

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 484
3141261

BETWEEN	BAOYOU LIU Applicant
AND	ALLSTAR ROOFING LIMITED First Respondent
AND	MINGYANG MA Second Respondent
AND	MENGYAO YU Third Respondent

Member of Authority:	Andrew Gane
Representatives:	David Kim, advocate for the Applicant Cherie Holland, counsel for the Respondent
Investigation Meeting:	1 May 2023 at Auckland
Submissions and other: material received:	29 May 2023 from both parties.
Determination:	29 August 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Baoyou Liu was employed to work as a welder for Allstar Roofing Limited (ARL) from 12 November 2019. His employment was arranged in China through a recruitment agent. His employment with ARL ceased on 14 January 2021.

[2] Mr Liu claims that:

- (a) he was unjustifiably disadvantaged in his employment in that he had been employed as a welder but was working as a roofer.
- (b) he was unjustifiably disadvantaged in his employment because was not paid at his contractual rate for a minimum of 40-hours per week, and that he was not paid for all the hours he worked for ARL.
- (c) he was not paid for some public holidays and rest breaks.
- (d) he was unjustifiably dismissed.
- (e) ARL breached the Holidays Act 2003 (HA).

[3] Mr Liu seeks compensation for his personal grievances, lost remuneration arising from his unjustified dismissal, wage arrears for the incorrect payment of wages and holiday pay and reimbursement of legal costs. Mr Liu also seeks penalties against ARL, Mingyang Ma and Mengyao Yu, directors of ARL, for various breaches of the HA.

[4] ARL does not agree that Mr Liu was unjustifiably disadvantaged or unjustifiably dismissed. ARL says Mr Liu resigned from his position as he had accepted another job elsewhere.

The Authority's Investigation

[5] I investigated Mr Liu's claims by receiving written statements and other documents from Mr Liu and a former work colleague Mr Wei Wang. For ARL I received written statements and supporting documents from Mr Ma and Ms Yu. At the investigation meeting on 1 May 2023, I heard evidence from witnesses who answered questions asked by myself and the parties' representatives.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. I have not recorded all of the evidence and submissions received. In determining this matter, I have carefully considered all the material, including all the evidence by the parties and their submissions.

Issues

[7] The issues for determination are:

- (a) Whether Mr Liu has personal grievances for unjustifiable disadvantage by ARL not employing him as a welder and/or paying him correctly.
- (b) Whether Mr Liu has a personal grievance for unjustifiable dismissal.
- (c) If Mr Liu has a personal grievance or grievances, what remedies should be awarded, considering:
 - i. reimbursement of lost wages under s123(1)(b) of the Act (subject to evidence of reasonable endeavours to mitigate his loss); and
 - ii. compensation under s123(1)(c)(i) of the Act.
- (d) Are there unpaid entitlements owing to Mr Liu for:
 - i. wage arrears;
 - ii. public holidays;
 - iii. paid rest breaks.
- (e) If a breach of the HA is established are penalties warranted?
- (f) Should either party contribute the cost of representation of the other party.

What happened

[8] ARL is a roofing company providing installation and re-roofing services for commercial and residential clients.

[9] When Mr Liu was recruited to work for ARL in China by a recruitment agent, he signed an individual employment agreement on 12 March 2019 for the position of a welder (the First IEA). The First IEA stipulated Mr Liu would be paid \$25.00 an hour for a minimum of 40 hours per week.

[10] On 8 August 2019 Mr Liu was required by ARL to sign another IEA (the Second IEA). He was specifically told by the agent that the terms and conditions were the same, however, the contractual pay rate was \$23.00 an hour for 35 hours per week. Both IEAs were for the position of welder. Mr Liu was not provided with a copy of either IEA.

[11] Mr Liu came to New Zealand in November 2019 to take up the employment. He started to work for the ARL on 12 November 2019 as a roofer.

Wage rate – what wage was Mr Liu paid?

[12] Mr Liu worked as a roofer, and not in the role of welder for which he had been recruited.

[13] A significant component of Mr Liu's wage arrears claim relates to the majority period of his employment, when he was being paid the hourly rate of \$23.00 an hour specified in the Second IEA. The evidence of both of ARL's directors is that they relied on the Second IEA supplied by their agent.

[14] The First IEA is clear that payment is at an hourly rate of \$25.00 for 40-hours per week. Mr Liu was specifically told by ARL's agent that no terms or conditions of employment had changed when ARL required him to sign the Second IEA. Mr Liu is therefore entitled to enforce the terms and conditions of the First IEA as being the correct contractual rates of payment and minimum hours as they were advised to him by ARL's agent.

Time sheets – was Mr Liu paid for the correct number of hours he worked?

[15] When Mr Liu started work, he was told he was not required to provide timesheets because he was not required to do additional hours. Mr Liu was only to work the hours as expressly set out in his employment agreement. Mr Liu did not submit his hours of work to ARL until 28 April 2020. From 28 April 2020 to 26 September 2020 Mr Liu submitted his handwritten hours to the ARL. From 28 September 2020 the Liu submitted his hours through ARL's online application called Dingding. Dingding is an app which is downloaded on an employee's phone and whereby the employee presses the app to start it at the beginning of their working day and presses the app again to finish it at the end of their working day.

[16] Mr Liu claims the hours he was paid for did not accurately reflect the hours he was working and that he kept his own written time records. When first questioned about his time keeping, Mr Liu said he did not initially keep records of the hours he worked, and yet when

questioned again as to when he would record his hours, Mr Liu said that he kept a record of his hours every night after work.

[17] There were a number of discrepancies in Mr Liu's time recording regarding the alleged hours he worked, which Mr Liu explained as being a result of his flat mate's child ripping up his time records and having to rewrite them from scratch. In conclusion I found Mr Liu's time records questionable and unreliable. For the reasons set out above I find the evidence to support Mr Liu's allegations regarding working excessive hours is unconvincing.

[18] ARL relied on the contemporaneous time entries provided by Mr Liu and paid him accordingly.

Holiday pay – was Mr Liu paid correctly for public holidays he worked?

[19] In the course of his employment, Mr Liu was not paid the following six public holidays:

- (a) Good Friday—10/04/2020
- (b) Easter Monday—13/04/2020
- (c) Anzac Day—25/04/2020 (observed Monday 27/04/2020)
- (d) Boxing Day—26/12/2020
- (e) New Year's Day—01/01/2021
- (f) Day After New Year's Day—02/02/2021

[20] Mr Liu also worked 11.5 hours on Auckland Anniversary Day (27 January 2020), but he was paid 8 hours at \$23.00 an hour (\$184.00). He should have been paid 1.5 x his hourly rate of \$25 for the hours worked (\$431.25) and provided an alternative day off or paid in lieu for this public holiday (\$200).

Rest breaks

[21] Mr Liu has also claimed that he did not take any paid rest breaks during his employment at ARL. The employment agreement specified that meal breaks were unpaid, but that rest breaks were paid and would be taken at suitable times during the employee's work. Mr Liu

often worked remotely and there was no oversight of breaks being taken, or not taken by any onsite management. In the circumstances it would appear probable that short breaks were required to (for instance) go to the toilet and that these would be taken as the work allowed. I find that it is likely that breaks were taken during Mr Liu's employment, though I accept that there was no systematic or organised provision to ensure that breaks were taken.

Unjustifiable action causing disadvantage

[22] Section 103(1)(b) of the Act, states that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[23] Mr Liu claims that he was exploited by ARL. He said he worked as a roofer, not as a welder, and that ARL did not pay him based on the hourly rates set out in the First IEA or for the actual hours he worked.

[24] I find Mr Liu was disadvantaged by ARL's unjustifiable actions, in treating him as a roofer and making him undertake work in this role rather than as a welder, which was the role he was employed in. Mr Liu was also disadvantaged by ARL failing to pay him his contractual pay as specified in the First IEA and by ARL failing to correctly pay his public holiday entitlements.

Was Mr Liu unjustifiably dismissed, or did he resign?

[25] Mr Liu claims he was constructively dismissed due to a number of factors. He said the real reason for his resignation was that he had been unjustifiably disadvantaged for a long time by having been underpaid his agreed contractual rate and that his employment had been unilaterally altered by the position being changed from a welder to a roofer.

[26] ARL wanted to have a close-down period for the business, starting from 23 December 2020. Mr Liu requested to take annual leave and ARL agreed to Mr Liu taking 3 weeks annual leave.

[27] Mr Liu resigned by via WeChat on 31 December 2020. He advised that his last day of employment would be 14 January 2021. The resignation message did not raise any reasons or issues which have prompted the ending of the employment. He also said, "*thank you for the*

support and opportunities that I have been given at the company during the past year, I wish you and Company all the best in the future.”

[28] ARL’s evidence is that the company believed that Mr Liu had already arranged another job. ARL accepted Mr Liu’s resignation and did not require the Mr Liu to work out the four-week contractual notice period. When Mr Liu was questioned about his future employment at the investigation meeting, he said he had obtained a role as a welder for another roofing company with a significant increase in hourly rate.

[29] In the circumstances I do not find that Mr Liu was constructively dismissed, because there was no causative link between the employer’s breaches and Mr Liu’s resignation. Mr Liu resigned from his employment at ARL to take up a better employment opportunity. Mr Liu’s personal grievance for unjustified dismissal is not made out and is unsuccessful.

Remedies for the unjustified action personal grievance

[30] As Mr Liu has been successful with his unjustified action personal grievances, I will turn to consider what remedies he is entitled to.

[31] Mr Liu did not lose any remuneration as a result of his personal grievances other than wage arrears, which I will address later. So, the only remedy he may be entitled to is compensation for humiliation, loss of dignity and injury to feelings.

Compensation for humiliation, loss of dignity and injury to feelings

[32] Mr Liu gave evidence about the effects on him of ARL’s actions of making him work as a roofer and not paying him his contractual rate. It caused a great deal of stress and left him feeling depressed.

[33] I determine that an appropriate award to compensate for the effects on him, accepting his evidence, was \$10,000.00. ARL is ordered to pay to Mr Liu compensation of \$10,000.00.

Contribution

[34] As I have awarded compensation to Mr Liu, I must now consider whether Mr Liu contributed to the situation that gave rise to his grievances. I am not satisfied that there is any behaviour by Mr Liu that amounts to contribution and warrants a reduction in remedies.¹

Wage arrears

Recovery of contractual entitlement

[35] Mr Liu was not paid the correct contractual rate during his employment; Mr Liu should have been paid \$25.00 per hour pursuant to the First IEA.

[36] Mr Liu is entitled to recover the contractual rate of \$25.00 an hour for the hours he worked from 12 November 2019 to 14 January 2021. The parties' representatives are to consult with each other to calculate the amount Mr Liu can recover. In the event that they cannot agree leave is granted after 14 days to return to the Authority to calculate the amount. The failure to pay Mr Liu correctly will affect Mr Liu's holiday pay entitlement and this must be taken into account when calculating the gross amount.

Public holidays

[37] I find that ARL did not:

- (a) Pay Mr Liu for the six public holidays set out at paragraph [19] - payment for these days at the rate of \$25.00 per hour amounts to \$1,200.00.²
- (b) Pay Mr Liu correctly for the hours he worked on Auckland Anniversary Day – the difference between what Mr Liu was entitled to and what he was paid is \$447.25.

[38] ARL is to pay Mr Liu \$1,647.25 for the public holidays that have been incorrectly paid.

Rest breaks

[39] Mr Liu has not established a claim to payment for arrears for unpaid rest breaks.

¹ Employment Relations Act, s 124.

² Holidays Act 2003, s 49.

Interest

[40] Mr Liu can recover interest on his contractual entitlement as set out in paragraphs [36] and [38] above, from the date of dismissal, being 19 January 2022, until the date of payment.³ The order for payment of interest is made under clause 11(1) of Schedule 2 of the Act. Interest is to be calculated by ARL using the Civil Debt Interest Calculator.⁴

Penalties

[41] I have found that ARL's failure to properly pay Mr Liu for public holidays was in breach of section 50 & 56 HA.

[42] When assessing an appropriate level of penalty, I have regard to the principles governing the imposition of a penalty.⁵

[43] Mr Liu has been compensated for his losses. The purpose of penalties is to deter, not to compensate. The penalty imposed is to reinforce to ARL and other employers the importance of keeping records of hours worked and of compliance with the requirements for payment of public holiday entitlements. I also note that ARL has previously been penalised for similar breaches of employment standards.⁶

[44] Accordingly, I order ARL to pay a penalty amount of \$3000.00 to the Authority for transfer to a Crown Bank Account.

Claim for penalties against the second and third respondent?

[45] Mr Liu has claimed that penalties should be awarded against both ARL and against Mr Ma and Ms Yu. However, although the directors may meet the requirements of being "directly or indirectly, knowingly concerned in, or party to, the breach" pursuant to s142W (1)(c) of the Act, any application to impose a penalty on such a person under s142X of the Act may only be made by a Labour Inspector.

³ Holidays Act, s84.

⁴ <http://www.justice.govt.nz/finances/civil-debt-interest-calculator>.

⁵ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson and Ford* [2018] NZEmpC 132.

⁶ *Wang v Allstar Roofing Limited* [2022] NZERA 299

Summary of orders

[46] Mr Liu was unjustifiably disadvantaged for which remedies have been awarded. His claims for wage arrears have been upheld. I make the following orders:

- (a) Within 28 days of the this of determination ARL is ordered to pay Mr Liu the following sum:
 - (i) Compensation for humiliation, loss of dignity and injury to feelings of \$10,000; and
 - (ii) The amount of arrears agreed by the parties' (noting that leave is granted to return to the Authority after 14 days to calculate the amount if the parties cannot agree) to Mr Liu; and
 - (iii) Public holidays of \$1,647.25.
- (b) Interest to Mr Liu as awarded in paragraph [40] above.
- (c) ARL is to pay a penalty amount of \$3000.00 to the Authority for transfer to a Crown Bank Account.

Costs

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

[48] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.⁷

Andrew Gane
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-payingcost.