

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 643
3132055

BETWEEN SHIPING WEI
 Applicant

AND KINDLE LIMITED
 First Respondent

AND ALAN ZHANG
 Second Respondent

Member of Authority: Philip Cheyne

Representatives: Yutao Wei, advocate for the Applicant and Applicant in person
 Alan Zhang for the First Respondent and Second Respondent in person

Investigation Meeting: 8 and 9 June 2022 and 16 March 2023 at Auckland

Information Received: 26 August 2022, 18 March 2023, 18 July 2023 and 26 October 2023 from the Applicant
 11 & 26 August 2022, 30 September 2022, 11 April 2023, 24 July 2023 and 30 October 2023 from the Respondent
 17 April 2023 from TransNational

Date of Determination: 1 November 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jun (Alan) Zhang is the director of and the majority shareholder in Kindle Limited. The company was incorporated on 20 February 2020. It took over an existing business on 9 March 2020.

[2] Shiping Wei worked in the business for the previous owner and was then employed by Kindle Limited (Kindle) from 9 March 2020. Mr Wei worked as a delivery driver. Mr Wei was dismissed on 23 September 2020.

[3] Mr Wei's claim is against Kindle and Alan Zhang.

[4] In his statement of problem, Mr Wei says he was a full-time worker paid partly in cash. He says that Mr Zhang's behaviour changed after he asked for payment of the Covid-19 wage subsidy, which he says he had not received. Mr Wei says that on 19 September 2020 in the office, during a dispute about a traffic infringement notice, Mr Zhang threatened and pushed him. Mr Wei says that Mr Zhang threatened him again on 23 September 2020 while they were out doing deliveries. Mr Wei says he was dismissed later that day. There are claims for reimbursement of lost cash wages, compensation for distress, arrears of holiday pay and sick leave, payment of the Covid-19 wage subsidy, recovery of a deduction for a traffic infringement notice and costs.

[5] In a statement in reply, Kindle and Mr Zhang say that Mr Wei was dismissed reasonably and lawfully for repeated violations of company rules and regulations and for threats to and an assault on Mr Zhang. As an essential service, the business continued to operate during Covid-19 restrictions, but Kindle allowed Mr Wei to stay at home for safety. Mr Zhang says he applied for and received a part-time Covid-19 wage subsidy for Mr Wei as a part-time worker and paid it to him. Mr Wei demanded a full-time subsidy. From then, Mr Wei's performance deteriorated. Mr Zhang gave Mr Wei various warnings, then dismissed him on 23 September 2020. Mr Zhang says that Mr Wei worked part-time, was paid holiday pay with his wages each pay period and took no sick leave during the brief employment.

The Authority's investigation

[6] There was an initial case management conference. Directions were made for Mr Wei to provide copies and transcripts of the recordings he held. Kindle was required to provide the employment agreement, wages and time records, any written warnings, the dismissal letter and CCTV footage of the 19 September 2020 office incident. Material was received from both parties.

[7] Mr Wei and Mr Zhang provided statements and they both appeared at the investigation meeting to confirm their respective statements and answer questions on oath. There is some video footage of part of the interaction between the men on 19 September 2020. Mr Wei and Mr Zhang separately made recordings of their discussions at different times during the employment.

[8] There were issues about the accuracy of the English translations of transcripts for the 19 & 23 September 2020 recordings. Following the investigation meeting, the Authority arranged independent transcripts and English language translations, which were copied to the parties. Further information was received from both parties in response. A date was set for the investigation meeting to continue.

[9] I heard further evidence from Mr Wei and Mr Zhang. During the second investigation meeting, Mr Wei produced a receipt book. After the meeting, I sought some further information from the parties and also decided to obtain an independent transcript and English translation of other recordings that had been produced in evidence. These further transcripts/translations were copied to the parties. I also sought and received some further material from both parties. Mr Wei had a further opportunity to provide payment information.

[10] I will set out relevant findings of fact, state and explain findings on relevant legal issues, express conclusions on issues required to determine the problem and specify any orders. It is not necessary that I set out a record of all the evidence and all the submissions.

[11] Issues for investigation were canvassed during the initial case management conference. Following the investigation meetings, the following issues arise for determination:

- (a) What terms of employment were agreed?
- (b) Was the dismissal justifiable?
- (c) If the dismissal was not justified, what remedies should be ordered?

- (d) Did Kindle meet its obligations to Mr Wei regarding the Covid-19 wage subsidy?
- (e) Are any arrears of holiday pay or sick leave owed to Mr Wei?
- (f) Did Kindle unlawfully deduct \$150.00 from Mr Wei's wages, entitling him to recover that amount?

What terms of employment were agreed?

[12] Mr Wei says he never received or signed a written employment agreement. This is not an action by Mr Wei to recover a penalty for not having been provided a written employment agreement. The dispute centres on what days and hours were worked. What was agreed is relevant to determining those and related matters.

[13] Mr Zhang says that he gave Mr Wei a written agreement when he took over the business in March 2020 and at the same time he gave agreements to other employees. After a direction, a copy of an agreement for Mr Wei was lodged with the Authority.

[14] Mr Wei sought a further direction that Mr Zhang lodge the original not a copy for forensic examination, as Mr Wei contended that it was "forged". However, Mr Zhang said that he only had a scanned version as he gave the original document to Mr Wei once it had been signed.

[15] Mr Zhang produced copies of similar agreements for Kindle's other employees dated in March 2020. It is not likely that someone in Mr Zhang's position would forge agreements for those other employees, so I accept the agreements for other employees were signed in about March 2020. If a purchaser of a new business had taken time to prepare employment agreements, it is likely that they would do so for all employees, rather than all but one of them.

[16] I note that the agreements provide \$18.90 as the pay rate. At the start of the employment, the Minimum Wage Act 1983 set \$17.70 as the minimum rate, but it increased to \$18.90 from 1 April 2020. The submission is that the inclusion of the later minimum rate in the agreements supports the contention that the agreements were not created in March

2020. Mr Zhang's evidence is that the agreements included the higher rate in readiness for the upcoming change. It is not improbable that someone in Mr Zhang's position might do that as a matter of convenience.

[17] I find that Mr Wei was given and signed his written agreement in about March 2020. Despite that finding, more needs to be said about the agreed arrangements. However, I will first summarise the agreement.

[18] The agreement provided for work as a "Casual Driver" on an as required basis for two or three days per week. The employer could cancel a shift on notice. The agreement incorporated employer policies, non-compliance with which might result in disciplinary action. Wages were \$18.90 per hour, paid fortnightly by direct credit. Holiday pay of 8% would be paid at the same time as regular pay. The employer could dismiss the employee if after a fair process, the employer concluded that the employee had engaged in serious misconduct. The employer could suspend the employee on pay to investigate allegations of serious misconduct. Other standard provisions were also included.

[19] It is common ground that Mr Wei performed work for Kindle in addition to the arrangement described by the employment agreement and as recorded in Kindle's payroll and time recording system. The dispute is about the amount of additional work. Mr Wei says he worked fulltime six days each week (Monday – Saturday) throughout the employment and was paid \$500.00 then \$600.00 cash weekly, in addition to what was recorded in Kindle's pay system. Mr Zhang says the extra work for cash was only for two weeks in March 2020 after he took over the business. He asked Mr Wei to work six days each week to show him the delivery routes and merchants.

[20] For most months, there is scant reliable evidence to prove what days Mr Wei worked. The best placed month is September 2020, covered by the delivery book. There are also WeChat messages. Based on that material, Mr Wei worked four days in the week ending 13 September and four days in the week ending 20 September 2020. WeChat messages indicate that Mr Wei did not work on Tuesdays and Fridays in the last two weeks of August 2020. Mr Wei never worked on Sundays, so the evidence establishes that he worked four days for

each of those two weeks in August. I therefore find that Mr Wei did not always work fulltime six days a week throughout the employment.

[21] The payroll and time records were not a complete record of Mr Wei's work. It is clear from Mr Zhang's recorded comments in May 2020 and later, details of which are set out elsewhere, that Mr Wei worked extra time for cash after the Covid-19 lockdown ended. Accordingly, I do not accept Mr Zhang's evidence that the extra work was limited to two weeks in March. I note also that the number of WeChat messages to Mr Wei about him not having to work the next day suggests that Mr Wei would otherwise have worked more than four days in each of those weeks. I find that it was agreed that Kindle would pay Mr Wei \$600.00 cash each week for extra work. I am not able to determine what days and hours Mr Wei worked in exchange for this payment.

Was the dismissal justifiable?

[22] It is common ground that Mr Wei was dismissed on 23 September 2020 by Mr Zhang.

[23] A personal grievance is a claim by an employee against their employer or former employer. Mr Zhang was identified as the second respondent in Mr Wei's statement of problem. However, Kindle Limited not Mr Zhang employed Mr Wei. A personal grievance claim cannot succeed against Mr Zhang personally, so that part of the claim must be dismissed.

[24] An employee who wishes to pursue a personal grievance claim must raise their grievance with the employer within 90 days, unless the employer consents to the personal grievance being raised after that time.¹ In his exchanges on 23 September 2020 with Mr Zhang, Mr Wei raised his unjustified dismissal personal grievance with Kindle.

[25] This application was later commenced in the Employment Relations Authority. It was noted during the case management conference that the only personal grievance specifically mentioned in the application concerned the dismissal. However, Mr Wei disputes Mr Zhang's evidence that he had received many warnings or an August dismissal letter

¹ Employment Relations Act 2000 s 114(1).

before the September 2020 dismissal. I deal with those disputes first for context, not separately as alleged personal grievances.

Was Mr Wei given any warnings?

[26] Mr Zhang lodged pdf files of warning letters he says were given to Mr Wei. Mr Wei disputes receiving them.

[27] The letters are in Mandarin. Copies were lodged with the Authority on 22 July 2021, following a direction. English language translations of each of the letters were also provided. Mr Wei did not dispute the accuracy of the translations, so it was not necessary to obtain independent translations. Later, Mr Zhang was directed to lodge copies of the properties information for the files of the Mandarin language warnings and the English language translations.

[28] The properties information for the English translations show “Created” dates between 1 July 2021 and 20 July 2021. That is consistent with the translations being done in response to the Authority’s directions.

[29] The following “Created” dates are in the properties information for the Mandarin letters: 7 July 2020; 15 July 2020; 16 July; 30 July 2020; 4 August 2020; 15 August 2020; 19 August 2020; 20 August 2020; 24 August 2020; 26 August 2020; 2 September 2020; 19 September 2020; 21 September 2020; and 23 September 2020. That information indicates that the letters in Mandarin were written during Mr Wei’s employment. I find as such.

[30] Mr Zhang recorded phone calls with Mr Wei on 7 July, 16 July, 28 July, 4 August, 12 August, 15 August, 26 August, 20 September and 23 September 2020. Some of the discussions related to issues set out in the warning letters. However, there is no mention in these phone calls that Mr Zhang might give or had given Mr Wei any warning letters.

[31] There are some WeChat (or similar) messages between Mr Zhang and Mr Wei dated in May, June, August and September 2020. There is no mention about the warning letters.

[32] There is an audio recording of an exchange between Mr Wei and Mr Zhang on 19 September 2020. The exchange followed an incident in the office, more about which is set

out later. At an early point in the recording, Mr Zhang was criticising Mr Wei and then said “I will issue you a warning letter later”. Nothing said by either Mr Zhang or Mr Wei indicates whether this had happened previously. What was said adds little to assessing the disputed point about earlier warning letters.

[33] In the audio recording “23-09-2020_Afternoon”, following an exchange about taking matters “to court”, Mr Zhang said “One more thing, you don’t need to come to work from tomorrow, OK?” Mr Wei responded with a direction to Mr Zhang to write him a letter saying he did not need to come to work from tomorrow. Mr Wei’s insistence on a letter suggests that he might have received other letters from Mr Zhang.

[34] Mr Wei in evidence describes the warning letters as “fabricated” and says he “never received any of his warning letters”. However, Kindle in its statement in reply said that from July to September 2020, Mr Wei “accumulated” 14 warning letters. Mr Zhang’s evidence is that from April to June 2020 he gave Mr Wei three verbal warnings, a first written warning in July and a total of 14 warning letters to September 2020.

[35] For different reasons, neither Mr Wei nor Mr Zhang impressed as a reliable witness, so general credibility does not assist with the resolution on this disputed point.

[36] There are no independent witnesses as to any warning. Mr Zhang indicated that other staff could give evidence about Mr Wei’s angry response when he received warning letters, but he did not arrange for them to provide any evidence.

[37] One might expect an employer or an employee to refer to recent warnings, in discussion between them about the employer’s ongoing concerns. The absence of mention of prior warnings in the recorded phone discussions from July to September 2020 suggests that Mr Zhang had not given written warnings to Mr Wei during the employment. However, I do note that on 19 September 2020 Mr Zhang said a warning letter would follow.

[38] I set out below details and findings about the “Dismissal Letter” dated “August 26, 2020”. Mr Wei denies being given this, but for the reasons below I find it was given to him. It summarises issues raised by the warning letters.

[39] An employer who wrote the warning letters on the dates in the properties information would ordinarily give those letters to the employee around the time they were written. It is likely that Mr Zhang did so. This leads me to reject Mr Wei's evidence that he never received the warning letters. I find he did receive them during his employment.

[40] I accept that Mr Zhang was dissatisfied with Mr Wei's work, as reflected in the topics that were discussed during the recorded phone conversations and as set out in the warning letters.

26 August 2020 Dismissal Letter

[41] Kindle lodged a document headed "Dismissal letter" dated 26 August 2020. As translated, it ends with:

After repeated unsuccessful communications with Wei shipin, the company informed him of his dismiss and gave him a four-week transition period to find a new job opportunity.

[42] The properties information for the Mandarin letter file states "Created: Wednesday, 26 August 2020 at 19.02".

[43] Mr Wei in his statement of problem says that "he has always wanted to fire me" before events in September. Mr Wei's evidence is that he was never given the "Dismissal Letter".

[44] In its reply, Kindle says that it gave Mr Wei a dismissal letter in August, but Mr Wei tore it up, threw it in Mr Zhang's face, said Kindle had no right to fire him and if Kindle did fire him, he would sue him. Mr Zhang's evidence is that he could not "bear it any more", told Mr Wei "If you keep being like this, I can't continue your employment" and gave the letter to Mr Wei. Mr Wei then tore it up and threw it away.

[45] There are no independent witnesses and no audio or video recordings of the exchange.

[46] I take from the properties information that Mr Zhang wrote the "Dismissal Letter" on 26 August 2020. An employer who writes a letter like that is likely to give it to the employee at the time.

[47] It is common ground that Mr Wei was dismissed not by this letter but on 23 September 2020, following events that day and on 19 September. Given that, Kindle had little to gain by falsely claiming to have drafted and given the 26 August 2020 letter to Mr Wei. That leads me to accept Mr Zhang's evidence that he gave it to Mr Wei in late August 2020, but Mr Wei tore it up.

[48] Mr Zhang told me in evidence that "we both felt that the letter was not effective – it was torn up". Mr Wei continued working, despite the letter. I accept Mr Zhang's evidence.

The dismissal – September

[49] On Saturday 19 September 2020, there was an incident in the office between Mr Wei and Mr Zhang. Mr Wei says that Mr Zhang "unjustly deducted 150 dollars" from his salary because of a council infringement notice. Mr Wei attempted to reason with him, but Mr Zhang claimed he was the law in New Zealand and threatened Mr Wei. Mr Wei says that Mr Zhang pushed him, then went to the packing area and yelled that Mr Wei had just hit him.

[50] Mr Zhang says that company rules make it clear that the driver is responsible for infringement notices, Mr Wei refused to pay and threatened to cause more tickets in the future, Mr Wei "came at" him and hit him, Mr Zhang pushed him away and went to the packing area.

[51] Kindle lodged some CCTV footage. One extract covers about 1 minute of the exchange in the office between the two men and a second extract includes most of that footage but starts about 1 minute earlier. Mr Zhang says that further CCTV footage no longer exists. The CCTV footage in evidence probably does not fully cover the relevant exchange between the two men. It is video only with a single camera angle.

[52] I will outline what the CCTV footage does show. Mr Zhang and Mr Wei were on either side of an office desk. There was an animated exchange between them. Mr Zhang pointed to a calendar on the wall, drew Mr Wei's attention to something on his phone, they pointed at each other and they each banged a hand on the desk. Mr Zhang did that first. They stood up. Mr Wei moved to the end of the desk. They appear to be arguing. Mr Wei turned and pointed at the CCTV camera. Soon after, Mr Wei moved towards Mr Zhang's side of the

desk. Mr Wei then pushed Mr Zhang towards the wall. There was a brief struggle and Mr Wei stepped back to the end of the desk, Mr Zhang then came round the desk past Mr Wei. Mr Zhang left the area covered by the CCTV camera, followed by Mr Wei.

[53] Based on the CCTV footage, I find that Mr Wei pushed Mr Zhang. Mr Wei also headbutted Mr Zhang. The latter finding is based on the footage and Mr Wei not directly denying it in a later exchange between the two men. There is also evidence of a graze on Mr Zhang's forehead, consistent with the footage.

[54] Mr Wei audio recorded another exchange with Mr Zhang, about 10 minutes later, also in the office. Soon after the conversation started, Mr Zhang asked Mr Wei if he could do his deliveries and Mr Wei said he could. Mr Zhang told him to print the orders, but also said he would issue a warning letter later. Mr Wei asked "Why?" Mr Zhang said that Mr Wei had contradicted the "boss" and "You headbutted me..." Mr Wei did not directly deny that. He said to Mr Zhang "You said you'd kill me if we were in China..." Mr Zhang did not deny saying that. Mr Wei mentioned "deducting my money". That led to a disagreement about whether the "code of conduct" applied, given the date of Mr Wei's "offence". Mr Zhang confirmed Mr Wei's view that "you just hate me" and said he kept Mr Wei on because of another employee. Mr Zhang said that he really did not want Mr Wei "Fighting with me every day, it's too annoying and tiring". Mr Zhang swore at Mr Wei. Mr Wei objected to that. They viewed CCTV of the earlier incident. The topic changed to discussion about deliveries and they were joined by a third person. Later, there was a fourth person involved. Mr Wei set off on some deliveries.

[55] Based on this recording, I find that the earlier argument was about Mr Zhang deducting the cost of an infringement notice from Mr Wei's wages and that Mr Zhang told Mr Wei he would kill Mr Wei if they were in China and swore at Mr Wei, before Mr Wei pushed and then headbutted Mr Zhang.

[56] Mr Wei next worked on Monday 21 September 2020. There is no evidence that the events of 19 September 2020 were discussed. Mr Wei worked again on Wednesday 23 September 2020.

[57] Mr Zhang went with Mr Wei on his delivery run in the morning on 23 September. They later met in the office. I rely on the independent transcription and translation² of the respective recordings for the following summary.

[58] In the morning, there was first an exchange about whether an instruction that Mr Wei not smoke in the work vehicle was compliant with New Zealand laws. They appeared to be at cross-purposes. Mr Wei told Mr Zhang he was scared of him. Mr Wei repeated that Mr Zhang had said he would kill Mr Wei. Mr Wei questioned why Mr Zhang was travelling with him that day. Mr Zhang said he was checking out deliveries and commented about his right to ride in the vehicle. Mr Wei said that Mr Zhang was scaring him. That led to Mr Zhang telling Mr Wei to stop yelling. Mr Wei asked if Mr Zhang wanted to kill him. Mr Zhang said he would call the police “if you keep doing this”. Mr Wei challenged him to call the police. Mr Zhang told Mr Wei to focus on driving. Mr Wei repeated that Mr Zhang was scaring him. The recording ended.

[59] Mr Wei’s evidence is that Mr Zhang “utilised his thumb to gesture a cutting motion across his throat” to him. That caused Mr Wei to “lose it” and yell. He was afraid there might be an accident.

[60] Mr Zhang’s evidence is that he went with Mr Wei because of customer complaints. He told Mr Wei not to smoke in the vehicle and there was an argument about that. Mr Zhang says that Mr Wei shook the steering wheel back and forth with one hand and swung his fist at him. Mr Zhang “tried to call the police”. Mr Wei then stopped “beating” him and spent his time “insulting” him.

[61] Each of the men was secretly recording the exchange, for evidence. It is likely that Mr Wei would have described the throat cutting gesture for evidential purposes if Mr Zhang had done that. Equally, it is likely that Mr Zhang would have described being hit if Mr Wei had done so. I do not accept the evidence of either Mr Wei or Mr Zhang on these points. In a later recorded discussion, Mr Wei did not deny that he had jerked the steering wheel while driving. Given that, I accept Mr Zhang’s evidence to that extent.

² Subject to an agreed amendment that Mr Wei said “I asked for your opinion first because you’re here. I’m not saying I’ll smoke if you’re not here, that’s what I mean.” (My emphasis).

[62] The next exchange in the office the same afternoon was recorded. There was first some discussion about client charges. Mr Zhang then asked if they could speak calmly. He suggested that Mr Wei get a family member to assist, to help mediate. Mr Wei did not agree to that. Mr Zhang then arranged for another employee to be a witness. Mr Zhang said that Mr Wei had jerked the steering wheel and was yelling, while driving that morning. Mr Wei said “But you were staring at me ... like you were going to kill me”. Mr Zhang said that they may have still been able to work together, but for what Mr Wei had done that morning. Mr Zhang then referred to the 19 September 2020 incident. They watched the CCTV footage, but disagreed what it showed. Mr Zhang suggested they call the police. Mr Wei encouraged that. Mr Zhang said he had been advised to call the police about Mr Wei’s driving. Mr Wei said “If we need to go to court, so be it”. He then suggested settling it via the Employment Relations Authority. Mr Zhang told Mr Wei “One more thing, you don’t need to come to work from tomorrow, OK?”

[63] Mr Wei required a letter stating that he did not need to come to work from tomorrow. Mr Wei also mentioned his paid leave, holiday pay, compensation and wages during the “Covid outbreaks”. Mr Wei left the premises.

[64] Kindle drafted a letter to Mr Wei. The properties information states that it was created late on 23 September 2020. It is headed “Warning Letter”. It refers to threats by Mr Wei to Mr Zhang during the morning delivery because Mr Zhang told him not to smoke in the vehicle. As Mr Wei’s behaviour seriously threatened the lives of others, the company issued a serious warning to him. There was not a separate letter of dismissal.

[65] Mr Wei did not return to work after the 23 September 2020 exchange. I find that Kindle dismissed Mr Wei on 23 September 2020 due to events on 19 and 23 September 2020, against a background of dissatisfaction with him. Kindle paid Mr Wei until the fortnight ending 22 October 2020.

[66] Whether the dismissal was justifiable must be determined on an objective basis by assessing whether Kindle’s actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. I must consider whether Kindle sufficiently investigated the matter considering available resources; whether Kindle raised its

concerns with Mr Wei before deciding to dismiss him; whether Kindle gave Mr Wei a reasonable opportunity to respond to the concerns before dismissing him; and whether Kindle genuinely considered Mr Wei's responses before deciding to dismiss him. I may consider other factors, if appropriate.

[67] The written employment agreement provided:

If, after following a fair process, the employer concludes that the employee has engaged in serious misconduct, the employee may be dismissed without notice.

[68] Kindle is a small business, with limited resources available to it. However, I note that Mr Zhang told Mr Wei in their exchange later on 23 September 2020 that he had already consulted a lawyer. Even having regard to Kindle's limited resources, it did not fairly investigate the allegations against Mr Wei.

[69] To the extent they can be discerned from the recordings on 19 and 23 September, the allegations were of serious misconduct: that Mr Wei pushed and headbutted Mr Zhang, that Mr Wei was arguing (fighting) every day causing Mr Zhang to be annoyed and tired, and that Mr Wei's driving on 23 September 2020 was erratic or dangerous. The point about arguing was based on Kindle's prior concerns and Mr Wei's responses then.

[70] A fair process required Kindle to clearly set out the allegations, give Mr Wei a copy of his employment agreement, the bundle of earlier warning letters and a copy of the CCTV footage, before meeting with him so he could answer these concerns. Mr Wei should also have been put on notice that the matter was serious, that he had a right to representation or support and that Kindle might dismiss him, before he was asked to answer the concerns.

[71] Mr Zhang was angry about Mr Wei arguing about smoking in the truck, about his driving and about him blaming that (and the 19 September incident) on Mr Zhang. The employment permitted the employer to suspend the employee for the purpose of investigating alleged serious misconduct. In those circumstances, a fair and reasonable employer could not have dismissed without first taking the steps mentioned above.

[72] The exchange on 23 September 2020 was not a reasonable opportunity for Mr Wei to respond, prior to Mr Zhang's decision to dismiss Mr Wei. Early in the exchange, Mr Zhang said:

Wei, here's the thing. If you hadn't done what you did today, we may still be able to work things out. But after what you did this morning, to be honest, there is really no room for negotiation. OK?

[73] I find that the opportunity to respond was nominal, rather than real.

[74] The above process defects were not minor. They have long been central to the procedural fairness requirements for justification for dismissal.³ The application of s 103A (5) of the Act does not prevent a finding that the dismissal was unjustifiable. I find that Mr Wei was unjustifiably dismissed and has a personal grievance against Kindle.

What remedies should be ordered?

[75] The starting point is that where the Authority determines that an employee has a personal grievance it may in settling the grievance provide for one or more of the specified remedies.⁴

[76] Kindle continued to pay Mr Wei the taxed component of wages for a month after the dismissal, despite circumstances that could have justified instant dismissal. There is limited reliable evidence of any other loss attributable to the personal grievance.

[77] In *Xtreme Dining Ltd v Dewar*,⁵ a Full Court concluded that the absence of a remedy, in rare cases, may be appropriate even if there is an established personal grievance. It is not open to reduce remedies to zero by application of s 124 of the Act. However, the Court confirmed:

Rather, where there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with "equity and good conscience. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The

³ *New Zealand Food Processing Union v Unilever New Zealand Ltd* [1990] 1 NZILR 35.

⁴ Employment Relations Act 2000 s 123(1).

⁵ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal.

We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[78] Mr Wei pushed and headbutted Mr Zhang on 19 September 2020. Mr Wei drove dangerously on the motorway on 23 September 2020 while Mr Zhang was a passenger. These actions count against a remedy for the personal grievance.

[79] Mr Wei claims he acted in self-defence, because during the exchange on 19 September Mr Zhang told him that he would kill him if they were in China. If Mr Wei had perceived it as a genuine threat, he probably would not have moved towards Mr Zhang during the exchange. I do not accept that Mr Wei's actions in pushing and headbutting Mr Zhang were in self-defence or were a proportionate response to what Mr Zhang said.

[80] Mr Wei claimed that he was scared of Mr Zhang while he was driving on 23 September 2020. I do not accept that evidence. While driving, Mr Wei got angry with Mr Zhang, was jerking the steering wheel dangerously and was yelling.

[81] Mr Wei's conduct on 19 September and 23 September together amounted to conduct so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance.

[82] The personal grievance is settled by the finding that Mr Wei has a personal grievance.

Did Kindle meet its obligations to Mr Wei regarding the Covid-19 wage subsidy?

[83] The Covid-19 lockdown applied from 26 March to 27 April 2020. Kindle was an essential service so its business continued. Mr Wei mostly did not work during the lockdown, by agreement with Mr Zhang.

[84] Legally enforceable obligations derive from the employment relationship. The arrears claim against Mr Zhang personally cannot succeed and will be dismissed.

[85] Kindle applied for and received a Covid-19 wage subsidy for Mr Wei. Kindle included Mr Wei as a part-time worker (fewer than 20 hours per week), so it received the

subsidy at the rate of \$350.00 per week. Mr Wei was paid less than that for the subsidy period. The payroll record shows a payment of 40 hours at \$18.90 per hour on 8 May 2020, by which Kindle says met its obligations to Mr Wei with respect to the subsidy and the limited work her performed over that time.

[86] Mr Wei's evidence is that he was not part-time, but was employed full-time working 6 days every week. Mr Wei says he continued to work on this arrangement to the end of the employment in September 2020. Mr Wei says he was paid cash of \$560.00 weekly at first, increasing to \$600.00 after 1 April 2020.

[87] In its reply, Kindle said that Mr Wei worked 10 hours across 3-4 days a week in March and throughout his employment. Later, Kindle acknowledged that Mr Wei had worked on 6 days per week for the first two weeks from 9 March 2020, and was paid in cash for the additional work, on top of the time and wages shown in its wages and time records. Kindle's evidence is that the additional work for cash was for Mr Wei to show Mr Zhang the routes and deliveries, to help him become familiar with the business. Mr Zhang says that he paid Mr Wei \$100.00 cash per day extra, so it would have been \$700.00 cash in total for the two weeks.

[88] Neither Mr Wei nor Mr Zhang impressed as a reliable witness, so the evidential dispute cannot be resolved on that basis. However, I am satisfied that Mr Wei worked extra hours for cash on his return to work after the lockdown in late April 2020, not just for two weeks at the start of the employment.

[89] Mr Wei kept no diary or other documentary evidence of his days and hours of work, except as referred to elsewhere in this determination. The WeChat messages are of limited assistance to prove that Mr Wei worked specific times and days, in addition to those recorded in Kindle's wages and time records.

[90] Mr Wei retained Kindle's delivery receipt book, for deliveries between 7 - 23 September 2020. He produced it at the last investigation meeting. The receipts are consistent with the wages and time records for the short period they cover. Mr Wei usually returned the receipt books to Kindle. He criticised Kindle for not producing the earlier books. However, I

accept Mr Zhang's evidence that they are generally disposed of after being used for invoicing purposes. There was no legal requirement to retain the books.

[91] Dates of work incidents mentioned in the warning letters are consistent with the wages and time records. Kindle produced recordings of work phone calls between Mr Zhang and Mr Wei in July, August and September 2020. With one exception, they are consistent with the wages and time records. There was a call on Sunday 20 September 2020, but the call related to an earlier work issue. Mr Wei's evidence is that he did not work on Sundays. WeChat messages between May and September 2020 indicate that Mr Wei either did or did not work on specific dates.

[92] Mr Wei produced three recordings dated 7 May and one dated 8 May 2020. The wage and time records do not record Friday 8 May as a work-day. Mr Wei relies on the exchanges on the two days to support his contention that he worked full-time 6 days a week, partly taxed and otherwise for cash. Mr Zhang's evidence is that the 8 May 2020 conversation was in April and that only part of the conversation has been produced. I agree that only part of the 8 May 2020 conversation has been produced, but that does not cause me to doubt the veracity of the properties information that confirms the recording was made on 8 May. Mr Zhang is wrong about the timing of the conversation. I will summarise the conversations on both days.

[93] In one discussion, Mr Zhang refers to advice from his lawyer, so there must have been a prior discussion between him and Mr Wei that caused him to get advice. The advice was to pay Mr Wei the Covid-19 subsidy based on hours he paid PAYE tax on (10 per week). As part of the exchange however, Mr Zhang said "Yes, I admit you are a full-time worker". Mr Wei asked to be paid the "full amount" for four weeks, but said he would accept \$2,000.00.⁶

[94] Mr Zhang repeated that payment to Mr Wei based on his taxed hours was correct, even though the subsidy he received was higher. Mr Zhang spoke of a "second option", if Mr Wei insisted on being paid the full wage subsidy. All of Mr Wei's working hours would be taxed and he would then pay Mr Wei the full subsidy he received. Mr Zhang might then have to ask Mr Wei "to take one day or a week off, maybe two or three days off". Mr Zhang

⁶ The subsidy for employees who worked 20 or more hours per week was \$585.80 per week.

said he could cut Mr Wei's hours "so you won't be working six days a week". The matter was not resolved.

[95] A second exchange started with mention of an article that Mr Zhang had given to Mr Wei. Mr Zhang went on to say he had asked Mr Wei to take a four-week break and come back to work when business got back to normal. He said if he had known that he would have to pay Mr Wei the subsidy, he would have asked Mr Wei to work. Mr Zhang offered to pay four weeks at 10 hours per week.⁷ If Mr Wei then wanted to "get paid like before" that was okay. If he wanted "...to get paid with your working hours taxed", that would also be okay. Mr Zhang said "In the IRD system, you will be recorded as working 40 hours a week and I will pay you for 40 hours as well". Mr Zhang said a third option was to pay Mr Wei the full subsidy, but he would not need to employ two drivers. Mr Zhang confirmed he was considering "letting you go", if Mr Wei was determined to get the full subsidy.

[96] Mr Zhang summarised the position as follows:

Let's get straight to the point. What I'm saying is, I can put this on hold today, but as the employer, let me put it this way, there are two options, we play by the book and follow the government's rules, 10 of your working hours were recorded in IRD and you paid tax for that, so 10 hours a week, for the previous four weeks, I pay you for 10 hours a week. After that, we play by the book and do everything as it should be. How do you feel about that? Alternatively, if you are determined to get the full subsidy for the four weeks, otherwise you feel you are being unfairly treated, I can pay you like that as you requested. No problem, the full subsidy can be given to you. But in the future, I'm telling you, under such circumstances, I really don't need you to come and work six days a week. When I'm free, I won't need you to come, I just need you to work three to four days a week. When the business is busy, I may need you to come and work, when it's not busy, I won't need you to come because I have to control the cost, right?

[97] In a brief third exchange on 7 May 2020, Mr Zhang confirmed that there were two options.

[98] There was a further conversation on 8 May 2020. Mr Zhang asked "for the past 4 week how much money was it?" He then confirmed he had "raise[d] it" to "\$600" from 1 April and "another 10 hours of taxes" to total "\$789". By "it", Mr Zhang meant the weekly cash payment to Mr Wei that was not recorded in the pay records.

⁷ Kindle received the subsidy on 15 April 2020 and paid this amount to Mr Wei on 8 May 2020.

[99] The recorded conversations on 7 and 8 May 2020 establish that Mr Wei had worked more hours than are recorded in the wage and time records kept by Kindle for the preceding period. It is likely that he worked on more days than are recorded. It is also likely that Mr Wei's total hours exceeded the threshold of 20 hours or more per week for the fulltime subsidy. Otherwise, \$600.00 cash for fewer than 20 hours extra work each fortnight would have been at a surprisingly high hourly rate.

[100] Kindle's Covid-19 wage subsidy application included a declaration that Kindle would use its best endeavours to pay at least 80 per cent of Mr Wei's ordinary wages; and pay at least the full amount of the subsidy to Mr Wei; but where the ordinary wage was lawfully below the level of the subsidy pay Mr Wei that amount.

[101] The agreement between Kindle and Mr Wei that he would take leave and not work during the lock down means that that the normal contractual obligation to pay wages if an employee is ready, willing and able to work did not oblige Kindle to pay him wages while he was on leave.

[102] Kindle did not apply for and receive the subsidy at the fulltime rate for Mr Wei, so there is no legal basis on which Mr Wei can now force it to pay him what it had not received. Kindle took the approach that it had met its subsidy undertaking by paying Mr Wei only the taxed component of his wages, so less than the subsidy it had received. By doing that, Kindle fell short of its undertaking with respect to Mr Wei. It should have paid him the whole amount of the subsidy it had received in his name.

[103] The shortfall in what was paid is not readily apparent on the material produced in evidence. I will order Kindle to calculate and pay Mr Wei the unpaid amount and reserve leave if required for those calculations.

Are any arrears of holiday pay or sick leave owed to Mr Wei?

[104] As above, enforceable obligations derive from the employment relationship. These claims against Mr Zhang personally cannot succeed and will be dismissed.

[105] The payslips show that Mr Wei was paid “Holiday Pay” at the same time as his fortnightly pay. Nothing additional to the \$600.00 weekly cash payment was paid to Mr Wei when the employment terminated to account for holiday pay.

[106] Mr Wei’s employment ended within 12 months so s 23 of the Holidays Act 2003 obliged Kindle to pay 8% of his gross earnings, less any amount paid for holidays taken in advance and any amount paid in accordance with s 28 of the Act. Mr Wei took no holidays in advance. Under s 28 of the Holidays Act 2003, an employer may regularly pay holiday pay with an employee’s pay if the employee works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks’ annual leave under s 16 of the Holidays Act 2003.

[107] Section 28 of the Act did not apply to Mr Wei. The timesheets do not support a contention that Mr Wei worked irregularly or intermittently. The arrangement was that Mr Wei worked six days a week, not just the days and time that were formally recorded. Mr Wei worked regularly. Kindle breached the Holidays Act 2003 by paying Mr Wei holiday pay on a fortnightly basis.

[108] The payroll information shows gross payments totally \$6,492.96. Holiday pay of \$519.44 should have been paid on that sum when the employment ended.

[109] Kindle paid Mr Wei cash of \$1,120.00 (2 weeks at \$560.00) before the lock down. Mr Wei resumed work in the week starting 4 May 2020 and the last payment was on 19 September 2020. Cash of \$12,000.00 (20 weeks at \$600.00) was paid after the lockdown. Cash payments totalled \$13,120.00. Using the IRD tax calculator (tax code M - year to 31 March 2021) PAYE of \$214.36 (on \$1,120.00) and \$2,330.00 (on \$12,000.00) needs to be added to the net payments. The gross earnings figure comes to \$15,664.36 so holiday pay of \$1,253.15 should have been paid.

[110] Kindle will be ordered to pay holiday pay to Mr Wei of \$1,772.59 (gross).

[111] There is no evidence that Mr Wei was absent from work and paid less than was otherwise due to him, by reason of him being sick. The claim for payment of sick leave must be dismissed.

Did Kindle unlawfully deduct \$150.00 from Mr Wei's wages, entitling him to recover that amount?

[112] The Wages Protection Act 1983 prohibits deductions from wages except in accordance with the Act. The Act permits deductions for a lawful purpose with the worker's written consent or on the worker's written request. Kindle did not have any written consent from Mr Wei. If there was a deduction from Mr Wei's wages, he is entitled to recover it from his employer, regardless of any company policy that drivers have to pay infringement notices they incur while at work.

[113] Mr Wei says that Mr Zhang deducted \$150.00 from the cash wages he received on 19 September 2020. Mr Zhang says that Mr Wei should have paid the infringement fee but he did not pursue it because he was worried that the conflict between them would escalate, given the incident on 19 September 2020.

[114] The full CCTV footage of the exchange in the office on 19 September was not produced in evidence, despite the Authority's direction. Mr Zhang told me it is no longer available.

[115] The footage in evidence appears to show Mr Wei with some cash while sitting opposite Mr Zhang and then putting cash into his wallet after he stands up. The exchange between the two men is consistent with the employer making a deduction from cash otherwise payable, the employee objecting, the employer attempt to justify that and the employee reacting angrily.

[116] It is likely that an employer who pays in cash would deduct from the cash they give the employee the amount they considered the employee was liable for. Put the other way, it is unlikely that the employer would leave it to the employee to repay some of the cash.

[117] The circumstances cause me to accept Mr Wei's evidence that Kindle deducted \$150.00 from the \$600.00 cash otherwise due to Mr Wei on 19 September 2020. The Wages Protection Act 1983 applies, despite the cash arrangement. Mr Wei is entitled to recover the unlawful deduction from his employer, not from Mr Zhang personally.

[118] Kindle will be ordered to pay Mr Wei \$150.00.

Summary and orders

[119] The claims as against Alan Zhang are dismissed.

[120] Kindle Limited unjustifiably dismissed Shiping Wei. No further remedy is ordered.

[121] Kindle Limited is to calculate arrears of wages due to Shiping Wei for the period from 26 March 2020 to 27 April 2020 based on what it received in Shiping Wei's name as a Covid-19 wage subsidy less the gross paid to him for the relevant period. Kindle Limited is to lodge and serve its calculations within 14 days of this determination and Shipping Wei may lodge and serve a response within a further 14 days. Leave is reserved to the extent necessary and a further determination will issue in due course.

[122] Kindle Limited deducted \$150.00 from Shiping Wei's wages, in breach of the Wages Protection Act 1983. Kindle Limited is to pay Shiping Wei \$150.00 (without deduction) by no later than 28 days after the date of this determination.

[123] Kindle Limited did not comply with s 23 of the Holidays Act 2003. Kindle Limited is to pay Shiping Wei \$1,772.59 (gross) by no later than 28 days after the date of this determination.

[124] Neither party was legally represented. However, if costs are an issue, a party may lodge and serve written submissions within 14 days and the other party may lodge and serve a written reply within a further 14 days. I will then determine the matter with regard to those submissions and the Authority's standard practice.

Philip Cheyne
Member of the Employment Relations Authority