the trial period clause could not apply to him. That argument did not succeed.

### *Period of employment*

[29] Mr Li had one period of employment and that was governed by the written employment agreement he was offered on 14 March 2019, that was accepted by Mr Li on 26 March 2019. Mr Li's employment by the respondent occurred in one continuous period that did not end until his last day of work, on 9 December 2019.

[30] Mr Li's decision to personally sign the signature page of his employment agreement and then date it 3 September 2019 did not create a new employment relationship or a second period of employment.

### **Did the Authority have jurisdiction over all of the claims Mr Li was seeking to pursue?**

#### *Claims against Ms Wang personally*

[31] None of the statements of problem Mr Li filed contained any claims against Ms Wang personally. Mr Li's witness statement did not explain what claim(s) he wanted to make against Ms Wang, he did not provide that information when he gave his evidence during the Authority's investigation meeting and he did not address that in his submissions.

[32] Even if a valid claim had been made against Ms Wang, (and the Authority was not satisfied it had been) then the only potential outcome of such a claim would have been a penalty under s 134(2) of the Employment Relations Act 2000 (the Act). However, s 135(5) of the Act required a penalty claim to have been commenced within 12 months of the breach occurring or coming to Mr Li's attention.

[33] That meant Mr Li should have filed any penalty claim by 9 December 2020 (being 12 months after his employment had ended), so he was out of time for seeking a penalty against Ms Wang. Any claim Mr Li had wanted to make against Ms Wang personally did not succeed.

#### *Unfair bargaining allegations*

[34] Allegations of unfair bargaining were raised by Mr Li's advocate for the first time during the Authority's investigation meeting. It was not mentioned in any of the statements of problem and Mr Li's witness statement did not address it.

[35] Mr Li's advocate asked the Authority to set aside the trial period in Mr Li's employment agreement because it was written in English, so Mr Li could not understand it.

However, Mr Li never told the respondents he could not read or understand English and/or that he wanted a Chinese language version of the employment agreement.

[36] The Authority was not satisfied that Mr Li had “diminished capacity” as required by s 68(1)(a), for any of the reasons set out in s 68(2)(a)-(d) of the Act. Even if he had been able to establish diminished capacity, Mr Li failed to establish the s 68(1)(b) requirement that the first respondent knew or ought to have known, because it could have reasonably been inferred from the facts/circumstances, about his diminished capacity.

[37] Ms Wang, Mr Gao, Mr Li and the recruitment agent Mr Li hired all speak the same language. There would have been no problem providing Mr Li with a Chinese version of the first agreement had he requested it. However, they were never told Mr Li could not understand the employment agreement or needed a Chinese language version of it.

[38] In such circumstances the respondents were entitled to reasonably conclude that if there was a language barrier, then Mr Li and/or his recruitment agent would have raised that problem with them from the outset, particularly when they all spoke the same language.

[39] Mr Li’s unfair bargaining allegations were also fundamentally undermined by the express acknowledgments he had made in clause 15.2 (referred to in paragraph [21] above) and by the declaration in clause 16 of his employment agreement. The declaration stated:

*I, JIEPENG LI, declare that I have read and understand the conditions of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement and have been allowed reasonable time to do so.*

[40] In the absence of any evidence or information to the contrary, the respondents were reasonably entitled to have relied on the acknowledgments and declaration Mr Li had made by accepting without question in these clauses in the employment agreement he had agreed to.

[41] Mr Li had the employment agreement for 12 days before he accepted the offer of employment. There were six months between the offer of employment and Mr Li starting work. He also had two weeks after receiving his work visa before he travelled to New Zealand or started work for the first respondent.

[42] Mr Li had enough time to have sought advice and/or to have asked the respondents to explain anything he did not understand and/or to have requested a Chinese language version of his employment agreement, had he wanted to do so.

[43] Mr Li's unfair bargaining allegations did not succeed.

#### *Penalty claims*

[44] The Second Amended Statement of Problem (2ASoP) lodged 26 October 2021 added new penalty claims for alleged breaches of record keeping and for unlawful deductions of the meal allowance from his wages.

[45] These two new penalty claims were made more than ten months outside the 12 month time limit for filing penalty claims, required by s 135(5) of the Act. The Authority does not have jurisdiction to determine the new 'record keeping' or 'unlawful deductions from wages' penalty claims, so those penalty claims did not succeed.

#### *Rest breaks*

[46] Mr Li's advocate's submissions raised for the first time a 'rest break' claim. The remedy for a failure to provide rest breaks is a potential penalty. However, there was no point in re-opening the Authority's investigation just to hear that claim because it was made for the first time more than a year after the 12 month deadline for filing a penalty claim had expired.

[47] To do so would have delayed the resolution of Mr Li's substantive claims, it would have increased his legal costs and it would not have resulted in any tangible outcome for him, even if he had managed to prove such a claim, which was denied by the respondents.

#### *Dismissal grievance*

[48] The respondents identified two grounds of challenge to the Authority's jurisdiction to investigate Mr Li's unjustified dismissal claim. The first ground was that the trial period clause prevented him from pursuing his dismissal grievance and (if that did not succeed) then the second ground was that Mr Li failed to raise his dismissal grievance within 90 days of his employment ending.

[49] Both grounds succeeded. The Authority agreed that it did not have jurisdiction to consider Mr Li's dismissal grievance.

(i) Validity of the trial period

[50] Mr Li's argument that the employment agreement dated 26 March 2019 was invalid because it was (unbeknownst to the respondents) signed by his authorised recruitment agent on his behalf and not him personally did not succeed. Mr Li's argument that he had previously been employed by the first respondent did not succeed.

[51] Mr Li's argument that the trial period in the employment agreement could not be relied on because it had expired before he arrived in New Zealand did not succeed. Mr Li's argument that him signing the signature page and dating it 3 September 2019 meant the trial period had expired before he was given notice of termination on 8 December 2019 did not succeed.

[52] In accordance with the Employment Court's decision in *Blackmore v Honick Properties Limited* the trial period started after Mr Li began working for the first respondent, i.e. on 13 September 2019, consistent with the phrase "*starting at the beginning of the employee's employment*" that is used in s 67A(2)(a) of the Act.<sup>1</sup>

[53] The trial period in Mr Li's first agreement met all of the requirements in s 67A of the Act, so it was valid and effective. Under s 67B(2) of the Act the valid trial period clause prevented Mr Li from bringing a dismissal grievance, because his employment was terminated within the 90 day trial period, in accordance with s 67B(1) of the Act.

(ii) Failure to raise dismissal grievance within 90 days

[54] Even if the trial period was not valid, Mr Li had still failed to raise his dismissal grievance with the first respondent within 90 days, as required by clause 14 of his employment agreement and by s 114(1) of the Act.

[55] Mr Li was given notice of the termination of his employment under the trial period clause in the agreement on 8 December 2019. He had previously been warned that his performance (cooking skills and teamwork) was unsatisfactory and that if it did not improve then he would be likely to be dismissed during the trial period.

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<sup>1</sup> [2011] NZEmpC 152 at [52].

[56] Mr Li's last day of work was 9 December 2019, so his dismissal grievance needed to be raised by 10 March 2020. However, it was not raised until 15 July 2020, when his statement of problem was served on the first respondent. That was more than four months out of time.

### **Was Mr Li owed wage arrears?**

*What was Mr Li's hourly rate?*

[57] Clause 7.1 of the employment agreement stated that Mr Li would be paid \$22 per hour. The respondents said Mr Li agreed to reduce his hourly rate from \$22 to \$18 when they discovered he was not familiar with the type of Chinese cooking the restaurant specialised in, while he upskilled his cooking abilities with that type of food.

[58] The Authority considered it more likely than not that the parties had verbally agreed to a temporary \$4 per hour reduction to Mr Li's wages, while he was learning how to cook the particular type of Chinese food the restaurant offered.

[59] Although Mr Li verbally agreed to this reduction, the first respondent was unable to rely on it as having reduced Mr Li's hourly wage rate. Clause 15.1 of the employment agreement stated, "*no variations shall be effective or binding on either party unless it is in writing and signed by both parties*".

[60] Because there was no signed variation decreasing Mr Li's hourly rate, he was entitled to be paid his contractual hourly rate of \$22 for the hours he worked. Mr Li is therefore owed wage arrears of \$4 per hour, plus 8% of that as holiday pay, for each hour he worked.

*Was Mr Li owed unpaid public holiday entitlements?*

[61] Mr Li was paid his normal hourly wage rate for the eight hours he worked on 28 October 2019, which was the Labour Day public holiday.

[62] Mr Li should have been paid time and a half for the hours he worked, as required by s 50 of the HA03 plus he should have also received an alternative day holiday, as required by s 56 of the HA03. Because Mr Li did not take this alternative holiday while employed, he was entitled to be paid for it when his employment ended, as per s 60(2)(b) of the HA03. That did not occur.

[63] Mr Li is therefore owed unpaid public holiday entitlements under the HA03.

*Which party's record of the hours Mr Li worked was more likely to be correct?*

[64] There was a discrepancy between each party's record of the hours Mr Li actually worked. The first respondent's contemporaneous wage and time record included all of the information required by s 130 of the Act, except Mr Li's postal address and that he was employed under an individual employment agreement. However, that information was known to the parties and was also recorded elsewhere.

[65] The Authority did not accept Mr Li's records of the hours he worked. There were conflicts between his records and, unlike the first respondent's record of the hours worked, Mr Li's records were not a contemporaneous record. He prepared his records many months later, specifically to support his wage arrears claim.

[66] Mr Li gave different numbers of hours he said he had worked and the amount of wage arrears he claimed increased over time. This undermined the credibility of his records. The Authority was therefore not satisfied on the balance of probabilities that the records Mr Li produced were more likely than not to be accurate.

[67] The Authority preferred the respondents' evidence about the hours Mr Li worked. Mr Gao, Ms Wang and Ms Tan all gave evidence that confirmed that the first respondent's record of Mr Li's hours was correct.

[68] Although each of these three witnesses had some self interest in terms of the evidence they gave about Mr Li's hours, so their evidence was treated with appropriate caution, the Authority considered that other independent evidence more likely than not supported those hours. In particular, the shifts staff worked, the likely busyness of the restaurant, the times of the day when staff were needed to work, and the workflow over the course of the day.

[69] The restaurant rostered staff to work one of two shifts a day. The first was from 7.30am to 4.30pm for preparing breakfast and lunch. The second shift was from 10.30am to 7.30pm for preparing lunch and dinner. Lunch was the restaurant's busiest time, with the number of customers and therefore its overall business (and therefore busyness) significantly reduced by dinnertime. The Authority accepted that as the day went on less staff were needed, because there was less work that needed to be done.

[70] The Authority also accepted the respondents' evidence that the restaurant had sufficient staff working to cover the hours it was open and the level of customers it had, based on the hours of work that had been recorded for Mr Li. There was no need for Mr Li to have worked for approximately two hours more than he was rostered to work every day, as he had claimed, because it was unlikely there would have been sufficient extra work for him to have done.

[71] The Authority considered that the contemporaneous record of the hours Mr Li worked that was kept by the respondents was more likely to be correct than Mr Li's records of the hours he worked.

*How many hours did Mr Li work?*

[72] Mr Li's evidence that he worked either 787 or 783 or 733 hours during his employment was not accepted. The first respondent's evidence that during his employment Mr Li worked 618 hours, on the dates, days and for the hours set out in its wage and time record was accepted.

[73] That conclusion meant the Authority accepted that Mr Li more likely than not worked 50 hours a week, based on him working the morning shift from 7.30am to 4.30pm on Mondays, Tuesdays, Wednesdays and Fridays and from 7am to 5pm on Saturdays and Sundays with one hour of unpaid rest time a day, which was used for breakfast, lunch and snack/rest breaks. Thursday was Mr Li's day off.

[74] However, there were two weeks during which Mr Li did not work 50 hours a week. The first occasion he worked less than 50 hours a week was when he was given paid time off on Tuesday 8 October and Wednesday 9 October 2019, so he could join in on a recreational holiday that the first restaurant had shouted all of its staff.

[75] This was an all-expenses paid three day break from 8-10 October 2019 for all restaurant staff. It did not cost Mr Li anything over these three days because all costs were paid for by the first respondent, as a 'treat' for its staff.

[76] In addition to the first respondent paying for everything, Mr Li also received \$288 in wages because he was paid for 16 hours (being 8 hours on 8 October and 8 hours on 9 October) he would have normally worked but did not actually work.

[77] Although it was a three day break, from Tuesday to Thursday, Mr Li did not work Thursdays. That meant only two out of the three days over entire break would have been

working days for him. Mr Li benefited not just from the holiday but as a result of him also being paid for days he was not required to work.

[78] The second week during which Mr Li did not work 50 hours was in his last week of work. He worked only 26 hours during that last partial week he was employed, 9 hours on Saturday 7 December, 9 hours on Sunday 8 December and 8 hours on Monday 9 December 2019. Although Mr Li was given a notice period to work out, he elected not to return to work after 9 December 2019.

*What was Mr Li paid?*

[79] The Authority relied on Mr Li's IRD print outs of his earnings to conclude he was paid a total of \$10,973 while employed by the first respondent. That consisted of \$10,140 wages paid to him over the period 13 September to 9 December 2019, plus the \$833 annual holiday pay he was paid on 30 June 2021.

[80] Although the respondents say Mr Li was paid in cash until he got a New Zealand bank account, the Authority preferred the IRD print outs as being the most objectively accurate way of establishing what Mr Li had been paid by the first respondent.

[81] That meant any supposed cash payments were excluded from the Authority's calculation of the total amount Mr Li was paid, unless those cash payments had also been advised to the IRD, so therefore appeared on the IRD's records of Mr Li's total earnings.

*What wages should Mr Li have been paid?*

[82] Excluding annual holiday pay, Mr Li should have been paid \$13,860 wages consisting of;

- (a) \$13,596 (being \$22 per hour x 618 hours worked);
- (b) \$264 public holiday entitlements consisting of;
  - (i) \$88 as the unpaid time and a half he should have been paid for the 8 hours he worked on the Labour Day public holiday on 28 October 2019 (being \$11 as half of his normal wage rate x the 8 hours he worked); and
  - (ii) \$176 for the alternative holiday he was entitled to be paid when his employment ended (being 8 hours x \$22 per hour).

*Was Mr Li owed annual holiday pay arrears?*

[83] Mr Li was entitled to be paid annual holiday pay of \$1,108.80, being 8% of his total gross earnings of \$13,860. However, he was only paid annual holiday pay of \$833, so Mr Li is owed annual holiday pay arrears of \$275.80.

*What wage arrears does the first respondent owe Mr Li?*

[84] Mr Li should have been paid total gross wages of \$14,968.80, but he was only paid \$10,973 gross.

[85] Mr Li is therefore owed wage arrears of \$3,995.80 gross, consisting of:

- (a) \$3,456 for underpaid hours worked;
- (b) \$264 for unpaid public holiday entitlements;
- (c) \$275.80 for annual holiday pay arrears.

**Did the first respondent breach the WPA?**

[86] On his first day at work the respondents gave Mr Li the option of bringing his own food to work or alternatively paying \$20 per day as a meal allowance that covered anything he wanted to eat from the restaurant during the day.

[87] Mr Li elected the meal allowance option. There is no dispute that on days Mr Li worked he ate whatever he wanted from the restaurant and he also ordered any food he wanted off the restaurant menu.

[88] That normally consisted of two free meals a day (breakfast and lunch) plus any snacks he wanted to eat between meals. In return for unlimited restaurant food, and as agreed, the first respondent deducted \$20 from Mr Li's wages. However, the daily meal allowance deduction was not recorded in writing.

[89] That omission breached s 5 of the WPA, which required Mr Li's written consent or written request for a deduction from wages to be lawful. Mr Li's employment agreement did not contain a deductions clause or refer to the meal allowance. This was a technical breach of the WPA. No penalty for that breach has been imposed because the penalty claim was out of time.

[90] The meal allowance was a generous offer and Mr Li derived considerable benefit from it. The arrangement was highly favourable to Mr Li because it not only saved him time and money but it also enabled him to eat as much restaurant quality food as he wanted to every day he worked.

### **Did the first respondent breach the HA03?**

[91] Section 25(2) of the HA03 required the first respondent to pay Mr Li 8% of his total gross earnings as annual holiday pay when his employment ended. Section 27(1)(b) of the HA03 required the first respondent to pay Mr Li his annual holiday pay when his employment ended. Section 27(2) of the HA03 required this to be paid to Mr Li with his final pay.

[92] Mr Li's final pay was paid on 12 December 2019 but he was not paid any annual holiday pay until 30 June 2021, and that amount was less than he was owed.

[93] The Authority finds that the first respondent breached the HA03 in the following ways:

- (a) Breach of s25(2), failure to pay Mr Li 8% of his total gross earnings as annual holiday pay;
- (b) Breach of s 27(2), failure to pay annual holiday pay in Mr Li's final pay;
- (c) Breach of s 50, failure to pay time and a half for the 8 hours Mr Li worked on 28 October 2019;
- (d) Breach of s 60(2)(b)(ii), failure to pay unused alternative holiday entitlement in Mr Li's final pay.

### **Should penalties be imposed for the breaches that occurred?**

[94] The Authority did not have jurisdiction to impose penalties on the second respondent. The first respondent, as Mr Li's employer, was required to ensure all of its employees were paid correctly and on time. That did not occur regarding Mr Li's HA03 entitlements.

[95] Penalties are imposed to punish and deter a wrongdoer, and to signal disapproval of unacceptable conduct. It is therefore appropriate to recognise the first respondent's breaches by imposing penalties on it.

*Penalty factors*

[96] Section 133A of the Act sets out the factors the Authority must consider when assessing penalties.

[97] *Objects of the Act* - The s 3 objects in the Act include (among other things) acknowledging and addressing the inherent imbalance of power between those in employment relationships as well as promoting the enforcement of employment standards.<sup>2</sup>

[98] *The nature and extent of the breaches* – There were four breaches of the HA03;

- (a) Public holiday entitlements not paid for the hours Mr Li worked on 28 October 2019;
- (b) Alternative day holiday entitlement was not paid out to Mr Li in his final pay;
- (c) Mr Li's annual holiday pay was not calculated correctly;
- (d) Annual holiday pay was not paid to Mr Li in his final pay.

[99] These four breaches can be categorised into two types of breaches of the HA03;

- (a) payment breaches (amount and timing of payments); and
- (b) breaches of public entitlements for work done on a public holiday.

[100] Under s75 of the HA03 the Authority may impose a penalty of up to \$20,000 per breach on the first respondent for its breaches of sections 25(2), 27(2), 50 and 60 of the HA03. The starting point for assessing penalties is therefore \$80,000 (being 4 breaches x \$20,000 per breach).

[101] *Global penalties* – These should be globalised into two breaches, as per paragraph [99] above. That lowers the starting point for assessing penalties to \$40,000 (2 x breaches x \$20,000 per breach).

[102] *Intentional, inadvertent or negligent* – The breaches of the HA03 that occurred were inadvertent and/or negligent. The respondents believed they had calculated Mr Li's annual holiday pay correctly and they were waiting for confirmation of Mr Li's bank account details because they knew he had left New Zealand, so those breaches were inadvertent. Mr Li had

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<sup>2</sup> Section 3(a)(ii) and (ab) of the Act.

not seen the request from the first respondent to confirm his bank account details for his annual holiday payment, until he was alerted to that by his representative. That is why Mr Li was so late in responding to that request.

[103] The respondents were not aware of the public holiday entitlements that applied to employees who worked on a public holiday, so those breaches were negligent. An employer's ignorance of the law is not a valid excuse for breaching its HA03 obligations.

[104] *Severity of the breaches* – The amounts involved in these breaches of the HA03 were at the lower end of the scale, being \$289.88 for annual holiday entitlements and \$264 for public holiday entitlements. These amounts should have been paid to Mr Li back in mid-December 2019 and he has still not yet been fully paid what he is owed. The breaches have therefore continued over a long period of time, so are likely significant to Mr Li.

[105] *Nature and extent of any loss or damage* - Mr Li has been deprived of money he was entitled to be paid more than two years ago, so he has lost the use of that money.

[106] *Steps to mitigate the effect of the breaches* – Ms Wang (previous owner) and Ms Tan (new owner) both apologised to Mr Li during the Authority's investigation on behalf of the first respondent for its breaches. The first respondent paid Mr Li the annual holiday it believed he was owed (although that was not the full amount) the same day he confirmed his bank account details. As a result of this determination Mr Li will be paid all that he is owed, so will not remain out of pocket.

[107] *Circumstances of the breach, including vulnerability* – The first respondent knew Mr Li was on a work visa that was linked specifically to his employment as a chef in its restaurant. Mr Li had not previously worked in New Zealand so was not familiar with his rights and entitlements as an employee.

[108] *Previous conduct* – The first respondent has not previously appeared before the Authority or had penalties imposed on it.

[109] *Deterrence* – Ms Tan, Mr Gao, Ms Wang, and the first respondent are all aware that the breaches of the HA03 that occurred were unacceptable. Mr Tan and the first respondent have taken legal advice to ensure all employment law obligations are met in future. Penalties

also act as a deterrent to other employers who may be too casual about ensuring all employer obligations are met, by sending a clear message that breaches of the HA03 are unacceptable.

[110] *Culpability* – The first respondent’s breaches of the HA03 occurred before Ms Tan purchased the business in January 2021. She has not been indemnified for potential liabilities, so bears the burden as the current owner of the first respondent of the financial consequences that have been imposed in this determination. These consequences/obligations arose from breaches that occurred while Ms Tan was still working as an employee of the first respondent.

[111] *Consistency* – The Authority is not aware of directly comparable cases. However, penalties have been set at a level the Authority believed was broadly consistent with other penalty cases, that involved HA03 breaches at the more minor end of the scale.

[112] *Ability to pay* – This was not raised as a factor.

[113] *Proportionality of outcome* – Proportionality must be applied to reflect the amount in issue as a result of the breaches of the HA03 that occurred. Mr Li will receive what he is owed, so he will be restored to a financial position as if the breaches had not occurred. Obviously there has been considerable delay in that occurring.

[114] While Mr Li has been deprived of the use of \$553.88 that he should have been paid more than two years ago, balanced against that is the fact he was paid \$288 for two days (8 & 9 October) when he did not work, he received unlimited restaurant quality food while employed, and he was given an all-expenses paid three day holiday by the first respondent a few weeks after he started work.

[115] *Outcome* – Bearing in mind all of these factors, the Authority has imposed total penalties on the first respondent of \$750 for its breaches of the HA03. It is to pay \$500 of the penalty imposed on it to the Crown bank account and pursuant to s 136(2) of the Act the remaining \$250 balance of the penalty is to be paid directly to Mr Li.

[116] The order that part payment of the penalty that has been imposed be paid directly to Mr Li recognised the length of time he has been deprived of money he is owed under the HA03.

**What, if any, costs should be awarded?**

[117] Mr Li as the successful party is entitled to an award of costs. The Authority was advised that Mr Li’s actual costs exceeded \$16,000. The Authority has adopted its usual notional daily

tariff based approach to costs, consisting of \$4,500 for the first day and \$3,500 for subsequent days of investigation meeting time.

[118] This matter involved one and a half days' of investigation meeting time. The investigation meeting ran from 11.30am to 4.30pm on 29 November and from 12pm to 4.30pm on 6 December 2021. This later than usual start time accommodated Mr Li, who faced a 5 hour time zone difference as a result of him being based in China.

[119] The notional starting tariff for assessing costs was therefore \$6,250 on a pro-rata basis, being \$4,500 for the first day plus \$1,750 for half of the second day (being half of the notional starting tariff of \$3,500 for second and subsequent days).

[120] The Authority was not aware of any factors that warranted adjustments being made to that notional starting tariff. The first respondent is therefore ordered to contribute \$6,250 towards Mr Li actual legal costs and to reimburse him \$71.56 for his filing fee.

## **Orders**

[121] In accordance with the findings in this determination, the Authority orders the first respondent to pay Mr Li \$10,567.36, consisting of;

- (a) \$3,995.80 wage arrears;
- (b) \$250 being the part of the penalty that was awarded to him personally;
- (c) \$6,250 contribution towards his actual legal costs; and
- (d) \$71.56 as a disbursement to reimburse his filing fee.

[122] The first respondent is ordered to pay the Crown bank account \$500, being the balance of the \$750 penalty that was imposed on it for its breaches of the HA03.

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