

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 134
3158083

BETWEEN	JUNGBIN SON Applicant
AND	YNK LIMITED First Respondent
AND	BO KYOUNG BAE Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Tony Sung, counsel for the Applicant No Appearance for the Respondents
Investigation Meeting:	21 February 2023
Submissions and/or further evidence	21 February and 6 March 2023 from the Applicant None from the Respondents
Determination:	16 March 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Jungbin Son, claims that the Respondent, YNK Limited (YNK), failed to pay his final wage amount when his employment ended and did not pay his outstanding accrued annual leave entitlement.

[2] Mr Son also claims that YNK did not pay him minimum wages because he worked at weekends, resulting in his working in excess of his 40 contractual weekly hours.

[3] Mr Son further claims that YNK failed to provide him with four weeks' notice as contractually required by clause 12.3 of the employment agreement signed by the parties; failed to pay holiday pay as required in respect of public holidays; and that YNK failed to keep wage and time and holiday and leave records as statutorily required.

[4] Mr Son further claims that YNK breached the duty of good faith it owed to him pursuant to s 4 of the Employment Relations Act 2000 (the Act).

[5] It is further claimed by the Applicant that the Second Respondent, Ms Bo Kyoung Bae, is liable as a person involved in the breaches.

The Authority's investigation

[6] No Statement in Reply was received from the Respondent.

[7] I am satisfied that service had been effected on the First and Second Respondents on the basis as follows:

- a) Service took place on the Second Respondent: On 13 January 2022, the Authority officer managed to have a phone call with the Second Respondent Ms Bo Kyoung Bae, who provided her working email address as syktiling@gmail.com. The Authority then sent an email together with proceedings documents to that email address stating the following:

Good afternoon, Bronwyn,

Referring to our phone call earlier, thank you for providing your email address.

The application has been served to syktiling@gmail.com.

Regulation 8 of the Employment Relations Authority Regulations 2000 requires that you file a Statement in Reply within 14 calendar days after the date of receipt setting out your view of the issues; the facts giving rise to them; and the remedies being sought by the applicant. The Statement in Reply is due 27 Jan 2022.

At that time, there was no reason for the Authority to think the documents had not been received by the Second Respondent at the email address she provided.

- b) It was not until about 1 April 2022, more than two months later, that David Kim (the husband of the Second Respondent and who was also involved in the operation of YNK) left an automatic out of office message stating: "This email is no longer used as all our companies (SYK & YNK Ltd) have been closed".

[8] Regulation 17(1)(b) of the Regulations to the Employment Relations Act 2000 (the ERA) states that service of a notice, order, or other document required to be served by the Act or these regulations may be effected on a corporation incorporated in New Zealand by leaving the notice, order, or document at the corporation's registered office. I am satisfied that service on the First Respondent YNK Limited was made in accordance with regulation 17(1)(b) when the parcel of document was served on the registered address of the company (on 49a Arrenway Drive) 24 August 2022.

[9] I am also satisfied that the Second Respondent, Ms Bae, received the documents by delivery to the email she provided which was still active on 1 April 2022.

[10] On the day of the Investigation Meeting, the start of the meeting was delayed allowing a late attendance by the Respondents, however there was no appearance by them.

[11] Given the difficulties encountered in progressing this case, I was satisfied that no good cause had been shown for the First and Second Respondents failure to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the ERA.

[12] During the Investigation Meeting I received written evidence from Mr Son and heard his oral evidence, taken under oath or affirmation. I also heard submissions from counsel for Mr Son.

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

Issues

[14] The issues requiring investigation are whether or not:

- (i) YNK failed to pay Mr Son his final wage payment upon the termination of his employment?
- (ii) YNK failed to pay Mr Son minimum wages?
- (iii) YNK failed to pay Mr Son four weeks' notice of termination of employment as contractually required by clause 12.3 of the employment agreement?
- (iv) YNK failed to pay Mr Son his outstanding accrued annual leave upon termination of his employment?
- (v) YNK failed to pay Mr Son holiday pay in respect of public holidays?
- (vi) YNK failed to keep wages and time records and leave records?
- (vii) YNK failed to act in good faith towards Mr Son?
- (viii) Was Ms Bae a person involved in any of the above breaches?

- (ix) Should YNK and/or Ms Bae be ordered to pay Mr Son outstanding wages and statutory entitlements?
- (x) Should penalties be awarded against YNK for breaches of the statutory and contractual entitlements, and if so, in what quantum?
- (xi) Should penalties be awarded against Ms Bae as a person involved in the breaches and if so, in what quantum?

Background

[15] Mr Jungbin Son wanted to work in New Zealand and searched for employment online whilst still in Korea. He was offered a job in New Zealand by the First Respondent, YNK Limited (YNK), a construction company of which the Second Respondent, Ms Bo Kyoung Bae is the sole director and shareholder.

[16] Mr Son was provided with an individual employment agreement which he and Ms Bae signed in July 2017 (the Employment Agreement). The relevant terms of the Employment Agreement are:

2.1 Position

The Employee is being employed as **Civil Engineer**.

2.3 Reporting

The Employee shall report to **Bo Kyoung (Bronwyn) BAE (Director)** or to any other representative of the Employer designated from time to time by the Employer.

5.1 Fixed Place of Work

The parties agree that the Employee shall perform their duties at **49a Arrenway Drive, Rosedale, Auckland**.

6 Hours of work

The Employee's normal hours of work shall be **40 hours per week**. The employee can choose which day to work each week and when to start and end work each day (as long as they work the agreed number of hours).

7.1 Payment of wages

The Employee's salary shall be **\$55,992 gross per annum before tax**, which will be paid monthly.

12.3 Ending employment

The employer might end the employee's job with reasonable cause, or the employee might resign. Unless otherwise set out in this agreement, either the employer or the

employee can end employment by giving 4 weeks' notice in writing. The employer may decide to pay the employee instead of the notice period. ...

[17] Mr Son said that he frequently reported to Mr Kim, Ms Bae's husband, and worked both in the office, and also out on site as required by the nature of his role.

[18] Not long after he commenced employment, Mr Kim asked if he could work on a Saturday. Being dependent on retaining his employment due to the visa requirements, Mr Son said he agreed. Over a period of time, he often worked on a Saturday or a Sunday, but he received no additional payment for these hours.

[19] Mr Son said he was also required to work on some public holidays. These totalled 8, three in 2017 (Good Friday, Queen's Birthday and Labour Day), 1 day in 2018 and 2019 (Labour Day), and three in 2020 (Good Friday, Queen's Birthday and Labour Day).

[20] Although he was paid on these days, he was not paid at time and a half rate, nor did he receive an alternative day in lieu.

[21] During July 2021 Mr Son said YNK had a project in Rotorua, and he was required to deliver materials on a daily basis. This required him working long hours due to the travelling time and as a result Mr Son said he became exhausted with the additional hours he was working.

[22] He had been considering resigning but was too concerned about his visa status to do so.

[23] On 22 July 2021 Mr Kim told him he was no longer employed. Mr Son said he asked why his employment was being ended, but Mr Kim told him only to leave and to leave behind the company car he was using that day.

[24] Mr Son stated that he believed the dismissal was caused by his protesting at all the additional hours he was being required to work.

[25] Following his summary dismissal, Mr Son did not receive his final month's pay, payment in lieu in respect of the notice period, or his outstanding holiday entitlement.

[26] Following his dismissal Mr Son said he engaged Mr Sung who requested the outstanding payments on his behalf and also a copy of YNK's wages and time records, but YNK did not provide them as requested.

Did YNK fail to pay Mr Son his final wage payment upon the termination of his employment?

[27] Mr Son's evidence was that he did not receive the final payment of his wages, or any payment in lieu of notice. The period of unpaid wages was from 1 to 22 July 2021.

[28] Mr Son was entitled to be paid his wages when they became payable unless he consented in writing to the deduction or if there was an agreed deduction of an overpayment pursuant to s 5 and s 6 of the Wages Protection Act 1983 (the WPA). Neither of these exceptions applied in Mr Son's case.

[29] I find that YNK breached s 5 of the WPA by failing to pay Mr Son his wages when they fell due.

Did YNK fail to pay Mr Son minimum wages?

[30] Mr Son's evidence was that he was required to work on a number of weekend days without pay. He also was required to travel and stay at accommodation near construction sites, and sometimes required to fly to the site but drive back a vehicle. These journeys resulted in his working additional hours beyond the contractual 40 hours, however he was not paid for these additional hours worked.

[31] Mr Son provided some documentary evidence and I accept that he did work some weekend days during the period he worked for YNK. However, he was unable to provide timesheets, rosters or a record of the actual hours he worked on each day.

[32] The Employment Agreement states at clause 6 that Mr Son could work his contractual 40 weekly hours on any days of his choosing.

[33] Without wages and time records, which YNK failed to provide when requested on behalf of Mr Son by Mr Sung, or any record of the actual hours worked by Mr Son, I find it is impossible to ascertain whether or not Mr Son's weekly hours exceeded 40 hours in any week, or that they failed to meet the minimum requirements.

[34] On that basis I am not satisfied that this aspect of Mr Son's claim has been substantiated.

Did YNK fail to pay Mr Son 4 weeks' notice of termination of employment as contractually required by clause 12.3 of the Employment Agreement?

[35] It was also a contractual requirement in accordance with clause 7.2 of the Employment Agreement that Mr Son be paid monthly. After YNK terminated his employment, Mr Son said that he failed to receive a final payment in respect of the last period he worked for YNK.

[36] I find that Mr Son is entitled to be paid for his final wage payment by YNK.

Did YNK fail to pay Mr Son four weeks' notice of termination of employment as contractually required by clause 12.3 of the employment agreement?

[37] Mr Son was entitled to receive four weeks' notice of the termination of employment, or to be paid salary in lieu of notice as set out in clause 12.3 of the Employment Agreement.

[38] Mr Son was not able to work a four week notice period due to the summary nature of his dismissal by YNK, nor did he receive any payment in lieu of notice

[39] I determine that Mr Son is owed payment in lieu of notice in accordance with clause 12.3 of the Employment Agreement.in respect of that non-payment.

Did YNK fail to pay Mr Son holiday pay in respect of public holidays?

[40] Mr Son claimed he had not been paid when he worked on some public holidays during his employment, these consisted of 8 in total.

[41] I am satisfied that Mr Son's oral evidence, together with the evidence he has provided in confirmation to the Authority, is credible.

[42] Whilst Mr Son was paid his normal rate for working on the public holidays, he was not paid at a rate of time and a half for the relevant day, nor did he receive an alternative day of leave in breach of s 50 and s 56 of the Holidays Act 2003 (the HA).

[43] I determine that Mr Son is owed monies by YNK in respect of 8 days payment at half rate and 8 alternative days leave.

Did YNK fail to keep wages and time records and leave records?

[44] Employers are required to keep and maintain wages and time records in respect of all employees and provide a copy to an employee or his or her representative when requested to do so pursuant to s 130 of the Act.

[45] YNK failed to provide the records when requested to do so by Mr Sung acting on Mr Son's instructions. There is therefore no evidence that YNK, which failed to engage with the Authority, has kept and maintained wages and time records in breach of s 130 of the Act.

[46] I find that YNK breached s 130 of the Act by failing to provide wages and time records when requested to do so.

Remedies

Unpaid final salary payment

[47] **I order that YNK pay Mr Son the sum of \$3,445.66 gross (calculated as \$55,992.00 ÷ 52 ÷ 5 x 16 days) in respect of his final period of employment.**

Unpaid notice period

[48] Mr Son was not paid four weeks salary in lieu of notice by YNK which it was required to do in circumstances.

[49] **I order that YNK pay Mr Son the sum of \$4,307.08 gross (calculated as \$55,992.00 ÷ 52 ÷ 5 X 20 days) in respect of salary in lieu.**

[50] **Mr Son was not paid outstanding and accrued annual leave payments upon the ending of his employment at YNK.**

[51] **I order that YNK pay Mr Son the sum of \$2,779.60 gross (calculated as \$55,992.00 ÷ 52 ÷ 5 x 13 days).**

Unpaid public holidays

[52] Mr Son was not paid in respect of a number of half days and provided with alternate days in respect of the public holidays he worked.

[53] **I order that YNK pay Mr Son the sum of \$861.42 gross in respect of 8 half days payment for working on public holidays, and \$1,722.83 gross in respect of 8 alternative days, a total payment of \$2,584.25 gross.**

Interest

[54] Mr Son seeks interest on the unpaid monies in respect of wages and holiday pay entitlement. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act.

[55] The purpose of interest is to reimburse someone for the loss of use of monies to which there is established entitlement as is the case with Mr Son.

[56] I consider it appropriate therefore to award Mr Son interest on the amounts awarded in respect of his unpaid final salary payment and unpaid notice period, and annual and public holiday entitlements

[57] YNK is ordered to calculate and pay interest to Mr Son within 21 days of the date of this determination on the sums for which payment has been ordered until they are paid in full.

[58] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.

Should YNK and/or Ms Bae be ordered to pay Mr Son outstanding wages and statutory entitlements?

[59] Ms Bae, as the sole director and shareholder of YNK, is a person involved in the failures to pay Mr Son his entitlements correctly and may be held liable to fulfil the remedies ordered to be paid to Mr Son pursuant to s 142Y(2)(b) of the Act: “to the extent that the employer’s employer is unable to pay the arears in wages or other money”.

[60] I determine that YNK and Ms Bae are both jointly and severally responsible for seeing this order is met in full. I determine that in the event that YNK is unable to, or fails to, pay Mr Son the sums awarded to him including the interest, Ms Bae is liable to pay the ordered payments.

Should penalties be awarded against YNK in respect of the breaches of contractual and minimum standard entitlements?

[61] I have found that YNK has breached the following in respect of Mr Son:

- a) Section 4 of the Employment Agreement by failing to pay salary in lieu of notice;
- b) Section 4 of the ERA in respect of a failure of good faith towards Mr Son;
- c) Section 5 of the WPA in respect of the failure to pay Mr Son’s outstanding wage entitlement;
- d) Section 24 of the HA in respect of the failure to pay annual leave entitlements.
- e) Section 75 of the HA in respect of the failure to pay public holiday entitlement; and
- f) Breach of s 130 of the ERA in respect of the failure to keep time and wage records.

[62] YNK also breached clause 12.3 of the Employment Agreement by failing to Mr Son in lieu of notice.

Good Faith Breach

[63] Employers and employees are expected to act in good faith towards each other pursuant to s4 of the ERA.

[64] Mr Son was required to work properly during his employment, and there is no evidence to the contrary. I note that his evidence was that he worked diligently, undertaking extensive travelling and weekend and public holiday working. YNK in return was expected to pay him correctly and on time. This it failed to do.

[65] I find that there has been a breach of good faith by YNK, and that Ms Bae as sole director and shareholder of YNK, is responsible for that failure.

[66] Penalties for breaches render a company liable to penalties up to a maximum amount of \$20,000.00 per penalty.

[67] In deciding whether to impose a penalty and if I decide to, deciding how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court in *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.¹

[68] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[69] One of the objects of the ERA is to promote the effective enforcement of employment standards. There is a duty to maintain wage and time records and provide these on request, and an employee is entitled to be properly recompensed throughout the period of their employment. This YNK has failed to do in respect of Mr Son.

[70] Failure to fulfil these requirements represents a failure to employment standards, and prejudiced Mr Son's ability to calculate the wages and other monies owed to him following the termination of his employment with YNK.

Identify the nature and number of statutory breaches

[71] There are six statutory breaches identified, each merit a penalty to a maximum amount of \$20,000.00. This is a potential total penalty of \$120,000.00.

¹ *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*. [2016] NZEmpC 143

[72] I consider that the breaches of the WPA and the HA should be considered as a global penalty of one breach respectively. This reduces the overall liability to four breaches and potential total penalty of \$80,000.00.

Step Two- assess the severity of the breaches

[73] The aggravating factors include the fact that Mr Son was a migrant worker who was entitled to be treated with respect in the New Zealand workforce. He was entitled to be paid properly during the period of his employment and to have access to the wage and time records for ensuring he could calculate payments due to him after his employment was abruptly ended.

[74] An ameliorating factor on the part of YNK include the fact that it did provide a written employment agreement to Mr Son.

[75] I consider that the penalty amount should be reduced to 50% of the total amount due in respect of the breaches.

The Respondent's financial circumstances

[76] No financial information has been provided by YNK, but the Companies Office records notes that its removal is likely to occur in the near future.

[77] No financial evidence has been provided by Ms Bae.

[78] Neither she nor YNK has participated in the Authority's processes.

The nature and extent of any loss or damage

[79] No payments have since been made to remedy the loss suffered by Mr Son.

Circumstances of the breach

[80] As observed by the Full Court in *Borsboom v Preet PVT Limited (Preet)* it is a matter of common knowledge within the community generally that minimum wages, minimum holiday entitlements and other statutory minima are applicable to all employment.²

[81] The circumstances of the breaches of the MWA and the HA highlights the vulnerability of employees, especially in the case of Mr Son who felt unable to resign because his visa was dependent upon his continuing to be employed by YNK.

² *Borsboom (Labour Inspector) v Preet Pvt Ltd & Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

Previous Conduct

[82] There is no evidence before the Authority regarding previous conduct by YNK.

Deterrence

[83] I consider that there is a need to enforce to employers the employment standards they are required to meet and that minimum entitlements are non-negotiable.

[84] Mr Son is a vulnerable employee, dependent on YNK for his visa and wish to apply for residence in New Zealand. As such I find that there is a need for particular deterrence for YNK.

Proportionality

[85] Having had regard to the level of penalties arrived at in similar cases, I am satisfied that the level of penalty is in accordance with that level.

Penalties

[86] According to the Companies Office website, it appears that YNK may be removed as a company shortly. It is however still listed. **I order YNK to pay a penalty of \$40,000.00 in respect of the breaches.**

Should a penalty be imposed on Ms Bae as a person involved with the breaches?

[87] Section 142W of the Act is applicable:

142W Involvement in breaches

(1) In this Act, a person is involved in a breach if the breach is a breach of employment standards and the person—

(a) has aided, abetted, counselled, or procured the breach; or

(b) has induced, whether by threats or promises or otherwise, the breach; or

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or

(d) has conspired with others to effect the breach.

(2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.

(3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:

(a) a person occupying the position of a director of a company if the entity is a company:

(b) a partner if the entity is a partnership:

(c) a general partner if the entity is a limited partnership:

(d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership:

(e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

[88] Pursuant to s 142W of the ERA, if a company breaches employment standards as YNK has done, a person who is an officer of the company may be treated as a person involved in the breaches. Pursuant to s 142W (3)(a) of the ERA a person occupying the position of a director of the company is to be treated as an officer of the company.

[89] I determine that Ms Bae was a person involved in all of the identified breaches of employment standards.

[90] YNK breached clause 7.2 of the Employment Agreement by failing to pay Mr Son the contractual notice period in lieu of his working it by his summary dismissal.

[91] Ms Bae as sole director of YNK entered into and signed the Employment Agreement. As sole director she would have been aware of the failure to pay the monies in lieu to Mr Son.

[92] YNK breached clause 4 of the Act by failing to act in good faith towards Mr Son.

[93] Ms Bae as sole director and shareholder of YNK would have been aware of the failure to act in good faith towards Mr Son by YNK since Mr Kim was delegated to act in her place as the person to whom Mr Son reported pursuant to clause 2.3 of the Employment Agreement.

[94] I determine that Ms Bae was a person involved in the breach of the good faith requirements of the Act.

[95] I find that Ms Bae is personally liable for the breaches of employment standards, the Employment Agreement, and the ERA.

Should any part of the penalties be paid to Mr Son?

[96] Mr Son has been compensated for all his losses. The purpose of penalties is to deter, not to compensate. The penalties imposed are to bring home to YNK and Ms Bae the

importance of maintain the employment standards in New Zealand which should be well known to all employers given the length of time they have been in place.

[97] However, I observe that the failure to pay Mr Son correctly and on time caused stress to him and this was compounded by his reluctance to speak up because of his visa dependent status as a migrant to New Zealand.

[98] I order YNK and Ms Bae are jointly and severally responsible for paying a penalty of \$40,000.00, of which \$4,000.00 (10 percent) is to be paid to Mr Son. The penalty is to be paid into a Crown Bank Account and the Crown will transfer the proportion awarded to him to Mr Son.

Costs

[99] There was no appearance on the part of YNK or Ms Bae and the Investigation meeting took less than half a day.

[100] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point.

[101] Accordingly, YNK and Ms Bae are jointly and severally is ordered to pay Mr Son the sum of \$2,250.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

Filing Fee

[102] I order YNK and Ms Bae jointly and severally to pay Mr Son the filing fee of \$71.56.

**Eleanor Robinson
Member of the Employment Relations Authority**