

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 211
3148981
3148961

BETWEEN	JIANGHUA CHEN First Applicant
AND	JINCHUN CHEN Second Applicant
AND	L2M CONSTRUCTION LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	David Kim, advocate for the applicants Liua He Tau Manu for the respondent
Investigation meeting:	24 January 2023
Submissions and information received:	At the investigation meeting and on 27 and 31 January 2023
Determination:	28 April 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] The applicants Jianghua Chen (Jianghua) and Jinchun Chen (Jinchun) are Chinese nationals who were recruited to work as carpenters for the respondent L2M Construction Limited (L2M) while still living in China. They signed employment agreements in China, and after arriving in Aotearoa New Zealand on work visas, started working for L2M.

[2] The applicants say they were paid less than the hourly rate in their employment agreements and are owed the difference between their hourly rates and what they were actually paid. They also say they did not work or receive any pay during the COVID-19 national alert level 4 lockdown in March and April 2020 and are owed wages for that period. They also claim not to have been paid for hours worked relating to three other periods of work, and did not receive public holiday pay during their employment, nor annual holiday pay on termination.

[3] The applicants say they were forced to resign to avoid further disadvantage from not being paid properly, claiming constructive dismissal. They seek lost wages and compensation for humiliation, loss of dignity and injury to feelings.

[4] Further, they claim penalties for L2M's alleged failure to comply with the Holidays Act 2003 (HA 2003) and for failing to keep or provide wages and time records under s 130 of the Employment Relations Act 2000 (the Act).

[5] Mr Manu had been named as a second respondent, but at the investigation meeting the applicants withdrew their penalty claims against Mr Manu, as well as penalty claims under to s 134 of the Act.

[6] L2M did not file a statement in reply in this matter but its director Liua He Tau Manu did attend the investigation meeting. At the investigation meeting I granted L2M leave to respond to these applications. L2M says the applicants are owed a small amount of the arrears claimed, that it relied on its accountant for payroll advice, and that the applicants ran away from their employment. It says L2M asked the applicants to return to work and it would pay of arrears owing, but the applicants refused to return.

What has the Authority's process been?

[7] The applicants lodged witness statements which were confirmed at the investigation meeting. They were assisted by a Mandarin-speaking interpreter and Mr Manu was assisted by a Tongan-speaking interpreter. Each of them answered questions under affirmation from myself and the applicants' advocate, and Mr Manu was given the opportunity to question the applicants. Both parties were given the opportunity to make oral closing submissions.

[8] As permitted by s 174E of the Act this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter, and specifies orders made as a result.

What are the issues?

[9] The following are the issues for investigation and determination:

- a. Does L2M owe the applicants arrears of wages for the shortfall between the agreed hourly rates in their employment agreements and what they were actually paid?
- b. Does L2M owe the applicants arrears of wages for hours not worked during the NZ Level 4 lockdown in March/April 2020?
- c. Does L2M owe the applicants arrears of wages for December 2020, January 2021 and April 2021?
- d. Does L2M owe the applicants public holiday pay and if so in what amount?
- e. Does L2M owe the applicants annual holiday pay and if so in what amount?
- f. Has L2M failed to keep and/or provide wage and time records in breach of s 130 of the Act?
- g. Have the applicants' penalty claims been brought within the 12-month statutory timeframes and if so, should penalties be ordered for any breaches and if so in what amount?
- h. Should part of any penalties awarded be made payable to the applicants?
- i. Do the applicants have personal grievances for unjustified constructive dismissal and if so, should remedies be awarded taking into account any issues of contribution?
- j. Should either party contribute to the costs of representation of the other party?

What is the background?

[10] L2M is a relatively small construction business which is usually engaged as a subcontractor. Mr Manu says in around 2019 he travelled to China to find workers to work in L2M's construction business. The applicants used the same recruitment agency in China, resulting in the offers of employment from L2M.

Employment agreements

[11] Jianghua signed an employment agreement with L2M on 2 August 2019, while he was still living in China. The agreement stated he was employed as a carpenter on a full-time basis working 40 hours per week, Monday to Saturday between the hours of 7am and 5.30pm. His agreed hourly rate was \$25 per hour, and he was to be paid weekly.

[12] Jinchun also signed an employment agreement with L2M on 21 June 2019, while he was still living in China. He was employed as a carpenter on the same terms, except his agreed hourly rate was \$26 per hour.

[13] The agreements were silent about variations to terms and conditions of employment.

[14] The employment agreements make clear that as employees the applicants were entitled to a paid day off on a public holiday if it was an otherwise working day for the them. The agreements outlined the applicants' annual holiday entitlements. However, the agreements stated annual holidays shall be taken the year they fall due, and incorrectly stated "any unused annual leave may only be carried forward to the following year with the written agreement of the employer".¹

Arrival and start of employment

[15] The applicants arrived in New Zealand on 1 February 2020. They did not know each other before arriving in New Zealand. Mr Manu says he was not ready for the applicants' arrival. However, he picked them up from Auckland International Airport and took them to accommodation he or L2M was renting, where other L2M workers were also living. Mr Manu paid the applicants' expenses, including rent initially. The applicants say the accommodation was in very poor condition and there were not enough bedrooms. They stayed in one room while others lived in the lounge.

[16] Mr Manu says he felt sorry for the applicants because they could not speak English. He said he was not in a position to arrange bank accounts and IRD numbers for them. He says he tried his best to look after them in the circumstances.

¹ Such a provision had no effect to the extent that it restricted or reduced the applicants' entitlements under the section 6 of the Holidays Act 2003.

[17] Jianghua started working for L2M on 19 February 2020. The applicants were initially asked to do painting work, not carpentry as per their written agreements. Mr Manu says he checked Jianghua's experience on arrival and found out he had experience as a painter but not as a carpenter. Jianghua said because he had painting experience, he was able to start working for L2M doing that, earlier than Jinchun.

[18] While he was doing the painting work from 19 February 2020 to 8 March 2020, Jianghua was paid only \$18 per hour. Mr Manu explained Jianghua was initially paid \$18 cash per hour to do painting work as that was the only work available. From 9 March 2020 onwards Jianghua was paid \$23 per hour, once he began to do carpentry work. The was still under his agreed rate of \$25.

[19] Jinchun started working for L2M on 24 February 2021. Jinchun was paid \$25 per hour, which was under his agreed rate of \$26. The Authority understands Jinchun was also paid less due to having less building experience than expected.

Deductions from wages

[20] At the investigation meeting Mr Manu described how L2M deducted 20 percent from the applicants' and other workers' pay for tax purposes. I understand Mr Manu to be explaining that the 20 percent deduction also included payment for public holiday pay and annual holiday pay. He also explained each month he would discuss this deduction with employees and they would confirm it was alright with them. Payslips provided by the applicants show deductions titled "PAYE 20%" and a corresponding amount deducted.

March 2020 Level 4 lockdown

[21] Neither of the applicants worked during the COVID-19 level 4 lockdown period between 25 March 2020 to 27 April 2020. The applicants were not paid for this period, saying at the time they did not know or ask whether they would or should be paid. Jianghua said at the time they were the only two Chinese people working for L2M and did not have any communication with others outside of L2M about their entitlements. It is clear the parties had difficulty communicating with each other, and used a translation function on a mobile phone for that purpose. Mr Manu said he was unsure if the applicants understood about their pay as communicating with them was very hard.

[22] The applicants remained living at the accommodation Mr Manu provided. The applicants were not required to pay rent during the lockdown, but after that started to each pay \$100 a fortnight in rent, which was deducted from their wages. Payslips provided by the applicants show rent began to be deducted.

Hours of work

[23] It is clear the applicants ordinarily worked six days a week from Monday to Saturday. Mr Manu says except for two or three weeks during their employment, the applicants worked “40 plus” hours a week. Although their hours fluctuated somewhat, the applicants say they worked on average 45 hours per week.

Non-payment in December 2020 and January 2021

[24] The applicants say they were not paid for 58.5 hours worked in December 2020 and 80.5 hours worked in January 2021. Jinchun says he asked L2M about their pay and was told it would be paid later. He says he was not given a reason. Mr Manu says L2M did not pay the applicants in December 2020 and January 2021 because the main contractor on site refused to pay L2M’s invoice. Mr Manu says he explained this to the applicants and asked them to keep working, and told them he would pay off the wages owing in the weeks to come.

Applicants move to Napier and Hastings for L2M work

[25] The applicants kept working and waiting for their missing wages to be paid. In January 2021 L2M obtained a renovation job in Napier and the applicants and other workers travelled there for the job. L2M also found work in Hastings and the applicants stayed in motel accommodation provided by L2M during the job. They shared a unit with other workers, five or six workers to a unit. It seems Mr Manu remained living in Auckland. Mr Manu says an L2M supervisor received the first invoiced payment instead of L2M. This resulted in the dismissals of the supervisor and other workers, but the applicants kept their jobs.

Applicants resign and are not paid for final week of work

[26] The applicants say they asked about their pay for December 2020 and January 2021 many times. The applicants ultimately gave written notice by instant message that they were resigning on 16 April 2021, after raising resignation with Mr Manu orally

prior to that. The applicants say they had no alternative but to resign in order to avoid further disadvantage of ongoing underpayment.

[27] The applicants' last day of work was Friday 23 April 2021. They returned to Auckland and on the Sunday that weekend went to Mr Manu's home and asked for their money. Mr Manu told the applicants if they came back to work L2M would pay off the wages owing. Mr Manu says the applicants kept calling him about not being paid their wages.

[28] Mr Manu says the owner of the Hastings property only paid a small amount of another invoice, having complained about being charged for two workers (the applicants) on the job. The applicants say they were not paid for 45 hours worked in their last week of employment.

Public holidays

[29] The applicants say they were not paid for 13 public holidays that were otherwise working days. L2M does not dispute this claim. Mr Manu, however, explained that he tells all L2M workers when they come to work for it that it cannot pay public holiday pay because the principals who engage L2M do not pay holiday pay. He also referenced the 20 percent deduction from wages as justification for not paying.

Annual holidays

[30] The applicants further say they did not take any annual holidays during their employment and were not paid out any annual holiday pay on termination of employment. L2M does not dispute this claim. Again, Mr Manu referenced the 20 percent deduction from wages as justification for not paying annual holiday pay.

Demand for pay and raising of personal grievances

[31] On or about 20 July 2021 the applicants' advocate sent a letter to L2M requesting it to pay money owed, to provide time and wage records, and raising personal grievances. It is clear L2M did not provide the requested time and wage records and did not give any reply to the letter. The applicants then lodged their application with the Authority on 20 and 26 August 2021.

[32] Following the investigation meeting, at the Authority's request L2M lodged pay information for the applicants. This was in the form of payslips rather than wage and

time records. Only four payslips were provided for Jinchun, and five for Jianghua, relating to four and five pay periods respectively. L2M has not provided wages and time records relating to any other pay periods.

Does L2M owe the applicants arrears of wages for the shortfall between the agreed hourly rates in their employment agreements and what they were actually paid?

[33] The applicants seek recovery of arrears of wages for the shortfall between the agreed hourly rates in the employment agreements and what they were actually paid per hour. Under the agreements, Jianghua had an entitlement to be paid \$25 per hour and Jinchun had an entitlement to be paid to \$26 per hour. Variations of terms and conditions must be agreed to by the parties to an employment relationship. There is no evidence before the Authority that L2M sought or received agreement from the applicants about varying their hourly rates at the time they commenced working in New Zealand.

[34] The Authority would have expected to see evidence of steps such as those outlined in s 63A(2) of the Act, which also applies to variations of terms and conditions. There is no evidence L2M told the applicants of their entitlement to seek independent advice on the variations or gave them a reasonable opportunity to seek advice. Given the applicants' very limited English and lack of work experience in New Zealand, there was a clear inequality of bargaining power between the parties. In that context compliance with s 63A(2) was of particular importance. Amended written employment agreements with the intended variation were not provided.

[35] Despite L2M's failings at the time of bargaining for the variations, the Authority finds the applicants ultimately accepted the variations to their hourly rate. Indeed, they proceeded to work and continue to work for L2M at lower hourly rates for over a year. During their employment, the applicants regularly received payslips for their work which identified the hourly rates they were receiving. That they were being paid a lesser hourly rate would have been readily apparent. There is no evidence they challenged their hourly rates during their employment, having had ample and reasonable time to do so. It seems they have only pursued this as a wage arrears issue after termination of employment.

[36] In the circumstances I consider three months plus a further month taking account the lockdown period was a sufficient period for the applicants to decide whether to

continue to work under the new hourly rates.² In continuing to work after that period, they consented to work at the new rates.

[37] L2M therefore breached the terms of the employment agreements for the first four months of the applicants' employment by not paying their agreed hourly rates. The applicants are entitled to be paid any resulting hourly shortfall during that period.

[38] I find Jianghua is owed \$945.00 being the shortfall in his hourly rate.

[39] I find Jinchun is owed \$540.00 being the shortfall in his hourly rate.

[40] Arrears of wages relating to the lockdown period are addressed and calculated separately below.

[41] Had the applicants sought a penalty for L2M's failure to comply with the requirements, I would likely have imposed a penalties under 63A(3) of the Act. A penalty was not sought and therefore I am unable to consider the imposition of a penalty for that non-compliance.

Does L2M owe the applicants arrears of wages for hours not worked during NZ Level 4 lockdown in March/April 2020?

[42] L2M acknowledges it did not pay any wages or a wage subsidy amount to the applicants during the Level 4 lockdown in March and April 2020. There was no evidence that L2M sought or received agreement from the applicants about not paying them during that period. L2M was again obliged to take the steps outlined in s 63A(2) of the Act. There is no evidence L2M did so.

[43] Both applicants had an entitlement to work up to 40 hours per week under their employment agreements. L2M was not entitled to unilaterally reduce their pay without their agreement, despite the difficult times.³ The applicants are entitled to be paid the agreed 40 hours per week at the hourly rates in their employment agreements for the lockdown period.

[44] I find Jianghua is owed \$4,000.00 in wages in relation to the lockdown period.

² *Patel v Adamar Holdings Ltd and Anor* [2014] NZERA Auckland 23.

³ *Raggett and Ors v Eastern Bays Hospice Trust t/a Dove Hospice* [2020] NZERA 266, at [32].

[45] I find Jinchun is owed \$4,160.00 in wages relating to the lockdown period.

Does L2M owe the applicants arrears of wages for December 2020, January 2021 and April 2021?

[46] L2M does not dispute that it failed to pay the applicants full wages for certain weeks in December 2020, January 2021 and April 2021. It does appear to dispute the amount owing however. Having heard from the parties, I accept the applicants' evidence as to the hours worked and amounts owing.⁴ The applicants are each owed pay for a total of 184 hours.

[47] I find Jianghua is owed \$4,232.00 for these periods.

[48] I find Jinchun is owed \$4,600.00 for these periods.

Does L2M owe the applicants public holiday pay and if so in what amount?

[49] L2M incorrectly believed it had no obligation to pay the applicants in respect of public holidays, and did not keep holiday and leave records in compliance with s81 of the HA 2023. Having heard from the parties I am satisfied that the applicants were not paid holiday pay for 13 public holidays which would otherwise have been working days. They were entitled to be paid their relevant daily pay or average daily pay for those days. As such, L2M has breached s 49 of the HA 2003.

[50] I find Jianghua is owed \$2,392.00 in public holiday pay.

[51] I find Jinchun is owed \$2,600.00 in public holiday pay.

Does L2M owe the applicants annual holiday pay and if so in what amount?

[52] The Authority is satisfied neither of the applicants took annual holidays in advance of entitlement, or took annual holidays once they were entitled to take them. It is common ground they were not paid out their annual holiday pay entitlements on termination of employment. As such, L2M has breached ss 24, 25 and 27 of the HA 2003.

⁴ Employment Relations Act 2000, section 132.

[53] I find L2M owes Jianghua is owed \$4,888.40 in annual holiday pay.

[54] I find L2M owes Jinchun is owed \$5,152.00 in annual holiday pay.

Has L2M failed to keep and/or provide wage and time records in breach of s 130 of the Act?

[55] The payslips provided by L2M relate to only a few weeks of employment, and do not include the number of hours worked each day in the relevant pay periods in compliance with s 130(1)(g) of the Act. There is no evidence the applicants had agreed usual hours.⁵ While Mr Manu indicated L2M's supervisor on jobs kept a record of hours worked, these have not been provided.

[56] L2M clearly failed to the provide forthwith the wages and time records it did hold (in the form of payslips) to the applicants when requested in July 2021. I am satisfied L2M has breached s 130 of the Act.

Have the applicants' penalty claims been brought within the 12-month statutory timeframes and if so, should penalties be ordered for any breaches and if so in what amount?

Whether applicants in time to recover penalties

[57] The applicants seek penalties pursuant to ss 75 of the HA 2003 and s 130(4) of the Act. I have found breaches of ss 49 and 27 of the HA 2003, and s 130 of the Act.

[58] The applicants lodged their applications with the Authority on 20 and 26 August 2021. The bulk of public holidays during the applicants' employment fell after August 2020. Each of those public holidays generated an entitlement to public holiday pay for that particular day, and a fresh cause of action arose each time a failure to pay occurred. The Authority will therefore consider penalties for those public holidays which fell within the 12 months preceding 20 and 26 August 2021.

[59] The applicants were entitled to be paid their annual holiday entitlements in the pay relating to their final period of employment. A cause of action arose after that failure occurred.

⁵ Employment Relations Act 2000, section 130(1B).

[60] The applicants requested wages and time records in July 2021. They are within time to bring an action for recovery of a penalty.

[61] The Authority is therefore satisfied each penalty claim was commenced within the statutory timeframes under s 76(5) of the HA 2003 and s 135(5) of the Act.

Whether penalties should be imposed

[62] In deciding whether to impose a penalties, and if I decide to, deciding how much that penalty should be, I need to consider the factors in s133A of the Act and the approach as set out by the Employment Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.⁶ These principles have been elaborated on and followed since.⁷

[63] The law in respect to quantification is well established given the content of s133A of the Act and requires that regard is given to the object of the Act; the nature and extent of any breach; whether it was intentional, inadvertent or negligent; the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach, including vulnerability of the employee; and previous conduct.

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

[65] One of the objects of the Act is to promote the effective enforcement of employment standards. There is a duty to keep compliant wage and time records and provide these on request, and an employee is entitled to receive their minimum holiday and leave entitlements. There is also a duty to keep holiday and leave records. The failure to fulfil these requirements represent a failure to comply with employment standards, and prejudiced the applicants' ability to calculate the wages and holiday pay owed to them following the termination of employment. This has also hampered the Authority's ability to calculate them.

⁶ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

⁷ *A Labour Inspector v Prabh Limited* [2018] NZEmpC; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

[66] Penalties for breaches render a company liable to penalties up to a maximum amount of \$20,000 per breach. The maximum penalties available for the breaches is \$120,000 (being three breaches per applicant). The Authority considers there is no basis here upon which to globalise the penalties.

[67] The aggravating factors include the fact the applicants were migrant workers who were entitled to be treated with respect in the New Zealand workforce. They were particularly vulnerable because of their limited English, the fact their work visas were sponsored by and tied to L2M as employer, and because their accommodation arrangements were tied to their employer.

[68] While employment agreements were provided to the applicants, it is clear L2M had no intention of being bound by their terms and conditions in respect of wages, public holidays, annual holidays and even the place of work identified (being Auckland).

[69] The applicants gave evidence that Mr Manu is a “good person” and had treated them well initially. At the investigation meeting, Mr Manu demonstrated very little understanding of minimum entitlements, and expressed remorse for that lack of understanding. He said he took full responsibility for everything and thought he did his best to look after the applicants – but is sorry if he got it wrong. Mr Manu also stated L2M relied on its accountant for payroll advice and thought what it did was lawful. I am satisfied the failures in respect of holiday pay and wages and time regards occurred largely due to L2M’s negligence.

[70] I consider an appropriate starting point for the penalties should be to 30% of the maximums available. This reduces the potential available penalties to \$36,000.

[71] No financial information has been provided by L2M, although Mr Manu gave evidence L2M is paying off a large debt to Inland Revenue. He said he has created a second company on the advice of his accountant to pay off L2M’s debt. Mr Manu says L2M is still trading and employs two people including himself, and its assets are two vehicles and some tools.

[72] At the investigation meeting Mr Manu advised L2M could not pay a penalty now but could pay it off later or every two weeks. No financial information documentation has been provided by Mr Manu.

[73] Shortly following the investigation meeting L2M made a promise to wage arrears relating to December 2020, January and April 2021. The Authority understands no payments have been made to date. L2M has not offered to pay any public holiday pay or annual holiday pay.

[74] 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 holiday entitlements and other statutory minima are applicable to all employment.⁸

[75] There is no evidence before the Authority regarding previous conduct by L2M.

[76] As noted, Mr Manu showed very little understanding of minimum entitlements or the importance of record keeping under the employment legislation. I consider there is a need for specific deterrence to set home to L2M that it should learn and comply with these basic legislative requirements if it wishes to remain an employer. In particular, it needs to understand it cannot contract out holiday and leave entitlements. The same message should be sent to other like-minded employers (and those advising them such as accountants) who might think such requirements are negotiable.

[77] Standing back, looking at the provisional figure and comparing it with other cases and the total arrears relating to the breaches, I conclude that a fair penalty is \$15,000.

[78] L2M has not provided any financial documentation demonstrating its financial position requires payment of the penalty by instalments.

Should part of any penalties awarded be made payable to the applicants?

[79] The applicants were directly affected by the breaches of the HA 2003. I find \$3,000 of the penalty should be made payable to each applicant.

Do the applicants have personal grievances for unjustified constructive dismissal and if so, should remedies be awarded taking into account any issues of contribution?

[80] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop*

⁸ Above n 6, at [87].

Employees Union v Woolworths (NZ) Ltd held that constructive dismissal includes, but is not limited to, cases where:⁹

- a. An employer gives an employee a choice of resigning or being dismissed.
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[81] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow or, in this case the applicants would leave their employment.¹⁰

[82] Failure to pay wages in full when due and owing is a serious breach of the duty owed to the applicants as L2M's employees.¹¹ L2M breached this duty owed because it did not pay the applicant for hours worked when the payment for that work fell due. I am satisfied L2M breached this duty owed to the applicants on a number of occasions which caused them to resign. I find in all the circumstances it was reasonably foreseeable the applicants would leave their employment. This is because the applicants put L2M on notice that the missed pays in December 2020, January and April 2021 were a serious issue. In response, all that L2M offered was to pay the wages owing over time if the applicants came back to work. The applicants have established they were unjustifiably constructively dismissed.

Reimbursement of lost remuneration

[83] The applicants were out of work for around 1.5 weeks before obtaining employment with a new employer. Jianghua seeks an award of lost wages of \$1,500 and Jinchun seeks \$1,560 for the period out of work. The applicants mitigated their lost income by finding alternative work. They are entitled to the amounts sought.

⁹ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

¹⁰ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

¹¹ Wages Protection Act 1983, section 4.

Compensation for hurt and humiliation

[84] The Authority is satisfied the applicants experienced harm under s 123(1)(c)(i) of the Act. Both applicants reported suffering psychologically. Jinchun spoke about having trusted Mr Manu as the boss and suffering the consequences on his own for that. The applicants had to find new employment and seek variations to their work visas which I accept was stressful. Having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation and the particular circumstances of this case, I consider awards of \$10,000 each under section 123(1)(c)(i) is appropriate.

[85] I am satisfied no deduction from the remedies awarded should be made under s 124 of the Act.

Summary of orders

[86] L2M Construction Limited is ordered to pay the following amounts within 21 days of the date of this determination to Jianghua Chen:

- a. \$945.00 being the shortfall in his hourly rate;
- b. \$4,000.00 for to the lockdown period;
- c. \$4,232.00 for December 2020, January and April 2021;
- d. \$2,392.00 in public holiday pay;
- e. \$4,888.40 in annual holiday pay;
- f. \$1,500 gross as reimbursement of lost remuneration; and
- g. \$10,000 as compensation; and
- h. \$3,000 as a penalty.

[87] L2M Construction Limited is ordered to pay the following amounts within 21 days of the date of this determination to Jinchun Chen:

- a. \$540.00 being the shortfall in his hourly rate;
- b. \$4,160.00 for to the lockdown period;
- c. \$4,600.00 for December 2020, January and April 2021;
- d. \$2,600.00 in public holiday pay;
- e. \$5,152.00 in annual holiday pay;
- f. \$1,560 gross as reimbursement of lost remuneration; and

- g. \$10,000 as compensation; and
- h. \$3,000 as a penalty.

[88] L2M Construction Limited is also ordered to pay a \$9,000 penalty to the Crown Account within 21 days of the date of this determination.

Should either party contribute to the costs of representation of the other party?

[89] Costs are reserved.¹² The parties are encouraged to resolve any issue of costs between themselves.

[90] If the parties are unable to resolve costs between them and an Authority determination on costs is needed the applicants may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum L2M 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. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹³

Sarah Blick
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

¹³ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.