

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 265  
3168684

BETWEEN	ANSON (ZHOUGER) HUANG Applicant
AND	OPTIMAL GPR & CCTV DRAIN INSPECTION LIMITED First Respondent
AND	DONG CONSTRUCTION LIMITED Second Respondent
AND	DONG (TONY) WANG Third Respondent
AND	XIAOXUE (MIKKY) ZHANG Fourth Respondent

Member of Authority: Rachel Larmer

Representatives: May Moncur advocate for the Applicant  
Ee Lau for First Respondent  
Mr Wang for Second Respondent and in person as Third  
Respondent  
Ms Zhang in person

Investigation Meeting: 18 April 2023 at Auckland

Submissions Received: 20 April 2023 from the Applicant

Date of Determination: 25 May 2023

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

### *The parties*

[1] The Applicant Mr Anson (Zhonger) Huang is a Chinese national. He is a permanent resident and has been living in New Zealand for 20 years, so he does not require a work permit to work here. He is a Mandarin speaker, so English is his second language.

[2] The First Respondent, Optimal GPR & CCTV Drain Inspection Limited (“*Optimal*”) is a company that undertakes drain inspections. Mr Dong (Tony) Wang and Ms Xiaoxue (Mikky) Zhang are both directors of Optimal. Mr Wang is also a 60 percent shareholder in Optimal.

[3] The Fourth Respondent, Ms Zhang is Optimal’s Operations Manager. She deals with day to day staffing matters, such as hiring employees, allocating them their days and hours of work, sending them to job sites, obtaining records from the employees of the hours they had worked, ensuring employees are paid, and the like. She described Mr Wang to Mr Huang as “*the boss*”.

[4] The Third Respondent, Mr Wang is the sole director and 50 percent shareholder of the Second Respondent Dong Construction Limited (“*Dong Construction*”), which among other things did traffic control work. Dong Construction was a subcontractor to Optimal.

[5] Mr Huang worked for Optimal doing drain inspections. Mr Huang also had experience in traffic management and control. When Mr Wang found out about that, he would approach Mr Huang while he was doing work for Optimal to do traffic management work for Dong Construction, instead of drain inspections for Optimal.

[6] When Mr Huang saw he had been paid wages by both Optimal and Dong Construction he asked Ms Zhang about that. She told him that Mr Wang owned both companies, so it was his decision about which company paid the wages to Mr Huang.

### *Mr Huang’s claims*

[7] Mr Huang claimed to have worked for both Optimal and Dong Construction Limited from 14 July 2021 to 4 November 2021.

[8] Mr Huang claimed he is owed wage arrears for hours he worked but was not paid for. Mr Huang said that he worked from 14 July 2021 until he was unjustifiably dismissed on 5 November 2021, when he was removed from Optimal’s WeChat workgroup.

[9] Mr Wang apparently made the decision to dismiss Mr Huang, without notice or any prior consultation with him. Mr Huang's dismissal was also verbally communicated to him by Ms Zhang in a phone call on 5 November 2021.

[10] Mr Huang was not provided with a written employment agreement, in breach of sections 63, 64 and 65 of the Employment Relations Act 2000 (*"the Act"*). Mr Huang sought that a penalty be imposed for that breach.

[11] Mr Huang claimed that the failure to pay him properly unjustifiably disadvantaged him in his employment. Mr Huang also claimed that his dismissed, without notice, on 5 November 2021 was unjustified.

[12] Mr Huang said the failure to pay him at least the minimum wage of \$20 per hour while he was employed and the failure to provide him with a written employment agreement were breaches of employment standards, as defined in s 5 of the Act.

[13] Mr Huang claimed that Mr Wang and Ms Zhang were 'persons involved in breaches of employment standards' under s 142W of the Act, because they either procured the breach or were directly and knowingly concerned in, or a party to, the breaches of employment standards that occurred.

[14] Mr Huang asked the Authority to grant him leave under s 142Y(2) of the Act to recover from Mr Wang and/or Ms Zhang personally any wage arrears the Authority ordered his employer to pay him, but which it was unable to pay.

[15] Mr Huang also sought that a penalty be imposed on:

- (a) His employer under s 133(1)(b) of the Act for failing to provide him with a written employment agreement; and
- (b) Mr Wang and Ms Zhang under s 134(2) of the Act for aiding and abetting breaches of his employment agreement, namely the failure to pay him his wages.

*Mr Huang's identity disputed*

[16] The Respondents initially denied knowing who Mr Huang was. Their denial of knowing Mr Huang was not credible. He had provided Ms Zhang and Optimal with:

- (a) His curriculum vitae (“CV”) that had his name, contact details and photo on it on 11 July 2021;
- (b) His bank account details on 16 July 2021;
- (c) His wife’s name, bank account details and IRD number on 20 August 2021; and
- (d) Personal grievance letter on 16 November 2021.

[17] Mr Huang also had personal face to face dealings with Mr Wang. Mr Wang also communicated with Mr Huang via the Optimal WeChat group. Dong Construction also had Mr Huang’s wife’s name, bank account number and IRD number and it paid Mr Huang’s wages to his wife.

[18] Ms Moncur sent the respondents a copy of Mr Huang’s New Zealand driver licence and advised them of his IRD number in an email sent on 9 June 2022, after they disputed knowing or employing Mr Huang. He also provided the Authority with a copy of his Chinese passport, which was copied to the respondents.

### **Employment related evidence**

[19] All of the respondents denied employing Mr Huang. That evidence was not credible because:

- (a) Optimal had made three payments into his bank account;
- (b) Optimal also paid him some of his wages in cash;
- (c) Dong Construction paid Mr Huang’s wife (who never worked for it) his wages into her bank account;
- (d) Dong Construction deducted PAYE from Mr Huang’s wages under Mr Huang’s wife’s name and remitted the PAYE on her wages to IRD under her name;
- (e) Optimal’s response, via its then advocate Mr John Wood on 16 November 2021, to Mr Huang’s personal grievance that same day contained numerous references that confirmed the existence of an employment relationship, including that;
  - (i) The personal grievance response was sent by Mr Wood on behalf of “*the employer*”, who was identified as “*Optimal GPR & CCTV*”. No other company or employer was referred to;

- (ii) The email responding to the personal grievance said “*The reason for his dismissal*”, “*At the time of his employment with the company*”, “*When he was employed Mr Huang ...*”, which are all indicative of an employment relationship;
- (iii) Optimal also made an ‘on the record’ offer to settle Mr Huang’s personal grievance, which he did not accept.
- (f) There were numerous WeChat messages that indicated there was an employment relationship, as set out below.

### **WeChat messages**

#### *Messages with Ms Zhang*

[20] Optimal’s claim that it never employed Mr Huang was contradicted by numerous WeChat messages between Mr Huang and Ms Zhang. Examples include (but are not limited to):

- (a) Ms Zhang asked Mr Huang “*Can you work on Wednesday?*”, to which he affirmed he could. Ms Zhang gave Mr Huang a start time and said that the work van would pick him up.
- (b) She also asked him to “*Give me a receipt for your lunch later*”.
- (c) There is also a WeChat message from Ms Zhang to Mr Huang telling him to “*Take the company vehicle*”.
- (d) Ms Zhang says to Mr Huang “*You are sure that you will join the company in the future, are you? In that case I will not hire anyone else.*”

[21] Mr Huang and Ms Zhang communicated over WeChat about work related matters, including the terms of his employment. She also issued him with work related instructions (allocation or work, start time and location of work) and he notified her of the days and hours he had worked, which she used to pay him. He gave her his banking details and she confirmed she had paid him.

[22] In a transcription of a voice message that Mr Huang left for Ms Zhang, that he sent her via WeChat on 15 July 2021, he asked her questions such as:

If I accept this job, do you provide me with a contract? How about work hours? According to you the start time is 8am in the morning and finishes at 6pm which

is a full day. Or I need to punch a timecard at every job site. I want to know more. Thank you. (sic.)

[23] On 20 August 2021, Mr Huang sent Ms Zhang his wife's information, so she could process his wages using his wife's name, bank account and IRD number, which Ms Zhang acknowledged receipt of. In other WeChat exchanges that occurred on 30 August 2021, Mr Huang confirmed when he had worked and Ms Zhang confirmed that she had processed his wages, as requested into his wife's bank account.

[24] In other WeChat message Ms Zhang recorded that Mr Huang's hourly rate was \$23 and that he would be paid fortnightly. She also sent him payslips.

#### *Messages with Mr Wang*

[25] The Authority was also given copies of WeChat messages between Mr Wang, on behalf of Dong Construction, and Mr Huang. These included the following exchanges that occurred on 4 November 2021:

- (a) Mr Wang on behalf of Dong Construction sent a message to Mr Huang and another employee that said *"This Saturday is to carry out traffic control work. No leave is permitted. From this Sunday leave is flexible for the following weeks."*
- (b) Mr Huang replied to that by saying *"I don't need to apply for leave as Saturdays are not my workdays."*
- (c) Mr Wang replied *"Have you noticed that the company is getting fewer jobs? The business needs to survive so (staff) need to work (during weekends)."*

[26] Mr Huang said he thought the exchange he had with Mr Wang on 4 November, where he said he did not work Saturdays, had caused Mr Wang to suddenly dismiss him, because he was removed from the WeChat workgroup that same day. Removal meant Mr Huang could not communicate with anyone at work or access any information about work related matters, such as where he was to go for work each day.

#### **Wages paid**

[27] Mr Huang provided the Authority with evidence that he had been paid \$250 on 30 August 2021 from Optimal into his bank account. He also provided a receipt for other payments he received from Optimal of \$179.50 on 16 July 2021 and of \$80.50 on 26 July 2021.

[28] Mr Huang provided proof of a direct credit into his wife's bank account of \$2,370.44 from Dong Construction on 18 November 2021, of \$1,289.62 on 1 November 2021 and on 16 November 2021 of \$1,107.78.

### **Background**

[29] Mr Huang said that in early July 2021 he was told by a friend that Optimal was looking for employees, and he was given Ms Zhang's contact details. Mr Huang spoke to Ms Zhang by phone a few times and communicated with her via WeChat. She asked him to send his CV, which he did. She then asked him to start work at 8.00 am on 14 July 2021. This offer and acceptance of employment occurred on 12 July 2021 via WeChat message.

[30] Mr Huang said he worked between 8.00 am and 5.30 pm on 14 July 2021, and he was given training on how to do CCTV inspections. He said he worked the same hours the next two days (15 and 16 July 2021) and continued to receive training from two other employees.

[31] In a WeChat message from Ms Zhang at 12.16 pm on 15 July 2021, she told Mr Huang that if he committed to the job by joining Optimal, then she would not look for other employees.

[32] On 16 July 2021 at 10.03 am, Ms Zhang asked Mr Huang via WeChat for his bank account details "*for processing wages*", which he provided. He was then paid by Optimal for some, but not all of, the hours he had worked.

### **IRD and PAYE issues**

[33] Mr Huang said that when he began his employment with Optimal, he was in the process of winding up a company that he owned in the education sector. He said that because he was closing that business down, he asked Optimal to pay his wages into a joint bank account jointly held with his wife.

[34] The respondents did not have any issue with that, which is why Dong Construction paid Mr Huang's wages into his wife's bank account.

[35] However, Mr Huang also asked Ms Zhang to deduct PAYE from his (Mr Huang's) wages under his wife's name, which Ms Zhang agreed to do.

[36] That was highly problematic from a legal perspective, as it involved everyone providing false information to the Inland Revenue Department ("*the IRD*").

[37] Mr Huang provided his wife's bank account number and IRD number to Ms Zhang on 20 August 2021, and Ms Zhang confirmed that she would make his wage payments to his wife, as if she was the employee.

[38] However, Mr Huang's wife was never employed by any of the respondents in this matter. There was no dispute about that. Nor was there ever any confusion or misunderstanding that Mr Huang's wife, instead of him, was the relevant employee.

[39] Mr Huang's wages for the work he did between 22 September and 4 November 2021 were paid into his wife's bank account and the relevant PAYE tax was deducted under her name and remitted to IRD under her name and IRD number.

[40] Mr Huang provided information to the Authority that showed that Dong Construction said it had paid his wife \$2,852 on 31 October 2021, \$1,319.28 on 30 November 2021, \$1,506.50 on 30 November 2021. She likely received two payments 30 November 2021 because one was Mr Huang's normal pay and the other was his final pay.

[41] The Authority noted these figures did not align with the amounts paid into Mr Huang's wife's bank account. There was no explanation provided for that discrepancy, which suggests Dong Construction's reporting to IRD may be inaccurate.

### **Circumstances of Mr Huang's dismissal**

[42] Throughout his employment Mr Huang communicated with Ms Zhang and Mr Wang, and other employees, via the Optimal WeChat workgroup.

[43] All staff members had to be a member of the Optimal WeChat group because all work related communications were conducted via WeChat messages and calls. Mr Huang said that Ms Zhang and Mr Wang virtually managed and operated the business via WeChat as far as communication was concerned.

[44] The Authority asked the respondents to provide copies of all of the WeChat communications while Mr Huang was employed, but despite multiple requests and directions for that to occur, it did not. The Authority has therefore relied on the WeChat messages Mr Huang has provided.

[45] Mr Huang was confused when he found out on 4 November 2021 that he had been removed from the company's WeChat workgroup, because it meant he was unable to

communicate with management or receive work instructions. He was also unable to communicate with fellow employees and therefore was unable to work, so he called Ms Zhang to find out what was going on.

[46] At around 10.00 am on 5 November 2021, Mr Huang said he managed to get hold of Ms Zhang by telephone and they had a five minute conversation. He reported that she told him his “*employment had been terminated*”.

[47] Mr Huang said he was shocked and asked why, but was not given a clear answer. Ms Zhang apparently told him that she was “*not responsible for the decision as it was made by Tony Wang.*”

[48] Ms Zhang said that Mr Huang’s final pay would be processed on 15 November 2021. He said he asked her several times why he had been dismissed, but she was reluctant to provide him with any explanation.

[49] Optimal’s response to Mr Huang’s personal grievance claim was sent to Mr Huang’s advocate on 23 November 2021. It said Mr Huang was dismissed when it became apparent he had given his wife’s number and “*his wife’s IRD number*”, once the seriousness of that action had been realised.

[50] Mr Wood claimed that not only was Mr Huang seemingly trying to defraud Inland Revenue, but “*Optimal*” was placed in the invidious position of supplying false information to IRD as well. The Authority noted that Optimal had agreed to that improper arrangement occurring.

### **Alleged conflict of interest**

[51] The respondents repeatedly raised concern that Ms Moncur had a conflict of interest, because Ms Zhang on behalf of Optimal had sent Ms Moncur a draft employment agreement and health and safety policy for her to provide advice on before Ms Moncur advised it that she had a conflict of interest, because she was representing Mr Huang.

[52] The Authority investigated this alleged conflict of interest, which included requiring Ms Moncur to provide an affidavit setting out the circumstances of her contact with Optimal. Emails between Mr Zhang and Ms Moncur were also reviewed.

[53] These allegations about the conflict of interest were not upheld. Mr Lau also wrote to the Authority on 1 February 2023 asking for Ms Moncur to withdraw from representing Mr Huang. That request was declined.

[54] The Authority was satisfied that there was no conflict of interest, and this finding was repeatedly advised to the respondents, who refused to accept that.

### **Representation of the respondents**

[55] On 19 June 2022 a Statement in Reply was lodged by Mr Wang on behalf of Optimal.

[56] Mr Wang, Ms Zhang and their support person Mr Ee Lao attended the first case management conference (“*CMC*”) held on 22 July 2022.

[57] The respondents advised the Authority at the CMC that Mr Lao was authorised to accept service of any documents and to communicate with the Authority on behalf of the respondent, which at that time was just Optimal.

[58] The Authority was also told that Mr Lao was authorised to represent Mr Wang and Ms Zhang personally and Dong Construction. Although the last three were not at that point parties to the proceedings, Ms Moncur had indicated that she would be joining them as named respondents.

[59] On 2 May 2022 Ms Zhang told the Authority Officer by phone that the respondents had instructed someone new. She was asked to email the Authority to confirm that, but that did not occur.

[60] Mr Lau was asked to confirm his representation of all of the respondents in this matter, in writing, after the CMC, and he did so on 4 August 2022.

[61] A second case management conference was held on 2 September 2022. It was attended by Mr Lau who was representing all four respondents, who by that time had been joined to the proceeding, along with Ms Zhang, Mr Wang, and Ms Moncur.

[62] On 9 September 2022 a Statement in Reply that named Optimal as the only party was lodged by Ms Zhang, with a request that all documents be referred to her. On 19 September 2022 an Amended Statement in Reply was lodged. The person who lodged it appeared to be

either Mr Lau or Ms Zhang, but there was no name on it and the signature was illegible. This document named all four respondents.

[63] Because the Authority could not effectively communicate with Mr Lau (he was not responding to calls or was hanging up when he answered a call from the Authority) and was not returning emails or voicemails, the Authority Officer contacted Mr Wang directly on 14 February 2023. Mr Wang told the Authority Officer that Mr Lau was still representing him, so he would ask Mr Lau to communicate with the Authority on the respondents' behalf.

[64] The Authority and Ms Moncur repeatedly asked for confirmation as to who was representing the respondents. Mr Lau, who has English as his second language, replied on 14 February 2023 at 4.31 pm "*I guide respondent to file the reply.*" (sic.)

[65] On 27 February 2023, Mr Lau emailed the Authority to say "*I am only representing Optimum* (sic)". He said the Authority had to ask Mr Wang, Dong Construction and Ms Zhang to file their own evidence.

[66] From 2 March 2023, the Authority communicated directly with each respondent, with Mr Lau representing Optimal. Mr Wang was communicated with as the director of Dong Construction, in the absence of any other nominated representative. Lack of clarity over changing representation made this matter more challenging than would otherwise have been.

### **Jurisdiction issues**

#### *Personal grievance letter*

[67] Mr Huang's personal grievance letter, which was sent by Ms Moncur on 16 November 2021, only raised an unjustified dismissal personal grievance claim.

[68] No other claims were made at that time, although it noted that "*penalty (reserved)*" which was insufficient to have commenced a penalty action under s 135(5) of the Act.

#### *Unjustified disadvantage claim*

[69] The unjustified disadvantage personal grievance claim was raised for the first time in Mr Huang's submissions which were filed with the Authority on 20 April 2023.

[70] The disadvantage grievance was therefore out of time, because it had not been raised within the 90 day time limit required by s 114(1) of the Act. The Authority therefore did not have jurisdiction over it.

*Statement of Problem*

[71] The first Statement of Problem lodged on 29 March 2022 named Optimal as the only respondent.

[72] The only claim that was made in that Statement of Problem was an unjustified dismissal personal grievance claim. There was no reference made to penalties.

*Amended Statement of Problem*

[73] The Amended Statement of Problem lodged on 25 July 2022 named the four respondents.

[74] The claims identified in the Amended Statement of Problem were an unjustified dismissal grievance, wage arrears during the training period and a penalty for failure to provide Mr Huang with an employment agreement.

*Penalty claims are out of time*

[75] The penalty claim was therefore raised outside of the 12 month period required by s 135(5) of the Act, because the cause of action would have become known to Mr Huang on the day that he started work (i.e. on 14 July 2021), when he said he was not given an employment agreement.

[76] Therefore the Authority does not have jurisdiction to impose a penalty for the failure to provide Mr Huang with an employment agreement.

*New claims made in submissions*

[77] Mr Huang's submissions lodged on 20 April 2022 raised, for the first time, claims that Mr Wang and Ms Zhang had both aided and abetted breaches by Mr Huang's employer, namely the failure to comply with minimum wage requirements and the failure to provide him with a written employment agreement. Penalties were sought against them under s 134(2) of the Act.

[78] These penalty claims were not before the Authority, so they have not been served on Mr Wang or Ms Zhang, because they were not raised in a Statement of Problem. The aiding and abetting claim was therefore not before the Authority, so it could not be determined.

[79] The penalty claim under s 134(2) of the Act against Mr Wang and Ms Zhang personally was also outside of the 12 month time limit required by s 135(5) of the Act, because the breach would have occurred on 14 July 2021, when Mr Huang's started work for Optimal.

### **The Authority's investigation**

#### *Investigation meeting*

[80] An in-person investigation meeting was set down for 18 and 19 April 2023 in Auckland. Mr Huang attended the investigation meeting on 18 April 2023. He gave his evidence with the assistance of a Mandarin interpreter, who was booked for the two day investigation meeting.

#### *Right to silence warning*

[81] The Authority was concerned from the evidence it was given that the PAYE arrangements involving Mr Huang's wife could expose him to a potential risk of criminal liability.

[82] Mr Huang was therefore advised by the Authority that he had the right to silence, meaning he did not need to answer any questions that could potentially incriminate himself. Despite that, he elected to do so anyway.

[83] Mr Huang said he genuinely believed he could not run his own company and also be an employee who had PAYE deducted from his wages. That view is obviously wrong.

#### *IRD issues*

[84] The taxation related issues are a matter for IRD. The Authority simply notes that the evidence in this matter indicated IRD irregularities had clearly occurred.

#### *Service of the Notice of IM*

[85] The notice of investigation meeting that was emailed to Mr Lau, as the respondents' nominated representative, on 15 September 2022 advised an in-person investigation meeting had been set down for 18 and 19 October 2023 in Auckland, with a Mandarin interpreter being provided by the Authority.

*Non-engagement of respondents*

[86] None of the respondents attended the investigation meeting.

[87] When the Authority Officer contacted each respondent to find out why they were not at the investigation meeting:

- (a) Mr Lau said that he was in the High Court and could not talk. He also said that he was sick, so would not be attending the Authority's investigation meeting. When asked if he would be attending the Authority following day (19 April) and he said he was busy, so he would not be;
- (b) Ms Zhang said that she would not attend the investigation meeting unless Mr Lau would, and as he was not available she would not be attending; and
- (c) Mr Wang said that he did know about the investigation meeting. That was not accepted because the notice of investigation meeting was emailed to his representative (Mr Lau) on 15 September 2022.

*Investigation process*

[88] The Authority conducted the investigation meeting, in accordance with clause 12 of schedule 2 of the Employment Relations Act 2000, in the absence of the respondents. The Authority used the information that had been provided by the respondents as a basis for questioning Mr Huang about his claims.

[89] Mr Huang gave evidence under affirmation, so where there were conflicts in the evidence, his account was the best evidence available. Because none of the respondents attended the investigation meeting, Mr Huang's evidence was uncontested.

[90] The failure of any of the respondents to appear meant the investigation meeting only took half a day (18 October). Mr Huang gave his evidence in a mix of English and Mandarin, so the Authority was assisted by the Mandarin interpreter.

[91] Mr Huang filed written submissions after the investigation meeting. The respondents were given an opportunity to file written submissions, but none of them did so.

*Lack of constructive engagement by the respondents*

[92] The way in which all of the respondents have conducted themselves regarding the Authority's investigation is highly unsatisfactory. They failed to provide relevant information, breached statutory deadlines, failed to comply with multiple directions and with the timetable that had been set with their agreement. They did not follow instructions and were often non-responsive to the Authority's attempts to communicate with them.

[93] The Authority records its concern that none of the respondents participated in its investigation in a manner that was designed to resolve the issues involved. Their conduct was sufficiently deficient that it could give rise to a request from the Employment Court for a good faith report under s 181 of the Act, if any of the respondents challenge this determination.

**Lack of employment records***Wage and time records*

[94] None of the respondents provided copies of Mr Huang's wage and time records, which an employer is legally required to keep under s 130 of the Act. That failure prejudiced Mr Huang's ability to bring an accurate wage arrears claim under s 131 of the Act.

[95] Accordingly, pursuant to s 132(2) of the Act, the Authority may accept as proven, all claims Mr Huang made about the wages he was actually paid and the hours, days and times he worked because none of the respondents had proved that his evidence or claims about that, were incorrect.

*Holiday and leave records*

[96] None of the respondents provided a copy of Mr Huang's holiday and leave records, which an employer is required to keep under s 81 of the Holidays Act 2003 ("*the HA03*").

[97] The failure to provide Mr Huang's holiday and leave records meant that the Authority, after hearing from Mr Huang, was satisfied that failure had prevented him from bringing an accurate wage arrears claim.

[98] Accordingly, pursuant to s 83(4) of the Act, the Authority has accepted as proved the evidence Mr Huang gave about his holiday pay that was actually paid to him and about his annual holidays, public holidays, sick leave or other leave actually taken by him while employed.

## Issues

[99] The following issues are to be determined:

- (a) Credibility findings
- (b) Findings on the material facts
- (c) Were any of the parties in an employment relationship?
- (d) What were the terms of Mr Huang's employment?
- (e) Is Mr Huang owed wage arrears?
- (f) Should Mr Huang be awarded interest on any wage arrears he is owed?
- (g) Was Mr Huang's dismissal justified?
- (h) If not, what remedies should he be awarded?
- (i) Should remedies be reduced under s 124 of the Act, on the grounds of contribution?
- (j) Have there been breaches of employment standards?
- (k) Are Mr Wang and/or Ms Zhang persons who were involved in the breaches of the employment standards that occurred?
- (l) If so, should the Authority grant leave to Mr Huang to pursue either Mr Wang and/or Ms Zhang for any wage arrears that his employer is unable to pay?
- (m) What costs and disbursements should be awarded?

### Credibility findings

[100] Mr Huang gave evidence under affirmation. His evidence was not challenged by the respondents, because they did not appear at the Authority's investigation meeting. That meant that Mr Huang's evidence was uncontested, and could therefore be accepted by the Authority.

[101] The Authority also relied on s 132(2) of the Act and s 83(4) of the HA03 to accept the evidence that Mr Huang has given regarding his days and hours of work, the amounts he was paid and any leave he took while employed. None of that information was challenged by the respondents.

**Findings on the material facts**

[102] The Authority makes the following findings in regard to material disputed facts:

- (a) Optimal employed Mr Huang from 14 July until 5 November 2021;
- (b) Mr Huang was employed to work 40 hours a week at the rate of \$23 per hour over that period, with the exception of 14 and 15 July 2021;
- (c) For work Mr Huang did on 14 and 15 July 2021, he was paid the minimum wage of \$20 per hour for the 17 hours he worked over that period, while he was being assessed for permanent employment;
- (d) Mr Wang made the decision to dismiss Mr Huang on 4 November 2021, by removing him from the Optimal WeChat workgroups. His decision was likely motivated by Mr Huang's WeChat message that he did not work Saturdays;
- (e) The dismissal was verbally communicated to Mr Huang by Ms Zhang in a five minute phone call they had on 5 November 2021;
- (f) No PAYE was paid by Optimal in Mr Huang's name to IRD or under his IRD number for the wages he was paid while employed;
- (g) Mr Huang, Ms Zhang and Mr Wang all agreed and arranged for Optimal to pay the PAYE that had to be deducted from Mr Huang's wages to IRD under his wife's name and IRD number;
- (h) Mr Huang was only paid \$50 per day for the two week training period he was required to undergo, in breach of the Minimum Wage Act 1983 ("*the MWA*"), which required him to be paid not less than the applicable minimum wage of \$20 per hour at that time;
- (i) Optimal breached s 63, 64 and 65 of the Act by failing to provide Mr Huang with a written employment agreement;
- (j) Mr Huang was not paid for the five week Covid-19 Level 4 lockdown, from 17 August 2021 to 21 September 2021 when he should have been paid his normal wages over that period, in the absence of the parties mutually agreeing on some other arrangement;

- (k) Optimal engaged in breaches of employment standards by failing to provide Mr Huang with a written employment agreement and by failing to pay him at least the minimum wage for all of the hours he worked;
- (l) Mr Huang did not receive a wage subsidy over the Level 4 lockdown period.

**Were any of the parties in an employment relationship?**

[103] Although Mr Huang in his Amended Statement of Problem claimed that he had been employed by Optimal and Dong Construction, the Authority finds that the employment relationship was only with Optimal.

[104] Mr Huang's belief that he had been employed by Dong Construction was based solely on the fact that it had paid him his wages (into his wife's bank account) on three occasions (18 October and 1 and 16 November 2021) and because Mr Wang had occasionally asked him to do traffic management/control work.

[105] The Authority finds that Optimal still employed Mr Huang when he did that work at Mr Wang's request, because Dong Construction subcontracted to Optimal.

[106] The traffic management/control work in itself was insufficient to have established an employment relationship. The normal contract formation elements of offer and acceptance, intention to create legal relations, certainty of terms and consideration were lacking. An employment relationship between Mr Huang and Dong Construction was therefore not established on the evidence.

[107] The Authority finds that only Optimal employed Mr Wang, he was not employed by Dong Construction.

[108] That was evident from the WeChat messages Ms Zhang had exchanged with Mr Huang, from the payments of wages that were made to Mr Huang and from the fact that PAYE was deducted from these wages' payments.

[109] Although the Authority noted that PAYE was deducted and remitted to the IRD under Mr Huang's wife's name, and not his own name or IRD number, those tax arrangements still indicated an employment relationship had existed.

*The doctrine of the undisclosed principle*

[110] The Authority considered whether Ms Zhang may be held legally responsible as Mr Huang's employer in accordance with the doctrine of the undisclosed principle, because she had communicated with him about work related matters. However, the evidence established that Mr Huang knew that he had been engaged by a company and that the company was Optimal. The doctrine therefore did not apply.

[111] Although "*Optimal*" is a trading name that appears to be used for a number of entities that Mr Wang and/or Ms Zhang are associated with, when he gave evidence during the investigation meeting Mr Huang said he was aware that the particular company he was working for was the First Respondent, "*Optimal CCTV and GPR Drain Inspection Limited*", and not another related company which traded under the "*Optimal*" name.

*Response to personal grievance*

[112] The Authority's view that Optimal had employed Mr Huang was supported by the response to his personal grievance letter that was sent by Optimal's then advocate, Mr Wood. The letter was sent on behalf of Optimal and it referred to "*the employer*", "*the reason for [Mr Huang's] dismissal*" and "*When he was employed Mr Huang ...*", which examples of employment related language being used.

[113] Had the parties not been in an employment relationship, then the Authority would have expected Optimal to have stated that from the outset and it did not do so. Optimal's response to Mr Huang's personal grievance indicated that, at that time, it had accepted the existence of an employment relationship.

*The evidence denying the employment relationship was unsatisfactory*

[114] The denial of an employment relationship was raised verbally during the first case management conference held on 22 July 2022.

[115] The Statement in Reply that was lodged on 19 June 2022, did not say that Optimal had not employed Mr Huang. Nor did the subsequent Statement in Reply that was lodged on 9 September 2022. It was not until the Amended Statement in Reply was lodged on 19 September 2022 that Optimal denied being in an employment relationship with Mr Huang.

[116] The so-called ‘witness statements’ that were filed by the respondents (which were all materially identical, bar one minor change regarding Mr Wang’s name, did not deny that Mr Huang had been employed by Optimal.

[117] Because none of the respondents attended the investigation meeting, the Authority could not ask them questions about the employment relationship that Mr Huang said existed. Based on the available evidence, the Authority was satisfied that Mr Huang was employed by Optimal, meaning those parties were in an employment relationship as defined by s 6 of the Act.

### **What were the terms of Mr Huang’s employment?**

[118] From 16 July 2021 Optimal agreed to employ Mr Huang to work 40 hours per week at the rate of \$23 per hour, to be paid fortnightly. Prior to that he had worked, as required, for the minimum wage of \$20 per hour.

[119] Mr Huang told Optimal he was not available to work Saturdays, but despite that he was offered, and did undertake, some Saturday work. However, he did not consider that Saturday work was part of his terms and conditions of employment.

### **Is Mr Huang owed wage arrears?**

#### *Effect of s 132(2) of the Act*

[120] Mr Huang’s evidence about the days and hours he worked and the amount he has been paid has been accepted, in accordance with s 132(2) of the Act, because the respondents did not prove his evidence was incorrect.

#### *What should Mr Huang have been paid?*

##### (i) 14 and 15 July 2021

[121] The minimum wage at the material time was \$20 per hour. Mr Huang was entitled to be paid the minimum wage for the hours he worked on 14 and 15 July 2021, before he became a permanent employee.

[122] He said he worked 8 and a half hours on both of those two days, so he was entitled to be paid \$340 gross.

(ii) 16 July to 5 November 2021

[123] Once Mr Huang became a permanent employee he was entitled to be paid at least \$920 gross per week, based on working 40 hours per week paid at the rate of \$23 per hour.

[124] There were 16 weeks between 16 July 2021 and 5 November 2021. He was therefore entitled to be paid \$14,720 gross.

(iii) Saturday work

[125] Mr Huang also said he worked four hours (from 8am to 12pm) Saturday 24 July 2021, so he was entitled to be paid \$80 gross for that. Although Mr Huang said he did other Saturday work, the evidence about that was not sufficiently clear to make any findings about at this time. His Saturday pay is therefore limited to one day only.

(iv) Training rate

[126] The parties did not agree on a 'training' rate of pay. Even if they had, it could not be less than the minimum wage of \$20 per hour. He should not have been paid only \$50 a day for so called 'training'.

(v) Annual holiday pay

[127] Mr Huang did not take any paid annual holiday while employed. Because he had worked for less than 12 months, he was entitled to be paid 8 percent of his total gross earnings on termination of his employment.

(vi) Unworked public holidays

[128] Because Mr Huang normally worked on Mondays, the Labour Day public holiday on 25 October 2021 was clearly otherwise a working day for him. Mr Huang was entitled to be paid for an unworked public holiday on that day.

(vii) Covid-19 Level 4 lockdown

[129] Mr Huang did not work and was not paid during the five week Covid-19 Level 4 lockdown that occurred from 17 August 2021 to 21 September 2021.

[130] The respondents claimed, without providing any supporting evidence, that Mr Huang received a wage subsidy over that period. However, when Mr Huang gave evidence in person

to the Authority he denied (under affirmation) receiving any wage subsidy or other income during this lockdown period.

*Summary of earnings if wages had been paid correctly*

[131] If Mr Huang had been paid correctly, then he should have been paid \$16,329.60 gross consisting of:

- (a) \$320 for work done on 14 and 15 July 2021;
- (b) \$14,720 for work done from 16 July to 5 November 2021 (16 weeks x \$920 per week based on 40 hours per week x \$23 per hour). This included his normal pay during the Covid-19 Level 4 lockdown;
- (c) \$80 for the four hours he worked on Saturday 22 July 2021;
- (d) \$1,209.60 as 8 percent of his total gross earnings of \$15,120 (\$320 + \$14,720 + \$80) from his anniversary date to the date of termination, as annual holiday pay.

*PAYE and IRD obligations*

[132] Optimal as Mr Huang's employer was legally required to deduct PAYE, ACC levies, and any other legally required deductions from his wages and remit that to IRD. That had to be done in Mr Huang's name and against his IRD number. That did not occur.

[133] Optimal therefore breached its legal obligation to pay Mr Huang's PAYE correctly, because it did not deduct PAYE and remit it to IRD under his name when:

- (a) It paid Mr Huang \$500 cash; and
- (b) It paid his wages on 16 and 26 July 2021 and 30 August 2021;
- (c) Dong Construction deducted PAYE from his wages but remitted it to IRD under his wife's name.

[134] These PAYE breaches appeared to be deliberate.

*Knowledge of the PAYE irregularities*

[135] Mr Huang said he asked Ms Zhang about whether PAYE had been paid on the wages Optimal had paid him and she told him it had not, because the amounts were so small no-one would be worried about it.

[136] Ms Zhang knew that Optimal had employed Mr Huang (and not his wife), but she agreed to pay the PAYE from Mr Huang's wages in his wife's name and under her IRD number instead of his. Mr Wang also knew that Mr Huang was Optimal's employee, not his wife, because she and Mr Huang had directly communicated together about work matters.

[137] For Dong Construction to paid the PAYE on Mr Huang's wages to IRD under his wife's name and IRD number, Ms Zhang must have passed that information on to Mr Wang. By implication, Mr Wang therefore had to know that Dong Construction was paying Mr Huang's wife as if she was an employee, and not him.

[138] A document called "*Support document*" filed by Mr Wang with the Authority on 17 August 2022 also indicated that Mr Wang knew about and participated in this fraudulent PAYE activity. The "*Support document*" said:

Anson has provided his wife detail and IRD asking for send money to his wife ([wife's name's] account) he also requests for work contract for his wife to show his bank. I never meet his wife and have no idea who she is. After 2 months I have realised it is not the right things to help him in that way. I have decided to terminate the contract with him and advise it should not be dealt with like this. [...] (sic)

[139] None of the respondents have explained why the income Dong Construction reported to IRD as having been paid to Mr Huang's wife did not match the amounts Mr Huang was actually paid, in terms of the money that was paid into his wife's bank account.

[140] The Authority was not told how much PAYE Mr Huang has paid himself to IRD on the wages he received while employed by Optimal. He did not seek to recover that from Optimal.

[141] It is Optimal's responsibility to ensure that the correct PAYE has been paid on the wages it has already paid Mr Huang and on the wage arrears and lost remuneration it has been ordered to pay him in this determination.

[142] Optimal is ordered to make the correct deductions from Mr Huang's earnings and remit them to IRD under Mr Huang's name and IRD number. Optimal must also reimburse Mr Huang for any PAYE on his wages that he has personally paid out of his own pocket to IRD, which Optimal should have, but did not, pay to IRD on his behalf.

*What was Mr Huang actually paid?*

[143] Mr Huang was paid total gross wages of \$5,777.74, consisting of:

- (a) \$1,010 (being \$179.50 + \$80.50 + \$500 + \$250) paid by Optimal; and
- (b) \$4,767.74 (being \$2,370.34 + \$1,289.62 + \$1,107.78) by Dong Construction.

[144] According to the evidence currently available to the Authority, no PAYE has been paid by Optimal to IRD under Mr Huang's name and IRD number.

*What is Mr Huang owed?*

[145] Mr Huang is owed wage arrears of \$10,551.86, which consisted of the \$16,329.60, which is what he should have been paid less the \$5,777.74, which he was actually paid.

[146] Accordingly within 28 days of the date of this determination, Optimal is ordered to pay Mr Huang \$10,454.86 wage arrears. The correct PAYE and any other legally required deductions must be calculated by Optimal and remitted to IRD, under Mr Huang's name and IRD number.

#### **Should Mr Wang be awarded interest on his wage arrears?**

[147] The Authority has the discretion to award interest in accordance with clause 11 of Schedule 2 of the Act. Optimal has deprived Mr Huang of the use of his own wages, which has caused him considerable stress and financial pressure.

[148] Accordingly, Mr Huang is awarded interest on his total wage arrears of \$10,551.86 gross, to be calculated in accordance with the Interest on Money Claims Act 2016, using the civil debt calculator on the Ministry of Justice website.

[149] Interest is to run from 5 November 2021 (being the date his employment ended) until the amount of wage arrears has been paid to Mr Huang in full.

#### **Was Mr Huang's dismissal justified?**

[150] Ms Zhang verbally informed Mr Huang of his summary dismissal by telephone on 5 November 2021, without providing any reason.

[151] Justification is to be assessed in accordance with the justification test in s 103A(2) of the Act. This requires the Authority to objectively assess whether Optimal's actions, and how

it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.<sup>1</sup>

[152] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith obligations imposed on an employer under s 4(1A)(c) of the Act and each of the four procedural fairness tests in s 103A(3) of the Act.

*Good faith obligations breached*

[153] Section 4(1A)(c) of the Act requires an employer who is proposing to make a decision that may adversely affect an employee's continuing employment, to provide them with access to relevant information and an opportunity to comment on it, before a final decision is made.

[154] Failure by an employer to comply with its statutory obligations may fundamentally undermine its ability to justify a dismissal. That is what has occurred in this case.

[155] Mr Wang made a unilateral decision to end Mr Huang's employment with Optimal. He did not provide Mr Wang with any relevant information before he made this decision, thereby depriving Mr Wang of an opportunity to comment on it. That breached s 4(1A)(c) of the Act. Mr Huang was never even told that his employment was in jeopardy, or the reasons why, so he was unable to address or respond to any concerns Optimal had.

*Procedural fairness obligations breached*

[156] Optimal failed to provide the Authority with any evidence to establish that it had sufficiently investigated its concerns before it dismissed Mr Huang. It appeared that Mr Wang dismissed Mr Huang in response to him saying he was not available to work on Saturdays.

[157] No concerns were raised with Mr Huang before he was dismissed. He was therefore deprived of any opportunity to respond to Optimal's concerns, meaning any explanation he may have wanted to have made was not available and therefore could not be considered, before he was dismissed.

[158] Optimal has therefore failed to comply with any of the four procedural fairness tests in s 103A(3) of the Act.

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<sup>1</sup> Section 103A(2) of the Act.

*Substantive justification*

[159] Substantive justification is to be assessed at the time Mr Huang was dismissed. Mr Huang asked Ms Zhang when they spoke on 5 November 2021 why he had been dismissed, but she was evasive and would not tell him.

[160] When he raised a personal grievance, Optimal's response to the personal grievance was that he had been dismissed because of the IRD number issues relating to his wife. The concern in the response to the personal grievance letter appeared to be that Mr Huang had seemingly attempted to defraud IRD which had placed Optimal in a position of supplying false information to IRD as well. There was also an allegation made that Mr Huang was already receiving the wage subsidy.

[161] Mr Huang's use of his wife's IRD number for PAYE purposes was capable of amounting to serious misconduct. It was also sufficiently serious misconduct that dismissal was within the range of reasonable responses available to a fair and reasonable employer.

[162] The Authority finds that Optimal had good reason for dismissing Mr Huang. It was dishonest for him to arrange for his PAYE to be paid to IRD under his wife's name and IRD number. Although Optimal had a good reason for dismissing Mr Huang, it carried out his dismissal in a procedurally unfair way.

[163] However, a fair and proper process would not have changed the fact that Mr Huang admitted he had deliberately used his wife's IRD number for payroll purposes, instead of his own PAYE number, which meant he knew his PAYE was not going to be paid to IRD correctly. Consultation with him, or a fair and proper process, would not have changed that key admission.

*Outcome*

[164] Optimal's dismissal of Mr Huang was substantively justified but conducted in a procedurally unfair manner, making it unjustified due to procedural errors. Section 103A(5) of the Act did not preclude the Authority from finding that Mr Huang's dismissal was unjustified, because the process defects that occurred were serious and unfair to him.

**What remedies should Mr Huang be awarded?***Lost remuneration*

[165] Mr Huang is not entitled to lost remuneration because his dismissal was substantively justified.

*Distress compensation*

[166] Mr Huang gave credible evidence to the Authority about the distress and stress this situation had caused him. He became emotional when discussing it during the investigation meeting and was obviously still upset about his dismissal.

[167] Mr Huang found it difficult being dismissed so close to Christmas and he struggled to find work. He did not obtain alternative employment until 10 February 2022. His family faced financial problems due to his dismissal.

[168] Optimal is ordered to pay Mr Huang \$10,000 under s 123(1)(c)(i) of the Act for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

**Should remedies be reduced under s 124 of the Act, on the grounds of contribution?**

[169] Having established that he has a personal grievance claim, the Authority is required under s 124 of the Act to consider the extent to which Mr Huang's actions contributed to the situation that gave rise to his dismissal grievance and if appropriate, to reduce his remedies accordingly.

[170] Contribution denotes blameworthy conduct that is proved on the balance of probability. The arrangements that Mr Huang made regarding his PAYE clearly involved blameworthy conduct, which he candidly admitted.

[171] It is therefore appropriate for his award of distress compensation to be reduced by 30 percent, to reflect the extent to which he contributed towards the situation that gave rise to his dismissal grievance.

[172] The Authority noted that the IRD issues would not have arisen if Ms Zhang, Mr Wang, Optimal and Dong Construction had met their legal obligations regarding IRD deductions and payments.

**Have there been breaches of employment standards?**

[173] It is clear that at least for some of the hours that Mr Huang worked he was paid nothing (i.e. during the five week level four lockdown). For other periods he was paid less than the minimum wage because he received only \$50 per day for working eight and a half hours, which was an hourly rate of \$5.88 when the minimum wage at that time was \$20 per hour.

[174] Optimal has therefore breached employment standards by failing to pay Mr Huang at least the minimum wage for all of the hours that he worked and by failing to keep a written employment agreement for him.

**Are Mr Wang and/or Ms Zhang persons who were involved in the breaches of employment standards that occurred?**

[175] Mr Wang and Ms Zhang were both potentially persons involved in breaches of the employment standards, because they were both directors of Optimal at the material time.

[176] However, Ms Zhang was the person who arranged for Mr Huang to become employed, she was the one who received a record of his hours of work, she sent him out on jobs and she was the one that arranged for him to be paid his wages.

[177] Ms Zhang was therefore the person who failed to keep a written employment agreement and who failed to ensure that Mr Huang was paid at least the minimum wage for all of the hours that he worked, in breach of the Minimum Wage Act 1983 (*“the MWA”*). Ms Zhang is a person involved in breaches of employment standards, as per the definition in s 142W of the Act.

[178] The evidence presented to the Authority did not establish that Mr Wang was personally responsible for the wages payments that were made to Mr Huang, which were less than the minimum wage, so the Authority is not prepared to find that he was a person involved in the breaches of employment standards that occurred.

**Should the Authority grant leave to Mr Huang to pursue Ms Zhang personally for any wages arrears that Optimal is unable to pay?**

[179] There was no evidence produced to the Authority that Optimal is unable to pay the wage arrears that Mr Huang has been awarded. However, Mr Huang believed there was a risk that Optimal may not pay him the \$10,551.86 wage arrears he had been awarded, so he wanted leave to pursue Ms Zhang personally, if need be.

[180] Accordingly, leave is granted under s 142Y(2)(a), only to the extent that Optimal is unable to pay the wage arrears for Mr Huang to seek to recover any wage arrears Optimal cannot pay him from Ms Zhang personally.

[181] Mr Huang will first need to seek to recover his wage arrears from Optimal. However, if Optimal is unable to pay him, then he has leave from the Authority to file an appropriate claim against Ms Zhang personally, if that becomes necessary in future.

### **What costs and disbursements should be awarded?**

[182] Ms Moncur asked that costs be reserved. Costs will therefore be dealt with by an exchange of memoranda.

[183] This matter involved a half day investigation meeting, so the starting point for assessing costs is \$2,250 being half of the notional daily tariff for a one day investigation meeting, which is currently \$4,500. Mr Huang is invited to identify in his costs submissions any factors that he says should result in the notional starting tariff being adjusted.

[184] Mr Huang has 14 days from the date of this determination to file costs submissions. Each of the respondents have 14 days after that within which to file their cost submissions. Cost submissions filed outside of this timetable, without the prior written leave of the Authority, will not be considered.

### **Outcome**

[185] The Authority made the following findings:

- (a) Mr Huang was employed by Optimal from 14 July 2021 to 5 November 2021;
- (b) Optimal unjustifiably dismissed Mr Huang on 5 November 2021;
- (c) Optimal breached minimum employment standards involving Mr Huang's employment, by failing to keep a written employment agreement for him and by not paying him at least the minimum wage for all of the hours he worked;
- (d) Ms Zhang, as a director of Optimal, was a person who was personally involved in these breaches of employment standards;
- (e) Mr Huang has been granted leave under s 142Y(2) of the Act to pursue Ms Zhang personally (as a person involved in breaches of employment standards)

to pay him his wage arrears of \$10,551.86, if Optimal is unable to pay him the money he has been awarded.

[186] Accordingly, within 28 days of the date of this determination, Optimal is ordered to pay Mr Huang \$17,551.86 gross plus interest, consisting of:

- (a) \$10,551.86 wage arrears;
- (b) Interest on the \$10,551.86 wage arrears, to run from 5 November 2021 until it has been paid in full, to be calculated using the interest calculator on the Ministry of Justice website; and
- (c) \$7,000 distress compensation (\$10,000 awarded to him less a \$3,000 reduction for contribution);

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