

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 271
3173924

BETWEEN LILI WANG
 Applicant

AND GREENTREE NM CATERING
 LIMITED (t/a MASTER BAO)
 Respondent

Member of Authority: Helen Doyle

Representatives: David Kim advocate for the Applicant
 Martin Lyttelton advocate for the Respondent

Investigation Meeting: 17 February 2023 by audio visual conference

Submissions Received: 21 February 2023 and 8 March 2023 from the Applicant
 17 April 2023 from the Respondent
 Further information provided by both parties in February and
 March 2023

Date of Determination: 26 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Lili Wang was employed by Greentree NM Catering Limited trading as Master Bao (Greentree) as a Chinese Pastry Chef in Auckland between 2 October 2020 and 17 November 2020. Greentree operates the Mater Bao restaurant at Westfield New Market shopping centre.

[2] Ms Wang was party with Greentree to a written employment agreement dated 17 August 2020.

[3] The statement of problem dated 1 June 2022 set out the following employment relationship problems:

- (a) Recovery of wage arrears;
- (b) Failure to pay minimum wages;
- (c) Failure to pay public holiday pay;
- (d) Failure to pay annual leave entitlements;
- (e) Failure to pay in lieu of a notice period;
- (f) Dismissal;
- (g) Penalties.

[4] Greentree lodged a statement in reply on 14 June 2022. Mr Lyttelton was not its representative at that stage.

[5] It was accepted in the statement of reply that there were wage arrears and that Ms Wang was owed holiday entitlements however Greentree did not accept the extent of working hours as set out in the statement of problem. It was not accepted that there was a dismissal or that there had been short payment of the notice period. It was not accepted there should be any penalty award however it was expressed in 1(e) of the statement in reply that Ms Wang would be entitled to some compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for late payment. Greentree provided its wage and time records and said that the amounts owing to Ms Wang were \$834.91 gross for overtime work, \$220 gross for an alternative holiday and \$699.50 for annual leave entitlements. Payment of these amounts was made.

[6] Payment was also made of the sum of \$1,000 by Greentree. This was expressed to be for the stress “she will have felt because we did not pay her on time”. The payment was expressed to be “without strings” and that Ms Wang could use the money and carry on with her claim subject to giving Greentree a credit.

[7] After the investigation meeting, the Authority was advised that Ms Wang wanted to withdraw the claims for penalties, the claim for three weeks’ payment in lieu of notice and the claim for compensation. These matters are duly withdrawn.

[8] What remains for resolution for Ms Wang is a monetary claim for the sum of \$2,760.44 being wage arrears of \$2,355.21, public holiday entitlements of \$200.75 and annual leave

entitlements of \$204.48. Mr Kim provided revised figures for the claims which were of assistance.

The investigation process

[9] The investigation meeting was originally scheduled to be held on 14 February 2023. A weather event in Auckland meant this matter was unable to proceed and the meeting was rescheduled for Friday 17 February 2023 by Teams. A Mandarin interpreter attended the investigation meeting with the Authority. Questions and answers were interpreted for the investigative process from English to Mandarin and from Mandarin to English.

[10] The Authority heard evidence from Ms Wang. It also heard evidence from the Director of Greentree, Jessie Bo and her personal assistant at the material time Hang Zhang, known also as William. Submissions were timetabled following the investigation meeting.

[11] 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. It states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter, and specifies orders made as a result.

The issues

[12] The Authority needs to determine the following issues in this matter:

- (a) What are the material clauses in the employment agreement between Ms Wang and Greentree?
- (b) Are findings in earlier Authority determinations involving Ms Wang and a different employer relevant for determining reliability of evidence?
- (c) How was time worked and breaks recorded?
- (d) What unpaid breaks should be deducted from the hours Ms Wang was present at Greentree?
- (e) Did Ms Wang work on 8 October and 10 November 2020?
- (f) How should overtime payments be assessed?
- (g) Are further wage arrears owing?
- (h) Is Ms Wang owed additional money for working on a public holiday?

- (i) Is Ms Wang owed additional money for an alternative day?
- (j) Is Ms Wang owed additional money for holiday pay?
- (k) How should the \$1,000 payment be treated if it is found that there is further money owing?

What are the material clauses in the employment agreement between Ms Wang and Greentree?

[13] Clause 2 of the employment agreement provides for the duties of the employee. It is stated that the duties and responsibilities require the employee to devote all normal working hours and their best endeavours to perform the duties in a manner to promote the interests of the employer.

[14] Clause 3 of the employment agreement refers to the hours of work. It provides that the position that Ms Wang had was a full time position with considerable responsibility and that the employee should devote time and attention during normal business hours exclusively to assigned duties and functions. It was noted in clause 3 that this will require additional hours as necessary and as reasonably required by the employer.

[15] Clause 5 assumes importance given the issues in dispute about unpaid breaks. It is set out below:

- 5.1 The Employee's performance will be reviewed periodically.
- 5.2 Where the Employee works for 2-4 hours, a 10 minute paid rest break.
- 5.3 Where the Employee works for 4-6 hours, a 10 minute paid rest break and a 30 minute unpaid meal break.
- 5.4 Where the Employee works for 6-8 hours, two 10 minute paid rest breaks and one 30 minute unpaid meal break.

[16] Clause 6 is about remuneration and sets out that the employee will receive the remuneration and other benefits specified in the first schedule.

[17] Clause 7 refers to wage and time records as below:

- 7.1 The Employer shall at all times keep a wages and time record which summarises the hours that the Employee has worked and any leave that he or she has taken.

- 7.2 The Employee shall be required to complete daily and weekly timesheets, accurately and honestly, and submit them to the Employer. The Employee may also be required to provide such information as the Employer may reasonably request to establish, monitor or substantiate the hours worked.

[18] The first schedule is set out below:

First schedule

1. Position: Chinese Pastry Chef
2. Working location: -----New Market, Auckland
3. Commencement date: Upon receipt of work visa from Immigration New Zealand
4. Hours: 40 hours per week
5. Remuneration: NZD 45,760 per annum (\$22 per hour). If working for overtime and public holidays, will be one and a half times (\$33 per hour).
6. Annual leave: 4 weeks per annum
7. Notice period: One month
8. Contract period: Permanent and on going or the employee shall start working for the employer on Greentree NM Catering Limited and continue until either the employer or the employee ends this relationship.

Are findings in earlier Authority determinations relevant in an assessment of the reliability of the evidence?

[19] Ms Wang was involved in an earlier Authority investigation with a different employer Happy Eating Limited (Happy Eating). Mr Kim and Mr Lyttelton were representatives for Ms Wang and Happy Eating in this earlier matter. Mr Lyttelton submits that the findings in both the substantive and re-opening Happy Eating determinations should be considered in any assessment of the reliability of Ms Wang's evidence.¹

[20] Mr Lyttelton has provided the Authority with copies of both the substantive and re-opening determinations and some submissions provided for those matters and refers quite extensively to these. The Happy Eating re-opening determination concluded that Ms Wang may have been untruthful about not having been employed by Greentree. This was described

¹ *Lili Wang v Happy Eating Limited and Ying Cao and Xiaoling Sun* [2022] NZERA 424 and *Happy Eating Limited v Lili Wang* [2023] NZERA 40.

as a “very small piece of the overall evidential puzzle.” Some other findings were set out that indicated adverse conclusions had already been drawn about Ms Wang’s credibility from the substantive determination.²

[21] Objectively assessed, the Happy Eating and Greentree matters are different in nature particularly given the withdrawal of several of the claims

[22] Ms Wang was found to have been unjustifiably dismissed from Happy Eating but was unsuccessful with her claim for wages arrears, rest breaks, holiday pay and sick leave payments.

[23] Greentree on the other hand accepted in its statement in reply that it had not paid to Ms Wang annual leave entitlements, payment for an alternative day and that it had failed to make payment for some hours at the overtime rate. The reasons it says this occurred included that the overtime clause was mistakenly inserted into the employment agreement and that it was believed, albeit incorrectly, that holiday pay could be retained because of the failure by Ms Wang to work the notice period. Greentree made payment of what it considered was owing after the statement of problem was lodged. The issue before the Authority is whether there is anything further owed to Ms Wang for wage arrears, working on a public holiday, payment for an alternative day and holiday pay. The issue in Happy Eating was whether there was anything owing at all for wage arrears, holiday pay and rest breaks.

[24] Further if Ms Wang was not truthful in one case it does not mean that the same conclusion can be reached in this matter. To conclude otherwise would not allow for any possibility that people can change their behaviour.

[25] The Authority is not persuaded that findings from the Happy Eating matter should influence any assessment about the reliability of Ms Wang’s evidence. The reliability of evidence falls to be assessed on the balance of probabilities as to what is more probable than not.

² Above 1 [2023] NZERA 40 at [48].

How were hours of work organised and time worked and breaks recorded?

[26] Ms Bo explained in her evidence that she would set the roster and Mr Zhang would communicate with Ms Wang by WeChat about her hours of work. An example of such a WeChat message was provided dated 26 October 2020.

[27] Ms Wang provided copies of time records that she said she kept when she worked and provided to Greentree from time to time. Her time records did not record breaks. Mr Zhang produced his time records for Ms Wang. Mr Zhang said that on his working days he would record the hours worked and break times of staff and when he was not in the shop the managing assistant would record these and report to him. He said that he would deduct from the hours the unpaid breaks and provide those records to the office so that salary and wages could be paid. Mr Zhang said that he met Ms Wang every day to confirm the work and break times with her.

[28] Ms Wang initially said that she took no breaks but then said in her evidence that fifteen minutes a day could be deducted. When final submissions were provided there was still reference to some days where Ms Wang maintained she did not take a break.

[29] The evidence supported it likely that the process in clause 7.2 of the employment agreement for daily and weekly timesheet to be provided by Ms Wang to Greentree may not have been strictly adhered to. It appeared this was overtaken by Mr Zhang providing his record to the office for payment.

[30] When the records of both Mr Zhang and Ms Wang are compared, the significant difference is the recording of unpaid breaks on Mr Zhang's records and subsequent deduction of unpaid breaks by Greentree when they paid Ms Wang. Greentree additionally say they have no record of Ms Wang working 8 October and 10 November 2020. Ms Wang's records show that she was working both these days. There is a further minor discrepancy on 9 October 2020 between the two records where Ms Wang recorded her finish time as 3.00 pm and Mr Zhang recorded the finish time as 2.40 pm. Aside from setting this out I have not had further regard to this minor discrepancy.

[31] I set out below the hours that Ms Wang arrived and left the workplace from her time records. They differed in a minor way to those provided by Mr Kim in his revised figures

because the Authority has set out the days based on the pay week which is from Thursday to Wednesday. This accords with the pay records provided by Greentree.

2/10/20 – 7/10/20			
2/10	Friday	11 am – 7 pm	8 hours
3/10	Saturday	8 am – 3pm	7 hours
4/10	Sunday	8 am – 3 pm	7 hours
5/10	Monday	12 am – 10 pm	10 hours
6/10	Tuesday	8 am – 3 pm	7 hours
7/10	Wednesday	8 am – 3 pm	7 hours
			46 hours
8/10/20 – 14/10/20			
8/10	Thursday	11 am – 8 pm	9 hours
9/10	Friday	8 am – 3 pm	7 hours
12/10	Monday	8 am – 2 pm	6 hours
13/10	Tuesday	11 am - 10 pm	11 hours
			33 hours
15/10/20 – 21/10/20			
15/10	Thursday	9 am – 8pm	11 hours
16/10	Friday	9 am – 10 pm	13 hours
17/10	Saturday	7 am – 9 pm	14 hours
18/10	Sunday	7 am – 8.30 pm	13.5 hours
19/10	Monday	8 am – 10 pm	14 hours
20/10	Tuesday	11 am – 10 pm	11 hours
			76.5 hours
22/10/20 – 28/10/20			
22/10	Thursday	8 am – 7.30 pm	11.5 hours
23/10	Friday	8 am – 7.30 pm	11.5 hours
24/10	Saturday	8 am – 8 pm	12 hours
25/10	Sunday	8 am – 7.30 pm	11.5 hours
26/10	Monday	8 am – 9 pm	13 hours <i>(Labour Day)</i>
27/10	Tuesday	10 am – 9 pm	11 hours
			70.5 hours
29/10/20 – 4/11/20			
29/10	Thursday	8 am – 7 pm	11 hours

30/10	Friday	8 am – 7.30 pm	11.5 hours
31/10	Saturday	8 am – 8 pm	12 hours
1/11	Sunday	8 am – 7.30 pm	11.5 hours
2/11	Monday	8 am – 7 pm	11 hours
3/11	Tuesday	10 am – 9 pm	11 hours
			68 hours
5/11/20 - 10/11/20			
5/11	Thursday	8 am – 7.30 pm	11.5 hours
6/11	Friday	8 am – 9 pm	13 hours
7/11	Saturday	8 am – 8 pm	12 hours
8/11	Sunday	8 am – 8 pm	12 hours
9/11	Monday	8 am – 7.30 pm	11.5 hours
10/11	Tuesday	10 am – 9 pm	11 hours
			71 hours
12/11/20 – 18/11/20			
12/11	Thursday	8.30 am – 7.30 pm	11 hours
13/11	Friday	8 am – 7 pm	11 hours
14/11	Saturday	8 am – 7.30 pm	11.5 hours
15/11	Sunday	8 am – 7 pm	11 hours
16/11	Monday	8 am – 6 pm	10 hours
17/11	Tuesday	10.30 am – 8.30 pm	10 hours
			64.5 hours

What breaks should be deducted from the above hours?

[32] Ms Bo said in her evidence about unpaid breaks that employees received a breakfast of noodles at 11am and then there was a lunch meal between 2pm and 3pm, a dinner meal and a snack for staff leaving late. She considered it would be impossible to make dumplings for the hours Ms Wang said she worked without a break with four other pastry chefs working.

[33] Mr Zhang said that the meals were offered to staff at no charge and staff also took unpaid rest breaks. He said that there were two meals, one for the morning shift, and the other after the morning shift had finished. He also referred to “unpaid rest breaks” during what he described as a quiet time after lunch before dinner.

[34] Ms Wang's evidence was that she only had one break time when she would have a meal after the lunch period and she would use fifteen minutes only. Ms Wang did not accept that there was a quiet time after lunch and before dinner because Master Bao was situated in a mall. Ms Wang denied taking a break during that time or at dinner time.

[35] The breaks recorded by Mr Zhang in his time records for Ms Wang vary. For the first week of Ms Wang's employment Mr Zhang deducted one hour for unpaid breaks each day except for 5 October 2020 when three and a half hours were deducted. During the second week deductions of one hour were made for two days and three hours for the third day. There is a dispute this week as to whether 8 October 2020 was a working day for Ms Wang. For the fourth, fifth and seventh weeks breaks of one and a half hours were deducted for each day. For the third week the breaks recorded by Mr Zhang and deducted for the six days worked were three hours for three of the days, one and half hours for one day, two hours for one day and two and a half for another day. For the sixth week where there is a dispute as to whether 10 November was a working day Mr Zhang recorded the following breaks for five working days. For three days, breaks of one and a half hours were deducted. For one day a break of two hours was deducted and for another two and a half hours.

[36] I have considered whether what Ms Zhang and Ms Wang said about breaks was consistent with other evidence shown to have occurred.

[37] Mr Lyttelton submits that no issue was raised by Ms Wang about her payments until the end of her employment. On 18 November 2020 Ms Wang raised issues about her payment with Mr Zhang by WeChat. I set out below the material part of the message.

Lili Wang: Willishh, you and the lady boss all said that it would be based on the employment agreement and I have wanted it too. Think feeling for others, \$22 per hour was in the agreement but how much have I been paid. I have given one month to you but I have not been paid based on the agreement and not been fully paid..... ..

[38] I am not persuaded that a failure to raise issues earlier than 18 November 2020 is significant. Firstly, for reasons that now do not have to be determined the first payment made to Ms Wang was on 30 October 2020. It comprised of three weeks of payment. I am not satisfied payslips accompanied the payment, and it was likely difficult for Ms Wang to ascertain how the pay was made up. She received further payments on 9 and 16 November and then raised an issue. There was not an extensive delay in doing so.

[39] On 20 November 2020 Ms Wang sent to Mr Zhang a WeChat message in which she copied her bank statements showing payments received from Greentree and copied her record of hours set out above in this determination. She requested wage records that same day and stated effectively that what she has by way of records should not be that different to Greentree. She asked for a copy of the payslips on 28 November 2020 and again on 30 November 2020. I am not satisfied that wage and time records and/or payslips were provided.

[40] Ms Wang's WeChat messages at the time are consistent with her evidence that she did not consider she had been paid correctly and did not understand why. If Mr Zhang had obtained Ms Wang's agreement each day to work hours and unpaid breaks it is less likely she would have raised a concern and/or it would have been able to have been immediately responded to. The difference between Ms Wang's records and payments made to her was principally the unpaid breaks that had been deducted.

[41] The evidence does not support the reasons for the difference between Ms Wang's own record and her payments was explained to her. The next time the parties communicated was when Mr Kim sent a letter dated 24 March 2022 advising that he was representing Ms Wang. He asked for certain payments on her behalf and wage and time records. The matter is now for resolution over two years after employment ended.

[42] A weekly payroll analysis for Ms Wang for each of the weeks she worked and a payroll record were provided by Greentree. The weekly payroll analysis includes the unpaid break hours. On occasion the unpaid breaks recorded in the weekly payroll analysis are different from Mr Zhang's records.

[43] On 5 October 2020 the unpaid breaks recorded in the weekly payroll analysis are 0.9 hours compared to the 3.5 hours that Mr Zhang recorded for that day. On 9 October 2020 Mr Zhang recorded unpaid breaks of one hour but Greentree in its weekly payroll analysis recorded 1.3 hours for unpaid breaks. On 30 October and 8 November 2020 Mr Zhang recorded 1.5 hours each day of unpaid breaks for Ms Wang however Greentree's records show deductions of 1.8 hours for unpaid breaks for each day.

[44] There is another aspect of the records that is confusing for 5 October 2020. Both Ms Wang and Mr Zhang recorded in their respective time records for that day that Ms Wang was present at the workplace from midday until 10 pm which is 10 hours. Total shift hours before deducting unpaid break times for this day are recorded as 7.5 hours. Ms Wang was paid for

6.6 hours that day. It is difficult to understand why the total shift hours would be reflected as 7.5 hours. Some emphasis was placed by Greentree on a break between lunch and dinner. I don't conclude that explains the total shift hours for 5 October 2020 being 7.5 hours. On 16 October 2020 Ms Wang was present at the workplace for 13 hours. Total shift hours are recorded in the weekly payroll analysis as 13 hours.

[45] I could not be satisfied to the necessary standard that Ms Wang took the unpaid breaks Greentree deducted before making payment to her. The raising by her of concerns about her pay from 18 November 2020 is consistent with a lack of understanding about why her pay was different to her own records. It is less likely that she would do this if she had agreed to such deductions as Mr Zhang said she did. Greentree records were not always consistent with Mr Zhang's records about breaks. I cannot conclude with any degree of safety that the breaks Greentree deducted from the hours Ms Wang was present at the workplace were taken and agreed to.

[46] I am however satisfied that Ms Wang was able to take some breaks and that meals were provided. To that extent it is appropriate to deduct the breaks as agreed in the employment agreement and do so to reflect that on occasion the working day was longer on occasion than twelve hours.

[47] When Ms Wang worked for more than four hours a 30-minute unpaid meal break is to be deducted. Where Ms Wang worked over twelve hours a further 30-minute unpaid meal break is to be deducted. This is consistent with the entitlement to rest and meal break entitlements in s 69ZD of the Employment Relations Act 2000 (the Act).

Did Ms Wang work on 8 October and 10 November 2020?

[48] Greentree say that they have no record of Ms Wang working on 8 October and 10 November 2020.

[49] After the Authority investigation meeting Mr Kim supplied two documents to support that Ms Wang had worked on each of these days. For 8 October Mr Kim provided a WeChat message from Mr Zhang to Ms Wang on 4 October 2020 which is a Sunday. Mr Zhang set out the workdays and hours for shifts for the week for Ms Wang. For 8 October 2020 which is a Thursday 11am to 8pm is set out. Mr Kim provided a google location record to support Ms Wang working on 10 November 2023.

[50] Mr Lyttelton objected to both documents. I advised Mr Kim and Mr Lyttelton that the google location record was provided without proper foundation and I place no reliance on it. I asked that Mr Lyttelton should discuss the WeChat message about 8 October 2020 with Mr Zhang. Mr Zhang has lost access to his i Phone and access to WeChat messages. That matter was not able to be advanced.

[51] I have placed weight primarily on two matters in determining whether it is more likely than not that Ms Wang worked on both or either of these days.

[52] Ms Wang commenced work on a Friday for her first week but otherwise worked every Thursday over the remaining six weeks. Apart from the first week she did not work Wednesdays. 8 October 2020 is a Thursday. The WeChat message about working on that day from Mr Zhang to Ms Wang whilst unable to be verified by him is not inconsistent or unusual with the work pattern. Mr Lyttelton referred to another WeChat message between Mr Zhang and Ms Wang dated 26 October 2020 in which Mr Zhang referred to shifts for Ms Wang. Mr Lyttelton pointed out correctly that the 8am -3pm shift on Wednesday 28 October was not actually worked. The Authority has relied on the WeChat message with other matters such as work patterns.

[53] The work pattern also supports that Ms Wang worked every Tuesday for the weeks she worked for Greentree. 10 November 2020 was a Tuesday. Assessed with the work pattern therefore it was not unusual that Ms Wang would have been working on a Tuesday.

[54] The second matter I have placed weight on is that Ms Wang's own record of days and hours were provided to Mr Zhang on 20 November 2020. They included both these disputed days. Legal proceedings were not afoot at that point with Greentree. Ms Wang wanted to know why her payments were not consistent with her record and provided her bank statements and her records to assist with that. There was no response at that time to her concern that there was a difference between the pay she received and her own records including that she did not work those two days. I conclude it less likely in those circumstances that Ms Wang would include two days that she did not work in her record.

[55] In conclusion, for the above reasons I find it more likely than not that Ms Wang worked on 8 October 2020 and 10 November 2020.

How should ordinary time and overtime payments be assessed?

[56] Schedule one of the employment agreement read as a whole provides that Ms Wang was to be paid for 40 hours of work per week at \$22.00 per hour and for additional hours over 40 per week at \$33 per hour.

[57] Mr Kim has calculated the claim on this basis. I conclude that it is the right approach because that is what the parties agreed to in their employment agreement.

Are there wages arrears still owing?

[58] To assess any wage arrears unpaid breaks need to be deducted from the hours recorded.

[59] For the first week from 2 October to 7 October 2020 I have deducted three hours for unpaid breaks. That leaves 43 hours for which payment should have been made. 40 hours should be paid at the rate of \$22 per hour and 3 hours should be paid at \$33 per hour. Ms Wang should have received \$880 gross for the 40 hours and \$99 gross for the hours worked over 40 hours. That is a total of \$979 gross.

[60] For the second week from 8 October to 13 October 2020 I have deducted 2 hours for breaks. That leaves 31 hours for which payment should have been made at the rate of \$22 per hour. Ms Wang should have received payment of \$682 gross.

[61] For the third week from 15 October to 21 October 2020 I have deducted 5 hours for breaks. On four days that week Ms Wang worked over 12 hours a day. That leaves 71.5 hours for which payment should have been made. 40 hours should have been paid at the rate of \$22 per hour and 31.5 hours at the rate of \$33 per hour. Ms Wang should have received \$880 gross for 40 hours and \$1,039.50 gross for hours worked over 40 hours. That is a total of \$1,919.50 gross.

[62] For the fourth week from 22 October to 28 October 2020 I have deducted 3.5 hours for breaks. That leaves 67 hours for which payment should have been made. 40 hours should have been paid at the rate of \$22 per hour and 27 hours at the rate of \$33 per hour. Ms Wang should have received \$880 gross for 40 hours and \$891 gross for hours worked over 40 hours. That is a total of \$1,771 gross.

[63] For the fifth week from 29 October to 4 November 2020 I have deducted 3 hours for unpaid breaks. That leaves 65 hours for which payment should have been made. 40 hours

should have been paid at the rate of \$22 per hour and 25 hours at the rate of \$33 per hour. Ms Wang should have received \$880 gross for 40 hours and \$825 gross for hours worked over 40 hours. That is a total of \$1,705 gross.

[64] For the sixth week from 5 November to 10 November 2020 I have deducted 3.5 hours for unpaid breaks. That leaves 67.5 hours for which payment should have been made. 40 hours should have been paid at the rate of \$22 per hour and 27.5 hours at the rate of \$33 per hour. Ms Wang should have received \$880 gross for 40 hours and \$907.50 for hours worked over 40 hours. That is a total of \$1,787.50 gross.

[65] For the seventh week from 12 November to 18 November 2020 I have deducted 3 hours for unpaid breaks. That leaves 61.5 hours for which payment should have been made. 40 hours should have been paid at the rate of \$22 per hour and 21.5 at the rate of \$33 per hour. Ms Wang should have received the sum of \$880 gross for 40 hours and \$790.5 for hours worked over 40 hours. That is a total of \$1,589.50 gross.

[66] The wages that should have been paid are a total of \$10,433.50 gross.

[67] Ms Wang was according to records from the Inland Revenue Department paid \$7,688.89 gross. In June 2022 Greentree paid a further sum of \$834.90 gross for wage arrears. The sum of \$10,433.50 less \$7,688.89 and \$834.90 leaves the sum of \$1,909.71 due and owing.

[68] There are wage arrears in the sum of \$1,909.71 gross due and owing to Ms Wang.

Is Ms Wang owed additional money for working on a public holiday?

[69] Ms Bo said in her evidence that Ms Wang had been paid at time and a half for the Labour Day public holiday that she had worked in 2020.

[70] The weekly pay analysis supports that Greentree paid Ms Wang for 55.4 hours for the pay week in which Labour Day fell. The gross payment made was \$1,345.66. That is more than 55.4 hours x \$22 which is \$1,218.8. The difference is \$126.86. This sum would appear to account for payment at time and a half for the public holiday on the hours that Greentree assessed Ms Wang worked that day. $\$379.50 (11.5 \times \$33)$ less $\$253 (11.5 \times 22) = \126.50 gross. I conclude it likely does and time and a half has been paid.

[71] There is however a small amount owing as I have concluded Ms Wang worked 12 hours that day rather than 11.5 hours. The amount owing is \$5.50 which is \$16.50 less \$11.00.

[72] There is a balance due and owing for working on Labour Day 2020, in the sum of \$5.50.

Payment for an alternative day

[73] Section 56 of the Holidays Act 2003 provides that an alternative day must be provided if an employee works on a public holiday. Ms Wang was not provided with an alternative day or paid for one in the pay relating to her final period of employment. Greentree recognises that it did not pay Ms Wang for an alternative day and has already made a payment of \$220 gross in or about June 2022. The issue is whether more is owed.

[74] Payment for an alternative holiday is set out in s 60 of the Holidays Act 2002 and is paid at not less than the employee's relevant daily pay or average daily pay for the day taken as an alternative holiday.

[75] I have calculated average daily pay in accordance with s 9A of the Holidays Act 2003 by dividing Ms Wang's gross earnings for the whole of her employment with the number of days worked.

[76] Ms Wang's gross earnings were \$10,439 including the small additional amount for working on a public holiday. She worked 40 days. The greater divided by the lesser is \$260.98 gross. Her average daily pay is \$260.98 gross.

[77] Payment in lieu of an alternative day off should have been made on that basis. Ms Wang was paid \$220 gross in or about June 2022 so there is a sum owing under this head of \$40.98.

Holiday pay

[78] Ms Wang is owed holiday pay on the combined sums of \$10,433.50, \$5.50, and \$260.98 which is a total of \$10,699.98 gross. No leave was taken during employment. 8% of \$10,699.98 is the sum of \$856 gross. The sum paid in June 2022 by Greentree of \$699.50 for holiday pay needs to be deducted. This leaves a balance due and owing for holiday pay in the sum of \$156.50 gross.

Treatment of the \$1000 payment

[79] When this payment was made to Ms Wang the claims included a personal grievance and penalties.

[80] It was made on the basis that there was some stress recognised because some payments were not made on time. I am not satisfied that the reference to giving credit related to the minimum standard payments and wage arrears rather than the other claims.

[81] In a notice of direction dated 30 August 2022 after a case management conference with Mr Kim and Greentree's then representative the Authority referred to that payment as being "with no strings for any stress related to the failure to pay on time."

[82] The payment was compensatory in nature and is not to be deducted from the money Ms Wang is owed for arrears of wages, working on a public holiday, an alternative day, and holiday pay.

Orders made

[83] Greentree NM Catering Limited is ordered to pay to Lili Wang within 28 days of the date of this determination:

- (a) The sum \$1,909.71 gross for wage arrears.
- (b) The sum of \$5.50 gross for working on a public holiday.
- (c) The sum of \$40.98 gross for an alternative day.
- (d) The sum of \$156.50 gross for holiday pay.

[84] An earlier compensatory payment of \$1000 is not to be deducted from the above amounts found owing.

Costs

[85] Costs are reserved.

[86] If costs are not agreed, then Mr Kim may lodge and serve a costs submission within 14 days from the date of this determination. Mr Lyttelton will have a further 14 days from receipt of the submission to lodge and serve reply submissions as to costs. Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[87] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.³

Helen Doyle
Member of the Employment Relations Authority

³ <https://www.era.govt.nz/assets/Uploads/practice-note-2> .