

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 171
3117860

BETWEEN	LILI WANG First Applicant
	XIAO YI Second Applicant
AND	YUJING ZHANG First Respondent
	BAOZHE XU Second Respondent
	B&S TRADE CORPORATION LIMITED Third Respondent
	HAPPY RAA LIMITED Fourth Respondent

Member of Authority:	Peter van Keulen
Representatives:	Daniel Zhang, counsel for the Applicants Yujing Zhang for the Respondents
Investigation Meeting:	9 November 2021, 10 February 2022 and 11 February 2022
Submissions and further information received:	From 2 March 2022 up until 26 January 2023 from the Applicants 12 March 2022 from the Respondents
Date of Determination:	11 April 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lili Wang (known as Emily) and Xiao Yi (known as Yi) came to New Zealand in 2014.

[2] In 2015 Emily was employed by B&S Trade Corporation Limited to work in its bakery business, Buns Bakery.

[3] In 2016 both Emily and Yi were employed by Happy RAA limited to work in its food business, the Ilam Food Bar.

[4] Emily says that whilst she worked for B&S Trade she was not paid her holiday pay; she was not paid correctly for public holidays that she worked; and she did not get paid rest breaks.

[5] Emily and Yi say they that whilst they worked for Happy RAA they were not paid their holiday pay; they were not paid correctly for public holidays that they worked; and they did not get paid rest breaks.

[6] Yi also says he was not paid correctly for all of the hours that he worked and he was then unjustifiably dismissed by Happy RAA.

[7] B&S Trade and Happy RAA both say they met all of their obligations to Emily and/or Yi in terms of wages, holidays, public holidays and rest break entitlements.

[8] Happy RAA says Yi was not unjustifiably dismissed and says, in any event, he failed to raise a personal grievance for unjustified dismissal within the requisite 90-day time frame.

[9] Happy RAA also says it overpaid both Emily and Yi, which they deny. And Happy RAA says Yi breached his employment agreement when he stopped working for it as he then worked for a competitor.

The Authority's investigation

[10] Emily and Yi lodged a statement of problem in the Authority making claims against B&S Trade, Happy RAA, Yujing Zhang (known as Yvonne) and Baozhe Xu (known as Bob).

[11] Emily's claims against B&S Trade are for:

- (a) Payment for working on public holidays and an alternative day of holiday.
- (b) Annual holiday pay.
- (c) Compensation for denying entitlement to paid rest breaks.
- (d) Penalties for failing to comply with the Holidays Act 2003, the Wages Protection Act 1983 and the Employment Relations Act 2000.

[12] Emily's claims against Bob are for penalties against him as a person involved in B&S Trades' failure to comply with the Holidays Act 2003, the Wages Protection Act 1983 and the Employment Relations Act 2000.

[13] Emily and Yi's claims against Happy RAA are for:

- (a) Payment for working on public holidays and an alternative day of holiday.
- (b) Annual holiday pay.
- (c) Compensation for denying entitlement to paid rest breaks.
- (d) Penalties for failing to comply with the Holidays Act 2003, the Wages Protection Act 1983 and the Employment Relations Act 2000.

[14] Yi's additional claims against Happy RAA are for:

- (a) Wage arrears for not being paid correctly for all of the hours he worked.
- (b) Unjustified dismissal, seeking compensation and lost remuneration.

[15] Emily and Yi's claims against Yvonne are for penalties as a person involved in Happy RAA's failure to comply with the Holidays Act 2003, the Wages Protection Act 1983 and the Employment Relations Act 2000.

[16] B&S Trade, Happy RAA, Yvonne and Bob lodged a statement in reply and counterclaim.

[17] In its statement in reply, B&S Trade:

- (a) Denies that Emily worked on public holidays so it says Emily has been paid correctly.
- (b) Says all holiday pay owing to Emily has been paid.
- (c) Says that Emily was given the opportunity to take paid rest breaks and should have taken them as rostered whilst working for B&S Trade.

[18] In its statement in reply, Happy RAA:

- (a) Denies that Emily and Yi worked on public holidays so it says Emily and Yi have been paid correctly.
- (b) Says all holiday pay owing to Emily or Yi has been paid.
- (c) Says that Emily and Yi were given the opportunity to take paid rest breaks they both should have arranged to take breaks between them whilst they were working.
- (d) Denies that Yi worked the hours he claims and says he was paid a salary for set hours and in this regard, he was paid correctly and no wage arrears are owed.
- (e) Denies that Yi was unjustifiably dismissed and says, in any event, he failed to raise a personal grievance for unjustified dismissal within the requisite 90-day time frame.

[19] In its statement in reply, Happy RAA raised counterclaims against Emily and Yi saying they were overpaid.

[20] After it lodged its statement in reply, Happy RAA claimed Yi had breached his employment agreement when he stopped working for it as he then worked for a competitor.

[21] None of these claims and counterclaims were resolved between the parties and I was required to investigate and determine them.

[22] I investigated the claims by receiving written evidence and documents, holding an investigation meeting on 9 November 2021, 10 February 2022 and 11 February 2022, and assessing the oral and written submissions of the parties' representatives.

[23] I received witness statements from Emily, Yi and Yvonne. In my investigation meeting, under oath or affirmation, these witnesses and Bob, confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives.

[24] As permitted by 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

What happened?

[25] B&S Trade is a company incorporated in 2008. Yvonne and Bob are shareholders in B&S Trade. Bob is also the sole director of B&S Trade. B&S Trade owned and operated a bakery known as Buns Bakery.

[26] Emily and Yi are married. They came to New Zealand from China in 2014 looking to migrate and start a family here. Prior to leaving China they had been introduced to Yvonne, as a licensed immigration advisor who would be able to provide them with immigration advice and employment.

[27] When Emily and Yi decided to come to New Zealand in February 2014, they came to Christchurch to study and were able to live in New Zealand on student visas.

Emily works at Buns Bakery

[28] In early 2015 Emily was looking for part time work in addition to her studies and she was, through Yvonne employed by B&S Trade to work part time at Buns Bakery.

[29] Emily began working at Buns Bakery on 10 February 2015.

The Ilam Food Bar

[30] In late 2015, the Ilam Food Bar business was for sale. Emily, Yi, Yvonne and Bob discussed buying this business and Emily and Yi working in it.

[31] There was conflicting evidence about how and why the Ilam Food Bar business was bought but in the end this was of no consequence to the claims before me. Happy RAA purchased the business and was Emily and Yi's employer.

[32] Happy RAA was incorporated in 2016. Yvonne is the shareholder and director of Happy RAA. Happy RAA purchased the Ilam Food Bar in 2016.

Emily and Yi work at the Ilam Food Bar

[33] On 18 March 2016 Emily and Yi began working at Ilam Food Bar.

[34] Ilam Food Bar operated seven days a week. The business needed employees to work for the food bar's opening hours and for preparation of food prior to opening and for additional work at closing.

[35] Initially Yi and Emily worked at Ilam Food Bar along with Bob. Yi was the food bar manager; Emily was a shop assistant and Bob was on hand to prepare the food at the beginning of the day and would come back in the evening to take the cash and leftover food to Buns Bakery.

[36] Both Emily and Yi were each to work 6 days a week for approximately 7.5 hours a day and have one off day a week. Emily and Yi were told that this arrangement was to be temporary and that more staff would be added shortly to relieve the staffing shortage.

[37] Shortly into their employment, Bob went to China to source materials and equipment for his businesses and in his absence the work of operating the food bar was carried out solely by Emily and Yi. This largely continued after Bob returned.

[38] In July 2016 Emily found out that she was pregnant and her health deteriorated such that she was unable to work.

[39] Happy RAA agreed that Emily was not required to work but it continued to pay her. This is the basis for Happy RAA's counterclaim of overpayment.

[40] Yi stopped working in February 2017.

[41] Yvonne asserts that around February 2017 Yi was sick and did not come to work. In response to this Yvonne told Yi to stay home to look after himself and Emily. She relies on an email in February 2017 in which Yi requested holidays from 6 February to 1 April 2017.

[42] Yi then found alternative work in March 2017.

Claims for penalties

[43] The various claims for penalties advanced by Emily and Yi all have a fundamental problem – the actions for recovery of the penalties were not commenced within the requisite 12 months of the events giving rise to them.

[44] I raised this matter with counsel for Emily and Yi during the investigation meeting and then after. Counsel responded in writing some time after submissions had been lodged, accepting the actions were not raised in time and the claims for penalties were withdrawn.

Emily's claims against B&S Trade

Did Emily work on public holidays and if so, was she paid correctly for these days?

[45] I am satisfied on the oral evidence from Emily and the documents, including rosters, that Emily did work three public holidays, 3 and 6 April 2015 and 27 April 2015. Emily was not paid correctly for this work and is owed \$497.81.

What was Emily's holiday pay entitlement and what was she paid?

[46] Emily was entitled to annual holiday pay calculated at 8% of her wages. She was not paid this by B&S Trade and is owed \$526.10.

Did Emily get breaks whilst working at Buns Bakery?

[47] Emily worked eight hour shifts at Buns Bakery, receiving a 30-minute unpaid meal break during each shift. Emily says she did not get paid rest breaks and Yvonne says staff were to agree between themselves when they can go to the breaks and to take them in line with their agreement.

[48] I am satisfied that Emily did get an opportunity to take breaks and this part of her claim does not succeed.

Emily's claims against Happy RAA

Did Emily work on public holidays and if so, was she paid correctly for these days?

[49] I find that Emily did work 7 hours on a public holiday, 6 June 2016. Emily was not paid correctly for this and is owed \$173.25.

What was Emily's holiday pay entitlement and what was she paid?

[50] Emily was entitled to annual holiday pay calculated at 8% of her wages. She was not paid this by Happy RAA and is owed \$616.44.

Did Emily get breaks whilst working at the Ilam Food Bar?

[51] Yvonne says that Emily and Yi had full control over how they structured their day when working at the Ilam Food Bar and they should have taken breaks. Emily and Yi say there was not enough time to take breaks.

[52] I am not satisfied that Emily and Yi did not have enough time to take breaks and therefore they could have taken them. Emily's claim for compensation for not being able to take breaks whilst working is not successful.

Yi's claims against Happy RAA

What hours did Yi work at the Ilam Food Bar and was he correctly paid for all of these hours?

[53] It has been difficult to establish how many hours Yi actually worked at the Ilam Food Bar. Overall, I am satisfied that he worked more hours than he was paid and is owed wage arrears for this. My best estimate based on the evidence, is to allow an additional 7 hours per week. Over the course of his employment this means Yi was underpaid by \$6,909.00.

Did Yi work on public holidays and if so, was he paid correctly for these days?

[54] I am satisfied that Yi worked the following public holidays and was paid ordinary time for these days – 25 March 2016, 28 March 2016, 25 April 2016, 6 June 2016, 24 October 2016, 26 December 2016 and 2 January 2017.

[55] Yi is owed \$2,226.00 for these public holidays.

What was Yi's holiday pay entitlement and what was paid?

[56] Yi is entitled to annual holiday pay on his earnings from Happy RAA, calculated at 8%.

[57] Yi was paid \$40,120.00 by Happy RAA. Yi is owed an additional \$6,909.00 and \$2,226.00 (as set out above). So, in total the holiday pay is calculated as 8% of \$49,255.00. This is \$3,904.00.

Did Yi get breaks whilst working at the Ilam Food Bar?

[58] As set out above, in relation to Emily, I am not satisfied that Emily and Yi did not have enough time to take breaks whilst working at Ilam Food Bar and therefore they could have taken them. Yi's claim for compensation for not being able to take breaks whilst working is not successful.

Yi's unjustified dismissal claim against Happy RAA

[59] There are two problems with Yi's unjustified dismissal claim. First I am not satisfied that he raised a personal grievance within the requisite 90 days and second, in any event, I am not satisfied that he was dismissed – based on the evidence I find he resigned because he had new employment.

[60] Yi's claim for unjustifiable dismissal does not succeed.

Happy RAA's counterclaim against Emily and Yi for overpayment

[61] Happy RAA's counterclaim is premised on an assertion that it continued to pay Emily and Yi when they were not working. This was from the time Emily left work because of her health and from when Yi stopped working.

[62] In both cases Happy RAA continued to make payment by consent. This cannot give rise to an overpayment.

[63] This claim was somewhat complicated by additional issues arising between these parties in relation to money that was said to be loaned for the purchase of the Ilam Food Bar business by Happy RAA. My concern was that this issue, which is the subject of proceeding in the District Court, needed to be resolved in order to assist my decision. An update provided by the applicants' counsel shows this matter has not yet been resolved and reflecting on that I have decided I need not wait and can determine this now without the District Court decision.

[64] The simple point is regardless of what the payments were for – wages, some draw down of earnings from the business or a repayment of a loan – the payments were not an overpayment that should be repaid. The payments were voluntary and part of an agreement between the parties and regardless of what that agreement was (i.e., what the payments were for, which the District Court will decide) they cannot be an overpayment.

Happy RAA's counterclaim against Yi for breach of his employment agreement

[65] Having considered Happy RAA's counterclaim as asserted by it and considering the evidence I am simply going to summarise my conclusion. There is no basis in fact for the allegation that Yi breached his employment agreement by working for a competitor. This claim by Happy RAA cannot succeed.

Summary

[66] B&S Trade Corporation Limited must pay Lili Wang:

- (a) \$497.81 for public holidays that she worked.
- (b) \$616.44 for annual holiday pay.

[67] Happy RAA Limited must pay Lili Wang:

- (a) \$173.25 for public holidays that she worked.
- (b) \$616.44 for annual holiday pay.

[68] Happy RAA Limited must pay Xiao Yi:

- (a) \$6,909.00 for wage arrears.
- (b) \$2,226.00 for public holidays that he worked.
- (c) \$3,904.00 for annual holiday pay.

[69] Xiao Yi claim for unjustified dismissal does not succeed.

[70] Happy RAA Limited's counterclaims fail as:

- (a) There was no overpayment made to Lili Wang or Xiao Yi.
- (b) There is no evidence that shows that Xiao Yi breached his employment agreement.

Costs

[71] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum the other parties would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[72] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.¹

Peter van Keulen
Member of the Employment Relations Authority

¹ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.