

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 298
3177189

BETWEEN

XI (ROBERT) CHEN
Applicant

AND

BREAD OF LIFE CHRISTIAN
CHURCH IN AUCKLAND
Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Greening and Kylie Hudson, counsel for the
Applicant
James Peacock, counsel for the three Opposing Trustees
of the Respondent Trust Board

Investigation Meeting: On the papers

Submissions and Other Information Received: 10 May 2023 from the Applicant
12 May 2023 from Respondent
25 May 2023 from Applicant
30 May 2023 from the Respondent
30 May 2023 from the Applicant
2 June 2023 from the Applicant
6 June 2023 from the Respondent
7 June 2023 from the Applicant

Date of Determination: 9 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Translation issues

[1] The parties and their witnesses have provided the Authority with English translations of Chinese documents. The witnesses all have English as a second language with their primary

language being Mandarin. There have been some disputes regarding the translations provided, so the Authority has been made aware of those differences.

[2] The Authority notes that different documents and witnesses have therefore referred to the same body/entity/document by slightly different names, reflecting a different choice of words in translations. That inconsistency may also be reflected in this determination. The quotes used in this determination reflect the translation provided to the Authority.

The problem

[3] The Applicant, Mr Chen is the Senior Pastor of the “*Bread of Life Church*” which is based in Auckland (“*the Church*”). Mr Chen has been paid as a salaried employee since 2015 up until his remuneration was unilaterally stopped from 20 April 2022.

[4] Mr Chen was ordained as a preacher in the Church in 2015 and he has been affirmed and authorised in that role by what is referred to as the “*Mother Church*” which is based in Taipei.

[5] Mr Chen’s first written employment agreement is dated 2 September 2019. Although that was the first time he was given an employment agreement, he said the nature of his status had not changed, because he had been an employee since 2015. That was evident from the Respondent’s deduction of PAYE, ESCT, ACC levies and its payment of the KiwiSaver contributions, including the compulsory employer contribution from his salary.

[6] The Church’s assets (funds and property) are held by the Respondent “*Bread of Life Christian Church in Auckland*”, which is a charitable trust that is incorporated as a board under the Charitable Trusts Act 1957 and is registered as a charity on the Charities Register.

[7] The Respondent has six trustees (“*the Trustees*”), who are in a three versus three dispute for some considerable time. The Authority considers that it is this interpersonal dispute among the Trustees, with three of them strongly opposing Mr Chen, which is at the heart of the employment relationship problem. In the spirit of helping the parties to resolve their employment relationship problem, the Authority has made strong comments about some of the Trustees in this determination.

[8] The purpose of those comments, which align with similar comments made during the case management conference on 14 April 2023, is to strongly encourage the Church and

congregation to take steps to resolve the Trustees' conflict outside of the Authority's and High Court's proceedings, because what has been occurring is not good for anyone. The Authority hopes this interim reinstatement determination acts as a 'wake-up call' that the situation between the Trustees that has existed up until now should not be allowed to continue.

[9] The Trustees are engaged in High Court litigation against each other and they have also taken opposing, and contradictory, positions on behalf of the Respondent in these Authority proceedings. They have also been unable to agree on basic issues such as what was discussed or agreed at Board meetings or on the contents of Minutes that have been issued.

[10] The Trustees' dispute is a serious matter that needs to be urgently resolved by the Church. Doing that will be a civil matter that is beyond the scope of this interim reinstatement determination.

[11] However, the Authority notes that the Trustees' dispute also has employment law implications, so the poor state of the relationships between the Trustees will need to be addressed to ensure the Respondent's employment law obligations are met. The Church should take lead responsibility for ensuring that occurs, if the Respondent is unwilling or unable to due to the extent of the dispute that exists between the Trustees.

[12] On the face of it there appears to be a serious question as to whether or not the Trustees are able to function in way that appropriately discharges the Respondent's legal duties and obligations. The Church may want to investigate those issues and if necessary take appropriate action to address the problems that are very evident.

[13] On 20 April 2022 the Respondent's Treasurer, Ms Julia Buhagiar, stopped paying Mr Chen's remuneration. Although she was told by another Trustees that was unlawful, who also sent her a copy of the Employment Relations Act 2000 ("*the Act*"), she has refused to pay Mr Chen since then. Her decision about that is supported by two of the other Trustees.

[14] Mr Chen claimed that the unilateral stopping of his remuneration amounted to an unjustified dismissal and he has sought interim reinstatement.

[15] Mr Chen has continued to perform his usual duties as Senior Pastor since his remuneration was stopped, but has done so without pay, on the basis that his role is more than a job for him. Mr Chen sees his role as him answering God's call to dedicate the rest of his

life to the Church. He is the only Pastor at the Church, so he feels it is his responsibility to continue to support the congregation.

[16] Three of the Respondent's trustees (including Mr Chen) support his position. The two trustees who support Mr Chen said the Respondent had no legal authority to stop his salary and they both support his interim reinstatement.

[17] The three trustees who oppose Mr Chen appear to do so vehemently. They say Mr Chen's engagement (whatever the nature of it was) ended on 31 March 2022 and he should not be reinstated. They have also claimed the Authority does not have jurisdiction over Mr Chen's claims, because he was never employed by the Respondent.

[18] Such a position appeared to fly in the face of overwhelming evidence to the contrary, so it raises the question about whether or not the three Trustees who oppose Mr Chen have been acting consistently with the duty of fidelity they have to the Respondent in their role as Trustees.

[19] The Church may want to investigate that concern, as well as whether the current Trustees have got to the point where they are unable to work together to discharge the Respondent's legal obligations. Three of the Trustees will not accept the ruling made by the Mother Church, which was brought in its role as the leading spiritual authority to help resolve the dispute about Mr Chen's employment.

The Respondent's conflicting response to Mr Chen's claims

[20] The Respondent has filed three Statements in Reply ("SiR") in response to Mr Chen's Statement of Problem. Trustee Yang Liu filed a SiR that supported Mr Chen's claims, as did Trustee Jiedan Li.

[21] The SiR lodged by Jiedan Li said that the Respondent "*fully agree and support all applications made by Pastor Xi Chen.*"

[22] The SiR also said that the suspension of Mr Chen's salary and his dismissal was not a decision the Respondent had made as "*the suspension of Pastor Chen's salary is entirely the decision of the Church's finance department.*" That quote meant Ms Buhagiar had made the decision herself, in a way that was outside the Respondent's authority or approval. She and two other Trustees denied that.

[23] Yang Liu said Mr Chen was employed as a permanent full time salaried employee, and that the suspension of his remuneration was a unilateral act the Respondent had not authorised, and disagreed with.

[24] Yang Liu also said the dispute between the Trustees about Mr Chen had been referred to the Mother Church in Taipei for advice and resolution. After considering the views of 100 people, the Mother Church issued a decision dated 29 April 2022 that said Mr Chen should continue in his role as Senior Pastor.

[25] Ms Buhagiar, Jianan Zhang and Xin (Connie) Huang are together referred to in this determination as “*the Opposing Trustees*”. These three Trustees refused to accept the Mother Church’s advice or outcome, so they have continued to actively resist Mr Chen.

[26] The third SiR was lodged by the Opposing Trustees. It said the Respondent did not employ Mr Chen, as he was employed by the Church under a fixed term employment agreement that had expired on 31 March 2022.

[27] That position contradicted the witness statement filed in support of the Opposing Trustees on 26 January 2023 by Zhihong (Cathy) Xie, who is a Church member who had also been a trustee from 2017 to 2020. Ms Xie’s statement said “*Our Church does not “employ” people.*”

[28] The SiR of the Opposing Trustees also said the Respondent paid Mr Chen’s salary, on behalf of the Church in furtherance of the Trust’s charitable purposes.

[29] They also said these Authority proceedings should have been brought against Becky Bi and Jack Cui who had signed Mr Chen’s employment agreement on 2 September 2019, They had signed the employment agreement on behalf of the Respondent as the group leaders of the Core Leadership Committee that was responsible for establishing and improving Human Resources rules and regulations.

[30] Ms Bi is someone who supports Mr Chen, so that evidence by the Opposing Trustees was disingenuous. If it were up to Ms Bi, then Mr Chen would be back at work and the Opposing Trustees are actively trying to prevent that from occurring.

[31] Ms Bi filed a witness statement on 13 March 2023 that said the Human Resources group members approved the draft employment agreement that was given to Mr Chen. Before that

occurred the draft employment agreement had also been approved by Pastor Zhou, who was the representative of the Mother Church in the Oceania area in 2019. The employment agreement was therefore not created or signed independently of the Respondent.

The Authority's investigation

[32] Mr Chen applied for interim reinstatement and urgency when he lodged a Statement of Problem with the Authority on 5 July 2022 alleging that he had been unjustifiably dismissed. The matter was granted urgency and the parties were directed to mediation. A timetable was set for the interim reinstatement matter to be determined 'on the papers'.

[33] Before that occurred, Mr Chen elected to put his interim reinstatement application on hold on a 'sine die' basis, which meant it could be reactivated. At the time the parties were focussed on the High Court proceedings and were undertaking mediation in connection with that.

[34] The unjustified dismissal claim was set down for a two-day substantive Investigation Meeting ("IM") on 27 and 28 April 2023. The witnesses speak Mandarin as their first language, so full interpretation of the IM was required.

[35] The parties subsequently filed witness statements in support of the unjustified dismissal claim. Some of the witness statements filed by the Applicant were disputed by the Opposing Trustees, who sought to have them withdrawn. The Opposing Trustees also sought additional time to file witness statements that responded to the disputed evidence.

[36] In preparing for the substantive IM, the Authority noted that the parties' witness statements did not adequately address the issues that had been identified during the case management conference held with the parties on 29 September 2022, which had also been recorded in the 'Directions of the Authority' that were issued to the parties that same day.

[37] An urgent case management conference ("CMC") was convened on 14 April 2023 to discuss issues associated with the substantive IM that was due to occur on 27 and 28 April 2023.

[38] During this CMC the Authority expressed concern that there would be insufficient time available during the allocated two-day investigation meeting for all nine witnesses to be heard, particularly when there would be full translation of the proceedings.

[39] That presented a bigger problem than usual, because the evidence filed by the parties at that point did not adequately address the issues that the Authority would be determining. That omission meant evidence would need to be led from the witnesses during the IM in order to address the issues that needed to be determined, because it had not been covered in their witness statements, thereby further lengthening the IM.

[40] After discussion with the parties, it was agreed during the CMC that the time available for the IM would likely be insufficient and that it was undesirable for the IM to go part heard. If the IM was not completed in two days then the next available dates with this Member (at that time) were in October 2023.

[41] It was agreed that it would be highly undesirable to have such a long gap between IMs. Starting the IM in April but having to adjourn it ‘part heard’ until October was therefore not considered to be a viable option. For these reasons, the April IM was vacated.

[42] The Authority took the opportunity during this CMC to express preliminary views on the evidence that had been filed by the parties so far, and how that related to the various issues that would be being determined and in particular what the law required.

[43] The Opposing Trustees’ counsel was specifically asked to convey the Authority’s views to them and to ensure they were aware of the relevant law that applied to Mr Chen’s situation.

[44] The Authority also asked the Opposing Trustees’ counsel to raise with them the possibility that they could be publicly criticised in a determination if this matter proceeded. Ms Buhagiar’s conduct was identified by the Authority as appearing to be of particular concern, based on the evidence that had been filed to date.

[45] The Authority wanted to forewarn the Opposing Trustees, and Ms Buhagiar in particular, that there could be public criticism of their/her actions, so they/she could be adequately prepared for that. The Authority recognises how personally damaging adverse comments made by it about individuals could be, so it is not something that is done lightly.

[46] The Authority recognises that its adverse comments about Ms Buhagiar could reflect poorly on her important role as the Respondent’s Treasurer. The Church and its congregation may wish to reflect on that.

[47] The Authority also expressed concern that Mr Chen had been unpaid since April 2022, but was continuing in his role. The Authority suggested that his interim reinstatement application could be reactivated, even though the April substantive IM dates had been vacated.

[48] After consultation with the parties, the interim reinstatement application was reactivated and the parties were directed to mediation (which was unsuccessful). A timetable was put in place for the interim reinstatement application to be determined 'on the papers'.

The evidence

[49] The parties have filed affidavit evidence and submissions on the reinstatement issue. They also filed witness statements and relevant documents on the substantive unjustified dismissal personal grievance claim.

[50] The Authority also had regard to the 191 page bundle of documents that was filed for the April 2023 substantive investigation meeting, which was vacated.

[51] Witness statements were lodged on 26 January 2023 by Xin (Connie) Huang, Zhihong (Cathy) Xie, and David Hsia in support of the position adopted by the Opposing Trustees. Ms Huang and Ms Xie converted their witness statements into affidavits, that they then lodged with the Authority on 6 June 2023.

[52] Witness statements were lodged on 13 March 2023 from Becky Bi, Ming Gao, Ruqing (Lucy) Dou, Yang Zhang and Yang Liu in support of Mr Chen.

[53] Witness statements were lodged on 24 March 2023 by Ms Buhagiar and Ms Huang on behalf of the Opposing Trustees. Ms Huang lodged further statements on 2 May 2023 and 15 May 2023.

[54] In terms of Mr Chen's evidence, the Authority has had regard to the affidavit he lodged on 8 July 2022, along with a copy of the affidavit dated 29 September 2022 he lodged with the High Court (a copy of which was provided to the Authority on 7 December 2022) along with his affidavit lodged in this matter on 10 May 2023 and his reply affidavit that was lodged with the Authority on 25 May 2023.

[55] The Authority also considered the witness statement Mr Chen filed that was dated 18 November 2022 (lodged with the Authority on 6 December 2022) along with his reply statement dated 28 February 2023, which was lodged with the Authority on 1 March 2023.

[56] Ms Buhagiar lodged an affidavit dated 28 July 2022 with the Authority on 29 July 2022 on behalf of the three Opposing Trustees. She also lodged additional affidavits on 26 May 2023 and 6 June 2023.

[57] The Authority requested and was also provided with a copy of Ms Buhagiar's High Court affidavit dated 20 July 2022, which was lodged with the Authority on 6 June 2023 (along with the other affidavits she lodged that same day).

[58] Both parties have also emailed the Authority additional information and responses to questions the Authority had posed.

[59] Both parties filed written submissions.

[60] The Authority has had far more evidence and information available to it than would normally be the case in an interim reinstatement application. It has received all of the evidence that relates to the substantive unjustified dismissal personally grievance claim. It has also spoken to the parties' counsel in detail about this matter at two case management conferences, so the Authority has been well placed to be able to form a realistic preliminary view on the merits of this matter.

Issues

[61] The following issues are to be determined:

- (a) Overview of, and findings on, material facts;
- (b) Were the parties in an employment relationship?
- (c) If so, does Mr Chen have an arguable case that he was unjustifiably dismissed?
- (d) If so, does he have an arguable case that he would be reinstated?
- (e) If so, where does the balance of convenience lie until the substantive claims can be determined?
- (f) Where does the overall justice lie pending the determination of the substantive unjustified dismissal claim?

- (g) What costs should the successful party be awarded?

Overview of, and findings on, material facts

The Church

[62] The Church is an unincorporated body of persons who share a common religious belief. There are eight Bread of Life churches in Auckland and one in Christchurch. There more than 600 Bread of Life Christian Churches around the world.

[63] The Respondent is the governing body of the Bread of Life Church (“*the Church*”) and it holds and is responsible for the Church’s assets, which come from donations.

[64] The Church is part of the global Bread of Life church network, established by the Bread of Life Church in Taipei (“*the Mother Church*”). The Mother Church provides spiritual leadership, trains and ordains pastors of the Church and assists with disputes resolution.

Employment by the Church

[65] The Church has pastors and preacher who support it. Preachers are members of the congregation who implement parts of the pastoral vision of the Church. Some are paid. The Pastor(s) lead the Church.

[66] Being the Senior Pastor is a religious role. The Senior Pastor (sometimes called Chief or Principal Pastor) must be a person who has been anointed to lead the Church by the Mother Church.

[67] The Senior Pastor is therefore not selected by way of a normal employment recruitment process, because all pastors must have a calling from God. They must also be nominated by Church leaders, their nomination must be confirmed through prayer, and they are anointed by the Mother Church (or its representatives) to become formerly ordained as a Minister, at which time they commit to serve God and the Church.

[68] This means that accepting a paid role only happens where a person has been called by God for service, and it also requires validation from, and a need for the role by, the Church. The Respondent is then responsible for being the employer and meeting the legal obligations of the employment relationship. There is a Personnel and Salary Management Charter, and the Personnel Management Committee and the appointment letters support the Respondent’s employer role.

[69] The Respondent employs not only salaried pastors, but also salaried co-workers. Both groups pay taxes to IRD and contribute to KiwiSaver. They have designated job responsibilities, working hours and receive corresponding benefits and protections of employment law. Mr Chen was not the only Pastor the Respondent has paid a salary to.

Mr Chen's employment as Senior Pastor

[70] In 2011 Mr Chen started work as an unpaid preacher at Bread of Life Church. He began working as a salaried Preacher/Pastor in February 2015, but was not provided with a written employment agreement. However, he was treated as a salaried employee because he was paid a salary and had PAYE deducted remitted to IRD.

[71] Mr Chen was anointed as a Pastor and ordained on 11 March 2018.

[72] In March 2018, Mr Chen was nominated by five core fellows, assessed by the Taipei Mother Church in his role as Pastor, and then agreed by all of the core fellows of the Church, to be ordained as a permanent Pastor of the Auckland Bread of Life Church.

[73] Around May 2021 Mr Chen was appointed a Senior Pastor of the Church at a meeting, which has minutes and resolutions. All employment documentation was approved by the Core Fellowship at that time, before Mr Chen was offered his employment agreement to sign.

[74] The anointment and dismissal of a Senior Pastor is always done in consultation with the Mother Church. Mr Chen has therefore also been affirmed and authorised in his employment as Senior Pastor by the Mother Church. He is currently the only Pastor/Preacher in the Church.

Trust Deed and variations

[75] The original Trust Deed was signed on 21 July 1998. The previous trustees of the then named "*Bread of Life Christian Church*" were incorporated as a Board under the Charitable Trusts Act 1957 in 1998. The Trust changed its name to its present name of "*Bread of Life Christian Church in Auckland*" on 23 November 2005.

[76] A Deed of Variation of Trust was signed on 26 June 2008 for the purposes of clarifying certain terms of the Trust Deed to enable it to be registered as a Trust with the Charities Commission.

The Respondent's composition

[77] The Respondent's six trustees are in dispute and their dispute has been ongoing for some considerable time.

[78] Mr Chen and two of the Trustees said he is the Chairman of the Respondent's Board, while the Opposing Trustees disputed that. Mr Chen is supported by Trustees Yang Liu and Jiedan Li. These three Trustees are together referred to as "*the Supporting Trustees*".

[79] Ms Buhagiar (who is also known as Chunhua Zhao) is the Respondent's Treasurer and she along with Jianan Zhang and Xin (Connie) Huang are the three Trustees who strongly oppose Mr Chen, because they consider he is unsuitable for his role as Senior Pastor. Ms Buhagiar has taken on the lead role for the Opposing Trustees in opposing Mr Chen.

Issues between the Trustees

[80] From the outset some of the Trustees appeared to have issues with Mr Chen. For example, in May 2020 when he was nominated as Senior Pastor Trustees Ms Buhagiar and Jianan Zhang did not attend his evaluation meeting.

[81] In November 2021 Trustees Ms Buhagiar, Jianan Zhang and Ms Huang had a difference of opinion with Mr Chen which resulted in a three versus three opposition situation.

[82] On 27 January 2022, Mr Chen removed Ms Buhagiar, Jianan Zhang and Ms Huang from the WeChat Group of the Group Leader and Workers for breaching the rules about what was to be posted in the group. From that point on the conflict between the Trustees appears to have intensified.

[83] The Authority's strong encouragement (in the 14 April CMC) to the Trustees to resolve their differences by agreement and mediation have been unsuccessful.

High Court proceedings

[84] Trustees Ms Huang, Ms Buhagiar and Jianan Zhang issued High Court proceedings under Part 18 of the High Court Rules and the Trusts Act 2019 against the three other trustees (Mr Chen, Yang Liu and Jiedan Li). The Authority has been advised that those proceedings involve a dispute about the Church's property and how it should be used.

April 2022 issues

[85] On 12 April 2022 the Trustees met and discussed Mr Chen’s position as Senior Pastor. The Opposing Trustees did not want him to continue in his role. A decision was made to refer the dispute to the Mother Church. That resulted in the 29 April 2022 decision in support of Mr Chen.

Ms Buhagiar’s decision to stop paying Mr Chen

[86] Ms Buhagiar decided to stop paying Mr Chen’s salary from 20 April 2022 because said his fixed term had expired on 31 March 2022.

[87] The Supporting Trustees told Ms Buhagiar that she was not permitted to simply stop paying Mr Chen his remuneration, as that was a breach of employment law. They also pointed out that there had been no Resolution to do so. Despite that, Mr Chen has not been paid since 20 April 2022.

[88] However, as a result of these proceedings a range of retrospective explanations, some contradictory and conflicting, have been given for Ms Buhagiar’s decision to stop paying Mr Chen. These have included:

- (a) Mr Chen was not an employee in a legal sense because his appointment was a spiritual one;
- (b) New Zealand employment law did not cover Mr Chen because he had signed a Declaration that said his appointment transcends the “*secular relationship*” and that he “*gives up any right of action that the law gives him*” and that in the event there was a dispute he will submit to the final ruling of the “*Bread of Life Christian Church in Auckland and Taipei Breach of Life Church*”, which the Authority noted is the “*Mother Church*”;
- (c) There was no employment relationship between the Respondent and Mr Chen;
- (d) He was employed for a fixed term that expired on 31 March 2022;
- (e) There was no valid employment agreement in place after 31 March 2022 so Mr Chen could not be paid;
- (f) Mr Chen was not employed because he failed to reapply for his role or to apply for an extension of his fixed term engagement after 31 March 2022;

- (g) Mr Chen had engaged in misconduct and/or serious misconduct and/or his performance was not up to standard, so he should not be allowed to continue in his role; and
- (h) Three of the Trustees and some of the Church's congregation (possibly around 20 people) did not want Mr Chen to continue in his role as Senior Pastor.

The Core Fellowship Committee

[89] In or around 2016, the Mother Church established a Core Fellowship Committee, also described as a Core Officer Committee or a Core Leadership Committee (these are all the same and are referred to as "*the Committee*"). The Committee has 14 members.

[90] On 5 April 2017 the Committee formulated and passed an Organisation Protocol and Rules of Service of the Core Officer Committee ("*the Protocol*"). From April 2017 the Church was governed by the Committee, which applied the Protocol and Regulations it had promulgated.

[91] From October 2017 to May 2022, the Committee performed the Respondent's functions and managed the assets of the Church. There were no Board meetings held during this time, with the only action taken by the Trustees being to sign legal documents to acquire property in 2017. The Authority was told that the Trust Deed was not followed during that period.

[92] The day to day management of the Church was performed by the Committee, which consists of all members of the Core Fellowship. The Personal Management Committee is a subordinate management committee of the Core Fellowship Committee, consisting of unsalaried members of the Core Fellowship. The spiritual aspect of the Church is led by the Pastoral Staff Association, who support Mr Chen.

Employment agreement

[93] Although Mr Chen has held a salaried Preacher/Pastor position since 2015 he did not initially have a written employment agreement. However, that changed when the parties signed a written "*employment contract*" (i.e. agreement) dated 2 September 2019.

[94] The Chinese version of the agreement was headed up in English "*Bread of Life Christian Church in Auckland*" which is the Respondent's legal name/identity.

[95] The “*employment contract*” (meaning employment agreement) that Mr Chen signed on 2 September 2019 stated that the date of employment was “*from 2nd September 2019 to 31st March 2022*”.

[96] Clause 10 of the employment agreement dealt with “*contract renewal*”. It stated that two months before the “*contract expires*”, Mr Chen needed to apply in writing to the “*Personnel and Payroll Management Committee*” for a renewal.

[97] In which case, the “*Core Fellowship Committee*” would determine whether or not “*to hire the person using the personnel and payroll management statute. A new contract needs to be signed to continue hiring an old person.*”

[98] The reference to “*statute*” is to the “*personnel and payroll management regulations*” (“*the Regulations*”). These were drafted on or around 4 March 2019, but there is a dispute about whether or not they were implemented.

[99] Mr Chen did not apply for a renewal of his contract/agreement because he believed he had permanent ongoing employment. Two of the other Trustees agree with that position.

Personnel Management Committee

[100] The Regulations provided that the Personnel Management Committee (“*PMC*”) was set up under the “*Council of Core Fellows*” (meaning the Committee). The PMC is a standing body of the Church and was responsible for the personnel management of the Church itself and the branch churches (meaning the evangelistic centres it had developed).

[101] The PMC was responsible for personnel management and appraisal of the “*Paid Fellows*” (meaning salaried Pastors). The Regulations dealt with the “*employment of paid Fellows*”) and set out the expected qualifications and pay rates for “*fellows*” (meaning paid employees) along with welfare and leave management entitlements and processes.

[102] The Regulations included a disciplinary process that allowed investigation and disciplining of paid employees for misconduct. The disciplinary process provided for written warnings, suspension and termination.

[103] Leave was provided in accordance with the Holidays Act 2003 (“*the HA03*”) and PAYE, ACC and KiwiSaver contributions, including the compulsory employer contribution to

KiwiSaver were to be deducted from the salaries of employees and remitted to IRD. Travel expenses were also covered.

[104] No decision was made by the PMC to end Mr Chen's employment or to stop paying him his salary.

Relevant law

Jurisdiction issue

[105] For the Authority to have jurisdiction to be able to investigate and determine Mr Chen's unjustified dismissal claim he must establish on the balance of probabilities that the parties were in an employment relationship, as defined in the Employment Relations Act 2000 (*"the Act"*).

[106] Section 5 in the Act interprets an employment agreement as any of the employment agreements specified in s 4(2) of the Act.

[107] Section 4(2) of the Act defines an employment relationship as (among other things) the relationship between an employer and an employee employed by the employer. Section 4(2) of the Act does not include parties who are in an independent contractor relationship or individuals who volunteers who work without reward.

[108] Section 6 of the Act defines the meaning of *"employee"*. It includes any person employed by an employer to do work for hire or reward under a contract for service.

[109] Section 6(2) of the Act requires the Authority, in determining whether or not a person is an employee, to determine 'the real nature of the relationship' between the parties.

[110] When doing so, s 6(3) of the Act requires the Authority to consider all relevant matters, including the intention of the persons involved, but it is not to treat as determinative any statement by the parties which describes the nature of their relationship.

[111] The labelling of the relationship by the parties is therefore merely one of the factors to be considered within the overall mix. So the intention of the parties is relevant, but not decisive of whether or not Mr Chen was an employee.

[112] The control test, integration test and fundamental/economic reality of the relationship test are all relevant factors to be considered along with all other relevant matters. This means that the Authority's inquiry into the real nature of Mr Chen's relationship is intensely factual.

[113] If the parties are in an employment relationship, then the Authority can go on to consider the interim reinstatement application. If not, then that is the end of the matter.

Interim injunctions

[114] The Authority is required to determine the interim reinstatement application by applying the law relating to interim injunctions, having regard to the object in s 3 of the Employment Relations Act 2000 (*"the Act"*). Section 3 of the Act refers to building productive employment relationships through the promotion of good faith behaviour.

[115] There are three steps required when determining this interim reinstatement application.

[116] The first is whether there was a serious issue to be tried, which is referred to as the *"arguable case test"*. This involved determination of whether or not Mr Chen has an arguable case for both aspects of his claim, namely that he was unjustifiably dismissed and if successful he would likely be reinstated on a permanent basis, instead of just receiving monetary remedies.

[117] The second step required the Authority to assess how best to regulate the positions of the parties until it had completed its substantive investigation into his unjustified dismissal claim. This assessment is referred to as *"the balance of convenience"*.

[118] Factors to be assessed include whether effective remedies were available to Mr Chen (other than interim reinstatement) and the effects interim reinstatement would have on the parties and others, such as the Church, its congregation and on those who opposed him because they believed he was unsuitable for his role.

[119] The third step in the process required the Authority to take an overall global view of the justice of the situation to determine what should be done in the interim period until the unjustified dismissal claim could be determined. Strengths and weaknesses in the parties' case were a relevant factor to weigh in reaching a conclusion at this stage.

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

[120] The Authority finds that the parties intended for them to enter into an employment relationship and for Mr Chen to be an employee.

[121] Mr Chen clearly expected to work in return for the reward of a salary after he transitioned out of his voluntary unpaid Preacher role. This intention was evident from the process that he went through in order to become an employee.

[122] Mr Chen took all of the necessary steps to enable him to transition from working as an unpaid Preacher to working in a salaried Pastor role. He was also promoted in May 2021 to the salaried “*Senior Pastor*” role, thereby showing career progression.

[123] The parties recognised that the salaried role of Pastor had a spiritual and a legal dimension. The spiritual aspect was covered by the “*Calling Declaration*”. The legal aspect was covered by the employment agreement.

[124] From a spiritual point of view, Mr Chen was called by God to serve a higher purpose as a Pastor and to lead the Church’s congregation, and he did that by obtaining approval from the Church and the Mother Church. From a legal and practical perspective, the parties also intended for him to be employed by the Respondent as the Pastor of the Church, which is why the Committed and PMC employed him.

[125] The dispute about Mr Chen’s status has only arisen in connection with these proceedings, as the Opposing Trustees have attempted to remove Mr Chen from his role with the Church. For the seven and a half years before that there was no dispute that Mr Chen, or for that matter the other previous paid Pastors, were salaried employees.

[126] Because of the various ongoing disputes between the Trustees, the Respondent has adopted the unrealistic position of saying it has a ‘split position’ because it both supports and opposes Mr Chen’s claims.

[127] Three of the Respondents’ Trustees (which included Mr Chen himself) said he was an employee who had been unjustifiably dismissed and should be returned to his role. The fact that half of the Trustees acknowledge the existence of the employment relationship should in itself should be decisive of Mr Chen’s status.

[128] When the Opposing Trustees were pressed to explain what the relationship with Mr Chen was if he was not an employee they struggled to do so. The Authority notes that as Treasurer Ms Buhagiar has been responsible for paying Mr Chen's salary as if he was an employee, so her recent claims that he was never employed by the Respondent appear to be based on her opposition to him returning to work.

[129] While the parties could have legally structured their relationship with Mr Chen in a way that made it clear he was not an employee, they elected not to. At the time the employment agreement was signed in September 2019 he had been treated as if he was a salaried employee since February 2015. The parties' mutual intention was to simply formalise the current arrangement in a written employment agreement.

[130] The HR Group WeChat group for the Respondent circulated the draft employment agreement for Mr Chen to nine members of that committee who all had input into it before it was finalised and offered to Mr Chen to sign. No-one disputed that he would be an employee or that the relationship would be an employment relationship.

[131] If there had not been a mutual intention that Mr Chen was to continue to be employed as a salaried Pastor then that was the time to have raised those concerns, and that did not occur.

[132] The minutes of the Core Fellowship Committee dated 2 September 2019 recorded that two Pastors (one of whom was Pastor Chen) had "*signed the employment contract*". There were 13 members of the Core Fellowship Committee present at the meeting, and minutes were circulated afterwards. Mr Chen's ongoing employment was obviously intended or an issue would have been raised at that time.

[133] The Opposing Trustees also appeared to have unwittingly acknowledged that there was an employment relationship, because the minutes of the Board meeting held on 12 April 2022 reflected employment related language. They referred to the fact that "*since the original employment contract has expired, salary payment will be suspended until the new employment contract is concluded*".

[134] These minutes were prepared by Jianan Zhang, who is one of the Opposing Trustees, so it reflected his thinking at that time. The Authority noted that the Supporting Trustees disputed the accuracy of the Minutes as they say the Respondent did not agree to suspend Mr Chen's salary payments during the 12 April 2022 meeting.

Relevant documentation

[135] The parties entered into a written employment agreement which did not change the nature of the relationship that had been in place since 2015, but which did record written terms and conditions of the employment.

[136] Although this document was described by the parties as the “*employment contract*”. The Authority has referred to it in this determination as the “*employment agreement*”, which is the correct terminology under the Act.

[137] The employment agreement also used ‘employment related’ language such as “*We hereby employ*”, “*employment instructions*”, “*date of employment*”, “*salary*”, “*PAYE*”, and “*KiwiSaver*” and “*ESCT deduction*”. This strongly indicates an employment relationship.

[138] In addition the employment agreement recorded the hours of work, the remuneration, the fact that KiwiSaver and ESCT would be deducted and that the employer would pay an extra three percent KiwiSaver compulsory employer contribution in addition to the base salary that was to be paid.

[139] There were leave provisions that aligned with the requirements of the HA03. It also recorded a long service leave entitlement that gave Mr Chen three months paid leave after he had worked for seven consecutive years.

[140] There was also a termination clause and the ability to terminate the employment for serious misconduct (with examples being given), or if Mr Chen failed to meet the standards set by the Personnel Payroll Management Statute. The Authority considers that the reference to “*statute*” was to the Regulations.

[141] The employment agreement was stated to be a “*complete contract*”, which meant that it superseded any previous written or oral contract.

[142] The HR Management Committee was to oversee the personnel file management and payroll management and any “*unsettled affairs relating to the employment*” would be governed by the Bread of Life Christian Church’s Personnel and Payroll Management Statute (meaning the Regulations).

[143] The Calling Declaration which was signed on 4 September 2019 stated that Mr Chen “*was hired by the Church as a full time Preacher*”. It noted that if there were issues with the

relationship then he was willing to seek a solution through communication and negotiation with the Church, and he was willing to submit to a final ruling of the Bread of Life Christian Church in Auckland and the Taipei Bread of Life Church (which was the Mother Church).

[144] Mr Chen has acted in accordance with that, because the issues involving his employment have been referred to the Mother Church, which on 29 April 2022 confirmed his employment as Senior Pastor should continue. That decision was made knowing the Opposing trustees and approximately 20 members of the congregation did not want him there.

[145] It is the Opposing Trustees who have been unwilling to accept that outcome. Mr Chen said in his affidavit that the Calling Declaration meant he recognised that if he was not supported by the Mother Church then his employment would be untenable, because of the core religious and spiritual aspect of his role.

[146] The Opposing Trustees' submission that the "*Calling Declaration*" meant Mr Chen gave up any legal rights he had, did not succeed, because parties may not contract out of the minimum protections of employment law legislation.

[147] An individual who met the legal test in s 6 of the Act of being an employee, who was in an employment relationship, will be covered all of the minimum code employment legislation. Therefore even if the parties intended for Mr Chen to give up all of his employment rights by signing the Calling Declaration (which he denied), then such an attempt to contract out of the protections of the Act is null and void.

[148] The Calling Declaration did not extinguish the employment relationship the parties had been in since 2015, or the employment agreement which had been signed on 2 September 2019. The Calling Declaration simply recognised the spiritual dimension of the role Mr Chen had been employed to do.

The parties' actions

[149] The parties have acted consistently with there being an employment relationship. The first time an issue was raised about Mr Chen not being an employee was in connection with this matter.

[150] Ms Buhagiar in her High Court affidavit dated 20 July 2022 stated that:

- (a) “*Pastors are employed and paid by the Board.*” The reference to “*Board*” was to the Respondent.
- (b) “*Mr Xi Chen was employed as a pastor from 2 September 2019 until his contract expired on 31 March 2022.*”
- (c) “*On 2 September 2019 Mr Chen and [another named Pastor] both signed new fixed-term employment contracts.*”
- (d) “*Mr Chen’s fixed term employment contract expired on 31 March 2022.*” and
- (e) “*The Board [meaning Respondent] voted not to support the renewal of Mr Chen’s contract.*”

[151] The Respondent treated Mr Chen as if it employed him. It paid him. It stopped his salary. It allegedly decided his employment should end. It is apparently resisting his return to work. The Opposing Trustees did not say in their SiR that the Respondent did not employ Mr Chen. They said he was a fixed term employee, whose employment had expired.

[152] The Respondent has paid Mr Chen a salary and has deducted and remitted PAYE from his salary to IRD since 2015. From at least 2 September 2019 the Respondent has also paid the KiwiSaver compulsory employer contribution to IRD for Mr Chen’s benefit, which indicates it recognised the parties were in an employment relationship.

[153] Although the employment agreement provided a mechanism for addressing concerns about Mr Chen’s conduct or performance, he has never been subject to a performance management process or to any disciplinary allegations or disciplinary process or disciplinary finding or disciplinary outcome.

Payment

[154] The fact that Mr Chen received a salary and PAYE was deducted and remitted to IRD is indicative of an employment relationship. As was the fact the Respondent paid the Compulsory Employer Contribution to KiwiSaver in addition to deducting Mr Chen’s employee contributions.

Taxation arrangements

[155] The Respondent, as the employer, paid Mr Chen’s tax and deducted any other compulsory deductions and remitted them to IRD.

[156] Mr Chen did not invoice for his services and while he initially worked as a voluntary unpaid Preacher, that changed when he became a paid salaried Pastor/Preacher in February 2015.

Was Mr Chen in business on his own account?

[157] Mr Chen was not in business on his own account. He did not contract his services to the Church or congregation. Instead he was called to serve.

[158] Mr Chen had never operated his own business in terms of the work he did for the Church and its congregation. He did not have a business entity which would have enabled him to have done so. He did not set up or own a company or other legal entity through which a business was operated.

[159] Mr Chen took no risks and had no opportunity to profit from his actions, he was merely paid a salary that had been calculated based on a specific hourly rate.

The control test

[160] The control test looks at the degree of control that is exerted over the work and the manner in which it is done. The greater extent to which an individual is regulated and supervised then the more likely they are to be considered an employee.

[161] Mr Chen was the most senior employee in the Church and he was the sole Pastor. He therefore had a high level of responsibility and authority, but was required to exercise that consistent with the principles and values of the Church and of the Mother Church.

[162] The employment agreement set out the prescribed duties and responsibilities he was expected to undertake, and he could be subject to a disciplinary process if he did not meet those requirements.

[163] The Authority considered that the degree of control that existed and the ability to discipline him was indicative of an employment relationship.

The fundamental/economic reality test

[164] The fundamental test looks at whether a person performing services is in business on their own account. There was no evidence that Mr Chen was operating business venture on his own account.

[165] The fundamental/economic reality test strongly suggested the existence of an employment relationship.

The integration test

[166] The integration test considers whether the work performed by Mr Chen was an integral part of the Respondent's operation and whether he had effectively become 'part and parcel' of the Church.

[167] There was no evidence to suggest that Mr Chen could or would be seen by anyone, including outsiders, as anything other than someone who was completely integrated into the Church. There was no evidence to suggest that he was operating in a solo or independent manner, distinct from the Church.

[168] The integration test was indicative of the existence of an employment relationship.

Tools of trade

[169] Mr Chen was provided with all of the equipment, including a laptop and phone, that was necessary to allow him to perform his duties and responsibilities. He was paid travel reimbursement. This supports the existence of an employment relationship.

Ability to subcontract

[170] Mr Chen could not subcontract out his role as Senior Pastor of the Church. He was only appointed to that position after a very specific process, which had a strong religious element, had been undertaken. He was expected and required to personally undertake the role and duties of the Senior Pastor.

Ability to work for others

[171] The issue of Mr Chen working for others never arose. Mr Chen has devoted his time to the Church and its congregation. There was no evidence that he received income from elsewhere or engaged in other work activities that were not related to his responsibilities or duties as an employee of the Respondent.

Industry practice

[172] There was no evidence about this, so it is considered to be a neutral factor. A religious institution may put in place a process that makes it clear that someone who is undertaking religious duties is not an employee. However, that did not occur in this case.

Identity of the employer

[173] The Opposing Trustees have argued that although the Respondent paid Mr Chen, it had no legal relationship with him. The Authority considered that was an unduly technical approach to the issue of Mr Chen's status, which did not align with the requirement to determine 'the real nature of the relationship'.

[174] Accordingly, that submission was not accepted, because the Authority has examined the real nature of the relationship. Mr Chen was clearly working for reward, because he provided his services and in return he was remunerated for doing so.

[175] The Respondent is the legal entity that delivered the salary to Mr Chen and it managed his employment, as is evident by the Opposing Trustees deciding to end the employment because they were unhappy with him.

[176] The Respondent was therefore the legal entity that had to meet the legal obligations it had as an employer. The Core Fellowship Committee acted as an agent of the Respondent in arranging Mr Chen's employment and the PMC was delegated to manage the employment relationship. However, the Respondent was responsible for employing, paying and dismissing Mr Chen's.

[177] Contemporaneous documents, including meeting minutes and WeChat messages show:

- (a) The Trustees believed that the continuation of Mr Chen's employment was an issue to be decided by the Respondent; and
- (b) The Opposing Trustees believed the Respondent had the power to end the relationship with Mr Chen, and it did so.

[178] The actions of the Opposing Trustees were therefore inconsistent with their assertion that Mr Chen was not employed by the Respondent, but was employed by the Church congregation as a whole, with the Respondent only processing his pay.

Summary

[179] The parties intended there to be an employment relationship, and they acted consistently with there being an employment relationship.

[180] The available documentation supports the existence of an employment relationship. The signed employment agreement and the Personnel and Payroll Management resolution strongly point to the establishment of an employment relationship. These documents provide for many of the usual features of an employment relationship:

- (a) Mr Chen's hours of work were fixed rather than flexible, as was his pay;
- (b) PAYE, KiwiSaver and ACC levies were deducted from his pay;
- (c) His expenses were reimbursed;
- (d) He was provided with leave under the HA03;
- (e) He could be investigated for misconduct and/or poor performance and he could have disciplinary sanctions imposed on him.

[181] The Declaration of Calling confirmed that Mr Chen's relationship with the Church was more than simply a secular relationship. This acknowledged that he had been called by God to serve the Church and that any disputes about his appointment as Pastor should be submitted to the Mother Church. It did not amount to a contracting out of employment law protections.

[182] The written documents evidence the intention of the parties, and this intention was not departed from in practice. Both at the time of Mr Chen's engagement and his dismissal the parties referred to the relationship as one of employment.

[183] The following features indicated the existence of an employment relationship between the parties:

- (a) Mr Chen's pay and taxation were processed like an employee;
- (b) Mr Chen was not in business on his own account. He did not operate a trading entity, pay GST or have the ability to make a profit from his efforts;
- (c) Mr Chen did not use his own equipment. He was provided with a mobile phone, computer, printer and projector to enable him to perform his role;

- (d) Mr Chen's expenses, including vehicle mileage, airfares and accommodation were paid by the Respondent;
- (e) The Respondent paid for Mr Chen's approved continuing education, such as theological education expenses and attendance at conferences;
- (f) Mr Chen's role as a Senior Pastor was integral to the spiritual leadership and management of the Church;
- (g) Mr Chen's role as Senior Pastor was a full time position which left him with little time to conduct other non-work endeavours;
- (h) The spiritual leadership of the Church cannot be contracted out. Mr Chen was engaged personally because he had the appropriate training and had been approved and ordained via the Mother Church to be the Senior Pastor of the Church.

Finding on the real nature of the relationship

[184] Standing back and weighing all of the various factors to determine the real nature of the relationship has satisfied the Authority that Mr Chen was more likely than not an employee, who was an employment relationship with the Respondent, as defined by the Act.

[185] Because Mr Chen has established that he was an employee in terms of the definition of employee in s 6(1)(a) of the Act, the Authority was satisfied it has jurisdiction to investigate his unjustified dismissal claim and to determine this interim reinstatement application.

Does Mr Chen have an arguable case that he was unjustifiably dismissed?

[186] Mr Chen bears the onus of establishing that there is a serious question to be tried, and that his unjustified dismissal claim was not frivolous or vexatious. This is a relatively low threshold to meet, and Mr Chen has easily done so.

[187] The Authority's assessment of whether or not Mr Chen had an arguable case that he had been unjustifiably dismissed focused on whether there were credible arguments to be made, and there clearly were.

[188] Mr Chen's salary was unilaterally stopped. He had not been subjected to any disciplinary process, nor did he agree to his employment being stopped. There was no evidence

produced to support the existence of a fixed term agreement, which met all of the legal requirements of s 66 of the Act.

[189] The failure to pay an employee their salary, and the failure to recognise the existence of the employment relationship, amounts in law to a dismissal. The Respondent's complete failure to comply with any of its good faith and procedural fairness obligations means it will be unable to meet the requirements of the statutory justification test in s 103A(2) of the Act.

[190] Mr Chen has a strongly arguable case for unjustified dismissal.

Does Mr Chen have an arguable case that if his unjustified dismissal claim succeeded then he would be granted permanent reinstatement?

[191] Section 125(2) of the Act provides that reinstatement may be ordered by the Authority if it is "*practicable and reasonable to do so*". At the time that Mr Chen filed these proceedings, reinstatement was the primary remedy.

[192] The Authority considered that Mr Chen had a strongly arguable case for permanent reinstatement, should his unjustified dismissal claim succeed.

Where does the balance of convenience lie pending the resolution of the substantive unjustified dismissal claim?

[193] This factor requires the Authority to assess the potential consequences and impact on the parties of interim reinstatement, pending the resolution of the substantive unjustified dismissal claim. The impact on third parties was also a relevant factor for consideration.

[194] A preliminary assessment of the merits of Mr Chen's case established he has a strongly arguable case for unjustified dismissal and for permanent reinstatement. This weighs in his favour.

[195] Timing considerations also strongly favoured Mr Chen. He has been without income since 20 April 2022, while still undertaking all of the elements of his role. It is unfair that the benefit of his services has been received for so long, without him being remunerated for that. He has a family to support and is entitled to be paid for the work he is doing to support the Church and its congregation.

[196] A substantive determination could be as far away as early next year, and there is almost no time available this year for a substantive IM. This likely lengthy delay favours Mr Chen.

[197] The position adopted by the Opposing Trustees appears very weak. They have given retrospective and conflicting explanations for stopping Mr Chen's salary, none of which appear credible or to have merit.

[198] The disputed matters involving Mr Chen and his ongoing employment have been referred to the Mother Church. They heard from over 100 people before assessing that Mr Chen's employment should continue. Mr Chen has considerable support from the congregation, and from his fellow Pastors at related churches. He is also the only Senior Pastor available to the Church and its congregation. These factors favour Mr Chen.

[199] While the Opposing Trustees say that they are representing the views of some of the congregation, based on the available evidence their numbers appear to be significantly less (possibly around 20 people) than the 70 plus congregation members who support Mr Chen.

[200] Although the Opposing Trustees have put forward information which they claim shows Mr Chen is unsuitable for the Senior Pastor role, their concerns were considered by the Mother Church and not upheld. The evidence produced is also on the face of it insufficient for the Authority to conclude that Mr Chen should not be permitted to continue in his role.

[201] It was also significant that while the Respondent had the ability to discipline or performance manage Mr Chen, that did not occur. Even if there were valid concerns, they were not dealt with in a way that is consistent with the requirements of the justification test in s 103A(2) of the Act.

[202] At a minimum, that required Mr Chen to be given formal notification of the concerns and an opportunity to respond to them after he had been provided with all relevant information, before a decision adverse to his ongoing employment was made. None of that has occurred.

[203] Ms Buhagiar has suggested that the Respondent does not have funds to continue paying Mr Chen. That was not accepted because the Church owns property.

[204] There is also evidence before the Authority that suggests Ms Buhagiar as Treasurer may have deliberately depleted Church funds in order to make Mr Chen's return to work as a

salaried employee more difficult or even impossible. If the Church's funds have been inappropriately depleted then the Church should address that as a matter of urgency.

[205] Ms Buhagiar's actions regarding Church funds is something she will be questioned about during the Authority's substantive investigation. This could potentially result in adverse comment being made about her in the Authority's determination if her explanations are not accepted.

[206] For these reasons the Authority considers that the balance of convenience strongly favours interim reinstatement.

What does the overall justice of the case require?

[207] The Authority's assessment of the overall interest of justice required it to stand back and review the overall position regarding interim reinstatement.

[208] When balancing the respective rights of, and risk to, the parties and to others such as third parties, the Authority was concerned to ensure that the congregation continued to have a Pastor to support them and that Mr Chen should be paid for the services which he has been providing.

[209] The only impediment to that appears to have been Ms Buhagiar's unilateral decision to stop paying him his remuneration and the support she has in that decision from the other two Opposing Trustees and some congregation members.

[210] There does not appear to be a sound legal basis for Ms Buhagiar to have adopted that position, which was resisted by the Supporting Trustees (one of whom was Mr Chen).

[211] The role of Senior Pastor exists and is being performed by Mr Chen. Interim reinstatement will not create a significant change in the status quo, aside from remunerating Mr Chen for the work he has been doing for the past 14 months without pay.

[212] The Authority considered it unjust for the Respondent to continue to receive the benefit of Mr Chen's work without paying him. Mr Chen's evidence was that he needed his income to support his family, with his wife being involved in supporting him to perform his role as Senior Pastor.

[213] Mr Chen cannot easily find alternative employment. He has been ordained and approved to serve in this particular Church in the Bread of Life network. Mr Chen's role as Senior Pastor is also more than just a job for him. It is a spiritual calling from God. Monetary remedies are not going to be an adequate substitution for interim reinstatement in these circumstances.

[214] Mr Chen has the support of the Mother Church, the other trustees (barring the three Opposing Trustees), his pastoral colleagues and the vast majority of the Church congregation need him and want him back. Third party interests favour interim reinstatement.

[215] The Authority considers that the overall justice of the matter weighs heavily in favour of allowing Mr Chen to be reinstated so he can continue undertaking his duties as the Senior Pastor for the Church, but be paid for doing so, until his dismissal grievance can be determined.

[216] The overall justice follows the balance of convenience and therefore strongly favours Mr Chen.

Outcome of interim reinstatement application

[217] Mr Chen's interim reinstatement application succeeds, because the Authority's assessment of the balance of convenience and the overall justice strongly favoured interim reinstatement in all the circumstances.

[218] Within seven days of the date of this determination Mr Chen is to be fully reinstated to the Senior Pastor role he held prior to 31 March 2022. The seven day period provided is to enable to necessary payroll arrangements to be made to pay him his normal salary.

[219] Mr Chen is to be paid his usual remuneration from the date of this determination, meaning his first salary payment is to be calculated from today's date.

Observations

[220] The Authority is concerned about the attitude and approach adopted to date by the three Opposing Trustees. This suggested they may continue to strongly resist Mr Chen's reinstatement, so the Authority is concerned they may either individually or together work to undermine Mr Chen and his interim reinstatement.

[221] The three Opposing Trustees are therefore directed to engage with Mr Chen and the Supporting Trustees in a good faith manner that is consistent with the legal obligations placed on employers by the Act.

[222] The Opposing Trustees could potentially face personal penalties under s 134(2) of the Act if they aid, abet, incite and/or instigate breaches of the implied good faith obligations in Mr Chen's employment agreement.

[223] The Authority records that if the three Opposing Trustees are unable to act in good faith in the execution of their roles as trustees, which is legally required of them as Mr Chen's employer, then consideration may need to be given to formally removing them as trustees.

[224] Accordingly, Mr Chen has leave to revert back to the Authority on an urgent basis if the Opposing Trustees fail to comply with their good faith obligations as an employer.

[225] It may be in the best interests of the Church and its congregation if an investigation is conducted into whether the three Opposing Trustees are acting consistently or inconsistently with their duty of fidelity as trustees regarding their dealings with Mr Chen and regarding the High Court litigation they have commenced and these Authority proceedings. An objective assessment of that appeared to be long overdue.

[226] The Authority notes its view that the Respondent would also be far better served if it had trustees who could work together in constructive manner for the best interests of the Church and its congregation. The authority recommends that action should urgently be taken to achieve that.

Costs

[227] Mr Chen as the successful party is entitled to costs, which are reserved pending the outcome of his substantive unjustified dismissal claim.

Orders

[228] The parties are in an employment relationship.

[229] Mr Chen is reinstated to his role as a salaried Senior Pastor on the same terms and conditions that are set out in his employment agreement dated 2 September 2019.

[230] Mr Chen's full reinstatement is to occur within seven days of the date of this determination to give the Respondent time to setup the necessary payroll processes.

[231] Mr Chen's next salary payment is to be backdated to the date of this determination

[232] The parties are directed to comply with their mutual good faith obligations imposed under the Act.

[233] Mr Chen may revert back to the Authority for urgent assistance if breaches of good faith occur.

[234] If the Opposing Trustees are unable or unwilling to comply with the Respondent's good faith obligations under the Act, then consideration may need to be given to replacing them with trustees who will ensure the Respondent, as an employer, acts in a way that meets its employment law obligations.

[235] The Opposing Trustees may put themselves at risk of having a penalty or penalties imposed on them under s 134(2) if the Act if they aid, abet, instigate or incite breaches of Mr Chen's employment agreement.

Rachel Larmer
Member of the Employment Relations Authority