

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 69

3136561  
3166842

BETWEEN PEISEN FAN  
Applicant in 3136561  
Respondent in 3166842

AND JKD FITNESS EAST  
AUCKLAND LIMITED  
First Respondent in 3136561  
Applicant in 3166842

AND SHUAI CHEN  
Second Respondent in 3136561

Member of Authority: Nicola Craig

Representatives: Mins Chang, advocate for Peisen Fen  
Martin Lyttleton, advocate for JKD Fitness East  
Auckland Limited and Shuai Chen

Investigation Meeting: 1 and 2 March, 21 and 22 April 2022

Submissions (and further information) received: 2, 16 and 30 May 2022  
6 and 24 May, 3 and 7 June 2022

Date: 15 February 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] During 2019 Peisen Fan began some work as a gym instructor for JKD Fitness East Auckland Limited (JKD or the company). JKD operated a sports gym in Auckland's North Shore.

[2] Mr Fan maintains that he was unjustifiably dismissed by JKD on 11 December 2020. JKD asserts that if Mr Fan was dismissed, there were good reasons for it although recognises the process adopted was not standard.

## **The Authority's investigation**

[3] An investigation meeting commenced on 1 March 2022 and continued on 2 March. Further time was needed. Before the meeting recommenced JKD lodged a counterclaim alleging that Mr Fan was overpaid in his final pay and seeking repayment. The two claims were then considered together with further investigation meeting days on 21 and 22 April 2022.

[4] Written witness statements were received, and oral evidence heard under oath and affirmation. I heard from Mr Fan, Xiang Li (JKD coach), two of Mr Fan's friends and Mr Fan's mother. For JKD I heard from director Shuai (Abel) Chen, shareholder Liying (Cheryl) Huang (also payroll operator and Mr Chen's wife), a receptionist, Shenshen Guan (who assisted JKD after Mr Fan's termination) and two parents of children who attended the gym, including Yi (Chris) Ding. Some witnesses appeared by audio-visual link. The Authority was assisted by interpreters of the Mandarin language. Written submissions were received from the parties on both claims.

[5] This determination has been issued more than three months after the date on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174(4) of the Employment Relations Act 2000 (the Act) was applicable.

[6] I have considered all the material provided by the parties. As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

## **The issues are compound**

[7] There was some ebb and flow in the issues for investigation and the parties' positions on them in the course of the proceedings.

[8] The issues for investigation in Mr Fan's claim with JKD are:

- (i) When did Mr Fan first become an employee of JKD, including consideration of the possibilities of November 2019 (after a learning contract was entered into) or May 2020 (when a written employment agreement was offered)?

- (ii) Was Mr Fan not offered an employment agreement by JKD at the time his employment began, thus breaching the Act and should a penalty be imposed?
- (iii) Was Mr Fan a permanent or a casual employee, was there any agreement about hours and does Mr Fan have any claim regarding JKD not providing any work hours agreed?
- (iv) Did JKD breach s 65(2)(a)(iv) of the Act by failing to specify in an employment agreement any agreed hours or an indication of the arrangements relating to the times Mr Fan was to work?
- (v) Did JKD fail to pay Mr Fan all his wages or other money due and/or pay his final pay late, thus breaching the Wages Protection Act 1983 and/or Holidays Act 2003 and if so, should a penalty be imposed?
- (vi) Did JKD breach its duty of good faith to Mr Fan and if so, should a penalty be imposed?
- (vii) Was Mr Fan disadvantaged by unjustified action of JKD regarding a disciplinary process?
- (viii) Was Mr Fan unjustifiably dismissed by JKD?
- (ix) If a grievance is established, what remedies (if any) should he receive?
- (x) Did JKD fail to provide wages and time records (as required by the Act) and/or holiday and leave records (as required by the Holidays Act), and if so, should a penalty be imposed?

[9] Mr Fan's representative confirmed at the start of the investigation meeting that Mr Fan was not seeking any further commission payments. The phrase "commission payments" was used by JKD in two ways – payments to staff for customers they attracted to the gym and payments made without tax deducted (also referred to as subcontract payments). There appears to have been no sub-contracting in the usual sense of a contractor arranging for someone else to undertake some or all of the work.

[10] The issues for investigation in Mr Fan's claim with Mr Chen are:

- (i) Did Mr Chen aid and abet a breach of employment terms by failure to provide Mr Fan with an employment agreement?
- (ii) Did Mr Chen aid and abet a breach involving failure to pay Mr Fan correct annual leave and holiday pay?

[11] The issues for investigation in JKD's claim are:

- (i) Did JKD overpay Mr Fan for the wage subsidy in his final pay and if so, should he be required to pay the company back?
- (ii) Should Mr Fan should be required to pay JKD for PAYE paid (during the investigation meeting period) to the IRD on top of the gross amount paid to him as subcontract payments?

[12] In the counterclaim JKD acknowledged that it owed Mr Fan \$411.76 gross for additional holiday pay and an increase in his week's pay in lieu of notice (as claimed by Mr Fan) but advised that it would not make that payment now and intended to set it off against any payments Mr Fan is found to owe to it. The effect of this is discussed below.

### **The parties' arrangements went through phases**

[13] Mr Fan arrived in New Zealand from China and started at the Auckland University of Technology (AUT) studying for a sports and recreation degree in mid-2017.

[14] In 2019 Mr Fan was working part time in a restaurant whilst studying. The restaurant owner introduced him to Mr Chen as Mr Fan needed 200 hours of (unpaid) internship with a qualified gym as part of his study.

[15] There was some complexity to the arrangements between the parties. I conclude that the arrangements went through the following phases:

- Starting in July 2019 Mr Fan completed a 16 hour per week unpaid internship with JKD as part of his AUT degree requirements. A learning contract was signed on 8 August 2019 and was specified to finish on 21 October 2019.
- Someone suggested Mr Chen started paying Mr Fan for his involvement at the gym. Mr Chen and Ms Huang were happy with Mr Fan's progress and offered to pay him for some work. Although it is suggested by Mr Chen that this started during the learning contract period, the payments did not start for some time after the first learning contract had, on its face, expired.
- Mr Fan began to be paid for work undertaken from 19 November 2019 with JKD now accepting this is when his employment with the company started.

- In February 2020 Mr Fan resigned from his restaurant employment and the second learning contract commenced, finishing on 17 May 2020. This completed the AUT requirement.
- Around 27 May 2020, an employment agreement was signed, although Mr Fan claims to have been coerced into signing.
- Mr Fan understood he was dismissed on 11 December 2020. He did not work for JKD after this date.

[16] The evidence about Mr Fan's hours and pay was not straightforward. Neither party gave particularly solid evidence on the arrangements. There are questions about whether part of Mr Fan's work at JKD was effectively as an independent contractor, with JKD saying he asked to be paid without tax deduction and take responsibility for the tax himself. The company also argues Mr Fan's employment was only as a casual employee. Although these questions do not result in claims for additional pay, the answers spin off onto other issues so must be resolved.

[17] Mr Chen's focus was on running classes and teaching other coaches, rather than on management. For at least some of Mr Fan's period of employment Mr Li was the manager. However, the evidence at the investigation meeting mainly concerned Mr Chen and Ms Huang's discussions, in person or via WeChat messaging, with Mr Fan.

[18] Initially Mr Fan was in an assistant role, working with other coaches, including Mr Chen. There is no claim for payment during the period prior to 19 November 2019, which was largely the time when the first learning contract was in place. Mr Chen says he was teaching Mr Fan during this time.

[19] At some point Mr Fan started individually teaching private classes or personal training sessions and running group classes.

[20] Mr Fan's student visa only allowed him to work 20 hours a week during term time. In the university holidays Mr Fan was entitled to work full time under his visa although he may not initially have been aware of this. He ran JKD gym holiday programmes for children.

### **No employment agreement initially provided**

[21] The parties now agree that Mr Fan's employment began on 19 November 2019, but he was not given an employment agreement until May 2020. Mr Fan claims this was a breach of the Act. There is mention of s 63A(2)(a) (failure to provide the employee with a copy of the intended agreement under discussion) and s 65(1)(a) (failure to have an employment agreement in writing).

[22] JKD accepts that accidentally no agreement was offered. With hindsight Mr Chen admits he should have arranged for JKD to enter into a written employment agreement on 19 November 2019 but mistakenly believed that an employment agreement was not required as Mr Fan was on learning contracts. Mr Chen does not have a sophisticated understanding of English and the learning contracts were in English.

[23] JKD breached its obligations under the Act to provide Mr Fan with a copy of the intended employment agreement under discussion in November 2019 and to have the employment agreement in writing at that time. Mr Fan seeks a penalty, which is discussed below.

### **Invoices were provided by Mr Fan**

[24] The parties agree that all the coaches at JKD had to provide weekly invoices and were paid monthly. Some of them were contractors but others were not. Ms Huang described the invoice requirement as being because she was not at the gym every day and could not check on attendance so asked people to record their classes in invoices. They were then verified, and she made payment.

[25] Mr Fan copied an invoice format provided by another coach, filled it out, sent it off and was paid. No payslips were provided.

[26] The invoices have a calculation of GST, but the evidence was that that was automatically done by the template. They have no GST number for Mr Fan as he was not registered for GST.

### **No untaxed payments agreed by Mr Fan**

[27] A not insignificant portion of the investigation meeting was taken up trying to establish the nature of parts of JKD's payments to Mr Fan. JKD asserted that, with Mr

Fan's agreement, some payments to him were made without tax deduction with him then responsible for paying the tax on those payments. This was in addition to accepting he was an employee.

[28] It is possible for two parties to simultaneously have an employment relationship and an independent contractor relationship. This might involve two separate types of work being undertaken, likely in different contexts. However, that does not really explain the situation here.

[29] For the purposes of these proceedings JKD did not seem particularly focused on establishing that Mr Fan was an independent contractor as such, more that he had authorised an arrangement for a period whereby he would pay his own tax. It did not argue that he was not an employee at the time he finished with JKD, meaning he could have no personal grievance claim.

[30] Mr Fan's position is that he was never a contractor. He was not entitled to be one under his student visa whereas he was entitled to undertake up to 20 hours of employment during course time. He does mention this on occasions to JKD representatives in WeChat messages.

[31] No written contractor agreement existed between JKD and Mr Fan.

[32] Rather than rely on original pay records, JKD provided a sheet which set out details of various payments to Mr Fan with descriptions. It is headed "*JKD Fitness – Revised Final Pay Calculation*". I refer to this as the payment sheet. It was compiled after Mr Fan's employment finished. Ms Guan initially said she compiled it although it appears with assistance from JKD's advocate. Later she said she did not compile the piece of paper but prepared some of the information.

[33] The payment sheet descriptions include "Wages", "Subcontract", "Subcontract Kids Holiday Programme", "Commission" and "Online class". These descriptions do not always match the description of JKD payments in Mr Fan's bank statements. For example, a payment received on 10 February 2020 is described in the bank statement as wages for January but on the payment sheet shows as "Subcontract January". There were different payment rates for different types of work. This is a complex picture.

### *Commission*

[34] There is only one “*commission*” payment referred to on the payment sheet, which seems to be a payment for attracting clients. Mr Chen says that these payments were made to coaches without tax but acknowledges that this may have been incorrect.

### *COVID wage subsidy*

[35] JKD applied successfully for the COVID wage subsidy on behalf of Mr Fan and others. This appears to have caused some administrative burden for the company. Via WeChat Mr Chen later suggested that Mr Fan apply himself as it might be more beneficial to Mr Fan to do that rather than the company applying.

[36] Mr Fan applied for wage subsidy as a self-employed contractor, but this was rejected by the Ministry of Social Development. He was not seen as self-employed.

### *Online classes*

[37] During COVID lockdown JKD offered online gym classes. On 30 April 2020 Ms Huang and Mr Fan communicated via WeChat about payments. Mr Fan mentions that the manager had said the online classes would be paid in cash, but Mr Chen had said it would go through PAYE. Ms Huang messages that there is no such talk about cash, the “*wage subsidy needs pay tax as well*”. Mr Fan says, “*what about follow by what coach Chen said, all pay tax as normal, online class is also (\$) 20 one hour before tax*”.

[38] Ms Huang also messages that JKD will make a payment of two parts – wage subsidy and online classes. She says she will calculate the PAYE and then pay.

[39] The messages show Mr Fan was aware of arrangements involving cash type payments but not that such an arrangement was agreed between the parties. In regard to this payment Ms Huang was repeatedly insistent on deducting tax and not agreeing to another arrangement. Mr Fan concurred.

### *Holiday programme*

[40] During one school holiday programme Mr Fan worked over 20 hours and JKD suggested he was paid as commission. It may have intended that to mean a contractor

payment but as referred to above “*commission*” was also used at JKD in the sense of a payment for clients attracted.

[41] Mr Fan agreed. Ms Huang’s evidence was that by doing so, he understood that the company would not deduct PAYE from the sum, it will be his responsibility. She said it was “*common knowledge*” at JKD that if coaches have extra income or pay, they have an obligation to pay tax. I do not accept that Mr Fan would necessarily have known this. For most of his time at JKD he was a student and in a different position to coaches who had full time employment or contracting arrangements elsewhere.

[42] On balance I conclude that Mr Fan did not know from what was said to him that the sums would not be taxed, and he would need to pay tax.

*“Subcontract payments”*

[43] From the payment sheet a subcontract payment was made for January 2020 (although this is inconsistent to the bank statement description), with wages then for February and March, returning to subcontract payments in May and June. The “*Subcontract Kids Holiday Programme*” payments were paid in August and November.

[44] Ms Huang’s evidence was that Mr Fan sought to have 20 hours a week paid as wages, and he invoice JKD for the rest of his income and pay the tax himself. However, that does not fit with the evidence that:

- All work was invoiced; and
- The payments were generally total monthly payments either as wages or as subcontract according to JKD’s payment sheet and Mr Fan’s bank statements.

[45] Similarly, to Ms Huang’s evidence, Mr Chen’s witness statement asserted that Mr Fan opted to receive part of his income for some months as a self-employed contractor. The type of work or number of hours this was to occur for was not specified. In his oral evidence Mr Chen indicated he was not aware of the details of this and had not spoken to Mr Fan specifically about it. He was not aware that the arrangement applied to a particular type of work.

[46] These pieces of evidence provide no satisfactory basis on which to find that Mr Fan agreed to receive untaxed payments on which he was responsible for tax.

[47] At some points Mr Fan knew that tax was being paid for him. For example, on 1 August 2020 Mr Fan messaged Ms Huang and she replies indicating that she had done the PAYE already.

### *Conclusion*

[48] JKD did not indicate to Mr Fan that he would be responsible for paying his own tax on any payments he received from JKD. It was used to dealing with coaches who were clearly set up as contractors, had other jobs or roles and understood what was involved. The complexity of the different pay rates for different aspects of work, the COVID situation and the absence of payslips made it difficult for Mr Fan to check what he was being paid. I do not accept that Mr Fan agreed with JKD that the company could make payments without tax to him.

### **Circumstances around offer of written employment agreement not ideal**

[49] During closing submissions Mr Fan's representative pointed to evidence that JKD did not provide Mr Fan with an opportunity to review the agreement proposed as there was an expectation it was signed and returned at the time it was provided. However, a penalty had not been sought on that basis and given the quasi-criminal nature of penalties, I do not proceed to consider a penalty here.

[50] In May 2020 Mr Chen indicated to Mr Fan he was intending to provide a written employment agreement.

[51] The agreement was handed over in person. There was no associated letter, which would often point out the employee's right to seek independent advice about the proposed agreement and indicate what the timeframe to do so was. Here the agreement contained a reference to the employee having been advised of the right to seek independent advice and having had reasonable time to do so. There is no evidence that Mr Chen advised Mr Fan of this, nor that Mr Fan read that reference. Mr Chen told the Authority he was open to negotiation about the terms of the agreement although he did not indicate this to Mr Fan.

[52] Mr Fan recalls Mr Chen saying he had to sign the agreement so that Mr Fan could apply for the second round of the wage subsidy himself as the company could no longer apply for him. He felt some pressure, although acknowledges Mr Chen did not force him to sign.

[53] A message later has Mr Chen suggesting that Mr Fan apply for a self-employed persons Covid subsidy. This implies Mr Chen may not have clearly understood that this was an employment agreement or the difference between the two relationships. Mr Fan reports telling Mr Chen that as he was on a student visa so he could not be self-employed.

### **Arrangement not casual**

[54] JKD argued that its arrangement with Mr Fan was casual, largely based on the written employment agreement. However, the evidence suggests otherwise.

[55] The first learning contract specified 16 hours a week and the second 15. Mr Fan was certainly there regularly, with Mr Chen describing Mr Fan as hardly ever having a day off initially.

[56] Even once payments began the arrangement was clearly part time and on-going. In the six months prior the employment agreement being signed Mr Fan was asked to commit to take various classes on particular days every week and did so. Classes would usually be fixed for a term. Mr Fan's work was indicated on a roster. He took personal training sessions which were pre-booked although they could be cancelled. Mr Fan had an expectation of on-going employment and worked every week.

[57] Various messages reinforce an ongoing arrangement. For example, Ms Huang on 30 April 2020 messaged during conversation about the wage subsidy - *"I hope you can work in the company with peace of mind in the future and get through this difficult time together"*.

[58] However, the employment agreement from May 2020 states in clause 3 that the parties agree *"that the nature of the relationship is a casual as required employment relationship"*.

[59] Neither party says that at the time the agreement was signed there was any discussion about hours or changes to the previous arrangement. Mr Fan saw it as a part time arrangement, having not been sent the agreement before meeting with Mr Chen, not looking carefully at it prior to signing it and not being given a copy to keep.

[60] Mr Chen's evidence was that he got a lawyer to provide the agreement after talking to him about the gym. He says he was unaware that there were various types of employment agreements.

[61] There was thus no common intention to change the nature of the arrangement to a casual one.

[62] This conclusion is reinforced by the continuation post-signature of previous practices. Mr Fan continued to be offered classes for an extended period and be expected to make himself available for them. He worked every week.

[63] In Schedule A of the agreement annual leave was stated to be "*paid 8% of earnings*" but this was crossed out. JKD did not operate 'pay as you go' holiday payments for Mr Fan so when he finished, he was entitled to holiday pay for his entire period of employment. This again supports that he was not casual.

[64] In summary, by the time the employment agreement was signed Mr Fan had been working for JKD for around six months, regularly taking the same classes and holiday programmes. There was no discussion between the parties to change the nature of the arrangements at the time the agreement was signed. The arrangements stayed the same. I conclude Mr Fan had on-going permanent part time employment with JKD for variable hours.

#### **No particular hours were guaranteed**

[65] Mr Fan accepts that he was initially told by Mr Chen that he could not be offered fixed hours but that he had a part time job.

[66] In his oral evidence Mr Chen accepts he did not talk to Mr Fan about the hours he would be working. Mr Chen says he told the manager to pay Mr Fan according to his working hours at the usual rate. Mr Fan's usual hours had been 16 hours a week. This started under the first learning contract and seem to initially have continued after that contract expired.

[67] Mr Fan says he was not provided with minimum guaranteed hours of work. However, there is no claim for payment for hours not provided.

[68] On Mr Fan's behalf a claim is made that there was a breach of his employment agreement as JKD failed to provide him with his minimum guaranteed hours and forced

him to sign a “casual” employment agreement. It is hard to see how there can be a breach of an oral employment agreement which contains no agreed hours of work by the employer failing to offer any particular work hours.

[69] The employment agreement document specified the hours as casual as required, with reasonable notice having to be given. The signing of the agreement seemed to have no particular effect on the hours of work offered to Mr Fan, so the casual provision was not used to his disadvantage during his employment.

[70] Mr Fan has not established his claim in this regard.

### **Mr Chen heard about another gym business being established**

[71] In late 2020 Mr Chen heard what he initially regarded as gossip, circulating amongst parents of children attending JKD classes, that Mr Li and Mr Fan were planning on setting up another gym. He also heard a name for the new gym and that there was an attempt to encourage students to go there.

[72] I note that in the lead up to and at the start of the Authority’s investigation meeting there was uncertainty from Mr Fan about whether he had coached the children of the parent witnesses. However, JKD provided photos, video and billing evidence which satisfied him that he had.

[73] Back to late 2020. Mr Chen became very angry on being asked by several parents about the new gym. As he was angry, he decided it was better to communicate electronically with Mr Li and Mr Fan via WeChat rather than meet in person. Mr Li had recently finished with JKD.

[74] Mr Chen reports messaging Mr Li on 10 December 2020, raising concerns and seeking an explanation about taking JKD’s customers. Mr Fan’s name was mentioned. There was no response. Mr Li denies getting those messages. In any event, there was no evidence that the messages were passed on by Mr Li to Mr Fan.

[75] On 11 December 2020 Mr Chen began what cascaded into a torrent of WeChat communications between him and Mr Fan lasting over three hours. Mr Chen started with the immorality of stealing clients but later indicated that he did not mind Mr Fan working elsewhere but wanted to have been told about that. Mr Chen admitted in the Authority that he had overreacted on the day by messaging Mr Fan that he could no

longer come to work. But he says he then tried to sort things out over the WeChat to no avail.

[76] A day or two later, as instructed, Mr Fan returned his gym keys, handed back his JKD clothing and picked up his personal belongings.

[77] Subsequently Mr Fan raised a concern that he had not been paid his full wage subsidy entitlement. He was contacted by another JKD shareholder, and a meeting arranged. At the meeting Mr Fan recalls the shareholder introducing him to Ms Guan, describing her as a very good capable lady who had just won a case and had learned labour law by herself. Ms Guan describes herself as a friend of the shareholder who asked for her assistance. She became involved in dealings with JKD's external accountant and Mr Fan.

[78] Via Ms Guan a JKD proposed final pay calculation was offered in February 2021. Discussion about a resolution of all concerns was unsuccessful and Mr Fan received his final pay a couple of months later.

[79] Companies Office records show the company operating the new gym was not incorporated until April 2021. Mr Fan recalls Mr Li approaching him in February 2021 having heard from other coaches that Mr Fan was not in a good state. Mr Fan accepts that he initially volunteered at the gym in about April 2021 and started working there in May 2021. On the basis of the evidence before me, this was credible.

### **Mr Fan was dismissed**

[80] Closing submissions for JKD argue that it is not clear from the evidence that Mr Chen did in fact explicitly terminate Mr Fan's employment or fire him with immediate effect.

[81] There were some difficulties with the parties providing different translations of the WeChat material, not based on an independent interpreter's analysis. The Authority's interpreters provided interpretation of some evidence and where necessary I prefer that version.

[82] After referring to the immorality of stealing customers, the first WeChat entries from Mr Chen on 11 December 2020 include the following:

You do not need to come back in the future, starting from now

Before the 20<sup>th</sup> give me the invoice  
You give/hand over the key to reception  
Clear (or take away) your belongings

[83] Mr Chen's messages communicate that Mr Fan does not need to come back (to work) anymore, should hand over his keys and remove all his personal things. This amounts to a sending away by the employer – a dismissal.

[84] However, the message conversation continued that afternoon. It is possible that if the parties agreed, the employment relationship could have been restored. But did that happen?

[85] After Mr Chen announced the dismissal, a large number of further messages were exchanged. Much later in the conversation, during a discussion about how Mr Chen treated staff, he asks "*How about you guys come and try to be the director of this company?*". Mr Fan says, "*You did not ask me; you have accused me and dismiss me straightaway*". Mr Chen does not then attempt to retract the dismissal. Rather he makes a comment, "*How about I work for you guys?*". He acknowledges "*that was my angry word*". A little later he again acknowledges being "*truly angry*" but does not withdraw the dismissal. Subsequent messages did not alter this position.

[86] Mr Fan understood that he was still dismissed and that was a reasonable assumption to make. He did not return to undertake any work. Mr Chen did not make any offer to have him back.

[87] Mr Fan was dismissed by JKD.

### **The dismissal was unjustified**

[88] JKD's employment agreement with Mr Fan contained provisions requiring him to conduct his duties in the company's and the employment relationship's best interests. The statutory good faith duties are also reinforced. The conflict of interest clause required Mr Fan to inform JKD if he became aware of any arising potential or actual conflict of interest. Other than via those provisions there was no requirement to seek the company's consent before taking on other work.

[89] Mr Chen regards stealing customers as a gross breach of JKD's trust and a conflict of interest. In addition, he formed the impression that Mr Fan admitted during the 11 December WeChat conversation to working at the new gym or for Mr Li while

still with JKD. Mr Chen thus saw Mr Fan as training customers who were being induced to transfer over to the new gym.

[90] This is a situation where the question of whether there was substantive justification for a dismissal is mired by procedural difficulties. JKD admitted there were problems with its process, although suggested these may have been overcome by the extended WeChat discussion.

*Test*

[91] JKD must establish that its actions were, on an objective basis, what a fair and reasonable employer could have done in all the circumstances.<sup>1</sup> I must consider whether the employer before dismissing:

- (i) having regard to the resources available, sufficiently investigated the allegations;
- (ii) raised the concerns with the employee;
- (iii) gave the employee a reasonable opportunity to respond; and
- (iv) genuinely considered any explanation.<sup>2</sup>

*Process adopted*

[92] Other than some investigation, JKD failed to undertake those steps before dismissing, given that the dismissal was communicated before any discussion with Mr Fan.

[93] I focus on investigation before looking at whether the extended message exchange on 11 December could be said to satisfy some of the other elements. The employer must justify the dismissal on the basis of the information it had at the time. However, given the lack of written information held by Mr Chen and communication to Mr Fan on 11 December about who said what, the Authority's investigation process became an exploration of what Mr Chen was told or not told.

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<sup>1</sup> The Act, s 103A(1) and (2).

<sup>2</sup> The Act, s 103A(3).

### *Investigation modest*

[94] Mr Chen's evidence of his investigation is modest. According to him he first heard whispers of something going on with Mr Li and Mr Fan and essentially ignored it until there were several people reporting it. Once that happened, he became concerned.

[95] Parents had quick chats with Mr Chen before the classes. Mr Chen acknowledges that he had almost no discussion with them about what Mr Fan had said to them, as he was rushing into his own classes. He did not get anything in writing from any parents including by way of electronic message. Mr Chen refers to making further enquiries with some parents, but they were reluctant to elaborate.

[96] Mr Chen was not willing or able to be very specific about who had told him what. At the investigation meeting he provided first names of four people he spoke to, including the two witnesses in this proceeding. More on their evidence below.

[97] Mr Chen initially said that he had first heard about there being a new gym on 9 or 10 December 2020 – a day or two before he dismissed Mr Fan. Confronted with a question about whether he had spoken in that period to the four people he named including follow ups, he expanded the period to a few days. This time question is discussed further regarding Mr Ding's evidence.

### *Mr Fan's involvement*

[98] Given the seeming involvement of two people, Mr Li and Mr Fan, it was important for Mr Chen to attempt to clarify the role of each. This was particularly so as regards Mr Fan, being both an existing employee and likely to be (if anything) a more junior player in any new venture. Mr Li was older, had been at JKD longer and had had managerial responsibility. According to his evidence, Mr Li was an independent contractor prior to his finishing with JKD.

[99] Mr Li accepted during the investigation meeting that he talked to parents at the JKD gym about his idea of establishing a gym, but his finance was not confirmed until February 2021 so (while he was still at JKD) he could not ask parents to transfer. He referred to talking to parents about trying his best with coaches (including Mr Fan) as his business partners. This may have been sales talk but in any event, there was no

evidence that Mr Fan or any other coach had discussed, agreed or became Mr Li's business partner.

*Mr Ding's evidence*

[100] The only specific direct evidence the Authority heard about Mr Chen being informed of Mr Fan's involvement was from Mr Ding. His evidence was that in late November 2020 he heard Mr Li and Mr Fan talking to parents "*introducing their new gym to be opening soon and telling parents that they can transfer their kids to the new gym*". The coaches did not talk to Mr Ding directly.

[101] As Mr Ding was an acquaintance or friend of Mr Chen and his wife is the JKD receptionist who gave evidence, he could not be seen as an entirely independent witness.

[102] In addition, Mr Ding's evidence had elements of uncertainty. There was some difficulty getting an understanding of how many incidents he had witnessed and how many people were involved. After some questions about the number of coaches involved he got to "*[a]t least one person, I'm sure two people*". When asked to clarify he said when referring to at least one, "*I was referring to Li Xiang and that happened one year and a half ago, when I recall again, I remember [Mr] Fan was also talking to parents about transferring their students to the gym*". He could not be certain whether it was during the same or different incidents with the two coaches.

[103] Mr Ding gave evidence about the circumstances in which he heard Mr Li talking to parents. His evidence about the circumstances involving Mr Fan was less certain; initially saying it was "*parents*" but later not sure whether it was one parent or more.

[104] Mr Ding's witness statement states that Mr Li and Mr Fan did not speak to him about the new gym as they knew he was a friend of Mr Chen. However, during his oral evidence he was very reluctant to admit a friendship, only saying he and Mr Chen know each other.

[105] By contrast Mr Chen agreed that the two were close friends and that he trusted all his close friends. Mr Chen brought Mr Ding along to a karaoke evening with JKD staff, having picked Mr Ding up from the airport after he had been away. Given that, Mr Ding's reluctance to accept the two were friends' casts doubt on his evidence.

[106] In addition, there were some inconsistencies between the evidence provided by Mr Ding and Mr Chen regarding their discussions with no records or documents in support:

- (i) Time – Mr Ding stated that he told Mr Chen about what he saw and heard in November 2020 and that he told Mr Chen the same day he heard Mr Fan speak to the parent/s. Mr Chen initially stated there was only one conversation. A little later he back tracked, saying he could not recall how many times they had spoken on the topic;
- (ii) Location – Mr Ding stated that he met with Mr Chen in a North Shore restaurant of Mr Ding’s friend, arranging the meeting by phone. Mr Chen recalled meeting Mr Ding at JKD’s gym and did not see why Mr Ding would have phoned him to set up a discussion about a new gym business. When Mr Ding’s evidence was put to him, Mr Chen said he was called, went to dinner but when Mr Ding tried to bring the subject up, Mr Chen asked him to cut it out; and
- (iii) Content – Mr Ding refers to telling Mr Chen about Mr Fan speaking to parents but did not mention Mr Li (at that time). He says he told Mr Chen about Mr Li on a different day later. The reason for this was not apparent as Mr Ding reports hearing Mr Li speak to parents before he heard Mr Fan do so. Mr Ding was unable to explain.

[107] Overall, there is sufficient doubt cast on whether Mr Ding told Mr Chen that he had heard Mr Fan approaching a parent to promote another gym’s business.

*The second parent’s direct evidence was not about Mr Fan*

[108] The second parent witness heard from other parents that Mr Fan was doing personal training himself, not with JKD. Clearly this was hearsay. One day the second parent heard a Mr Li trying to convince some parents to go to his new gym. Mr Fan was not present. The second parent says he told Mr Chen about Mr Li, with no mention of Mr Fan.

[109] Mr Chen’s evidence was that the second parent told him he had heard Mr Fan and Mr Li talking about setting up another business. By contrast the second parent’s

evidence did not indicate that he had heard Mr Fan talking about it. This casts doubt on Mr Chen's evidence and investigation.

*Mr Chen considered there was an admission*

[110] Mr Chen believed that, as of 11 December 2020, Mr Fan admitted having started work at the other gym, although, other than Mr Chen's interpretation of the WeChat exchange, there was little else to support this timing. Was there a sufficient basis for Mr Chen's conclusion?

[111] JKD relies on its own translation of the Mandarin WeChat conversation. For example, its interpretation has Mr Fan say "*when I go to Mr Li's to teaching lessons... I can only work for who can pay me more money as I do need money for food, this is justified*". The interpretation put forward for Mr Fan has him saying "*if I teach class at Mr Li's place... I cannot cover my living expenses. It would make sense if I could work for people who provide higher wages*".

[112] The translation from the Authority's interpreter has Mr Fan, after denying that he had told parents to have classes at Mr Li's place rather than JKD, saying "*I go to Mr Li's place for a class it's not in breach of morality/ethics*".

[113] Another translation by the Authority's interpreter has Mr Fan saying "*I only did what was right and appropriate or justified. Who gives me more money/pay and I will provide the class. It has nothing to do with morality*". The interpreter noted to the Authority the possibility of people having different interpretations of Chinese.

[114] At the time Mr Chen took Mr Fan's statements as an admission that he was currently working for Mr Li. There are some messages which support that, but others are hypothetical or future focused. Both Mr Fan and Mr Chen say that they were angry during the conversation. Mr Fan reports taping the keys very fast and missing punctuation.

[115] Mr Fan accepted in questioning at the Authority meeting that Mr Chen gained the sense from the messages that Mr Fan was already teaching for Mr Li and can now see that this was a misunderstanding between them.

[116] I conclude that a fair and reasonable employer, when dealing with electronic messages, confronted with what seems like an admission but with other statements

suggesting more hypothetical or future-focused responses, would have made more attempt to clarify that point and/or sought an in person meeting later to check the employee's position. Mr Chen did not do that.

### *Conclusion*

[117] There were two aspects to Mr Chen's concerns – that Mr Fan was working at another gym without telling him and that he was trying to persuade parents to transfer to a different gym which would have been a conflict of interest. Mr Chen should have done more to clarify Mr Fan's position on the first aspect and during the WeChat exchange Mr Fan strongly denied the latter.

[118] For the reasons outlined above, there was not an adequate investigation to allow Mr Chen to have got to the point where he genuinely believed that Mr Fan had tried to persuade parents to transfer. Mr Chen's assumption that Mr Fan had already begun working at the other gym without telling Mr Chen meant he saw motivation for Mr Fan to have persuaded parents although there was little reliable evidence to support that.

[119] Then, there was no proper setting up of the process to speak to Mr Fan. Before Mr Fan was informed that he was dismissed, JKD did not provide him with any information about who it had spoken to and minimal information about what was said. JKD did not meet its good faith obligations to Mr Fan. He therefore did not have a reasonable opportunity to respond to the allegations before being dismissed.

[120] There was no in-person meeting to discuss JKD's issues. Mr Chen's reluctance about meeting in person when he was angry had some logic but that does make dismissal without any discussion with Mr Fan acceptable. Too angry to meet means too angry to fairly decide to dismiss.

[121] I have considered whether the WeChat message exchange could have covered off the procedural elements in s 103A(3), albeit after Mr Chen's initial indication that Mr Fan was to finish work. The exchange included the provision of some information by Mr Chen and responses from Mr Fan.

[122] The problem is that Mr Chen did not come with an open mind. He was upset and angry and had predetermined the decision. Mr Fan's denials that he had tried to persuade parents to transfer had no traction as Mr Chen was not open to investigating further or changing his mind.

[123] In conclusion the elements in s 103A(3) are not met. JKD did not act as a fair and reasonable employer could have done. Mr Fan was unjustifiably dismissed.

[124] I do not accept that the defects in process were minor and did not result in Mr Fan being treated unfairly.

#### **No need to consider disadvantage**

[125] Having found that Mr Fan was unjustifiably dismissed, I do not proceed to deal with the unjustifiable action disadvantage claim based on the same facts.

#### **Mr Fan receives remedies**

[126] Mr Fan claims lost wages totalling \$4,004 gross. This is made up of 14 weeks of wages at \$286, being an average of 13 hours a week at \$22 an hour. There is sound basis to go slightly over the three-month period in s 128 of the Act. Mr Fan made sufficient efforts to find other work but was hampered by it being the Christmas period and his feeling of hopelessness after having been dismissed.

[127] Mr Fan also seeks \$20,000 compensation for humiliation, loss of dignity and injury to feelings. Mr Fan was significantly impacted by his sudden dismissal. He felt humiliated and destroyed. Mr Fan had just graduated and was hoping to work productively to fully support himself. Instead, he ended up feeling hopeless, being unable to meet his financial commitments. He had to turn to friends and family for financial support at a time when he had hoped to be able to financially support his parents.

[128] Mr Fan's sleep and eating were impacted. He was observed by others to be in a bad mood, feeling helpless and refusing social invitations. One witness described Mr Fan as a mess, unwashed and unshaven. Mr Fan contemplated returning to live in China. Being dismissed just before Christmas was especially hard, seeing others enjoying the festive environment and looking forward to gatherings. Mr Fan instead felt anxious and lonely.

[129] The impact of the dismissal continued for some time so, for example, Mr Fan became anxious when there was a short delay with provision of an employment agreement from his next employer.

[130] JKD provided social media content from Mr Fan's account. This shows entries about receiving presents, having a sense of satisfaction and getting help from lots of friends. Mr Fan is seen in late December commenting that he was cooking a nice meal and exercising, then taking a trip out of Auckland.

[131] Mr Fan's explanations were that young people do not want others to see the bad parts of their life and he was trying to show gratitude to someone who sent him presents. He referred to an inspirational message he posted to make himself feel better. I accept Mr Fan's explanation for the seemingly positive messages put up, especially in December. There were several witnesses who spoke compelling of how poorly Mr Fan was in reality.

[132] The remedies sought by Mr Fan are reasonable subject to the question of contribution by him.

#### **No deduction for contribution**

[133] From JKD's perspective any loss or harm caused by Mr Fan's own admitted misconduct in breaching his duties to JKD. As outlined above, I am not satisfied that there is a firm basis on which to conclude that Mr Fan had admitted misconduct during the WeChat messages.

[134] Mr Fan did let the parents of one child know, shortly after his dismissal, that he could not take the training session on 12 December 2020. That child did later move to be trained by Mr Fan at the new gym but according to Mr Fan's unchallenged evidence, that was some months after he finished with JKD. This provides no basis for a finding of contribution.

[135] I conclude that no deduction from remedies for contribution is warranted.

[136] JKD is therefore ordered to pay Mr Fan the following grievance remedies within 28 days of the date of this determination - \$4,004 gross in lost wages and \$20,000 in compensation under s 123(1)(c)(i) of the Act.

#### **No breach of employment agreement established**

[137] For Mr Fan it is submitted that there were breaches of his employment agreement by failure to provide fair and reasonable process under clause 11 and to meet PAYE obligations.

[138] Clause 11 covers notice periods for termination, a list of reasons why termination without notice may occur, abandonment situations and return of property by the employee. The clause does not specify a process for dismissals as such. There is therefore no breach established.

[139] Employers, including JKD, have obligations regarding the deduction of tax, under the taxation legislation. There is no provision in the employment agreement specifically about PAYE deductions. I make no finding of breach in this regard.

### **Good faith already considered**

[140] Mr Fan's good faith claim covers the same issues as the grievances – little or no investigation or disciplinary process. Having incorporated those issues in the dismissal claim I do not deal with them again as that would risk double dipping on remedies.

### **Holiday pay is owing**

[141] After Mr Fan finished working for JKD there was an extended time before his final pay was paid. Christmas holidays no doubt intervened, including for JKD's external accountant who was to be involved in the calculations.

[142] In text messages between Ms Guan for JKD and Mr Fan from 21 January 2021 onwards, Ms Guan insists that the calculation of the final pay is "*absolutely correct*" and the accountant can explain. In later messages she explains aspects of the calculations such as the ordinary pay used to determine holiday pay.

[143] Mr Fan argues that there remains \$442 gross unpaid for holiday pay. This is based on a calculation of his holidays outstanding, a week's wages and the amount of wage subsidy (\$3,497.97) proposed by JKD.

[144] In its counterclaim JKD accepted that it owed Mr Fan an additional amount of \$411.76 gross for additional holiday pay and for "an increase to his final week's pay in lieu of notice". The company did not pay that money, rather intending to set it off against any money he is said to owe the company.

[145] The calculation JKD used to determine Mr Fan's final pay appears not to recognise that as he had been employed over a year. He was entitled to four weeks'

holiday pay for that year, rather than simply 8% of his total income.<sup>3</sup> In addition he was entitled to 8% of his income for the few weeks worked after his one-year anniversary.<sup>4</sup>

[146] JKD owed Mr Fan four weeks' leave at \$22 an hour for an average of 12.98 hours a week, amounting to \$1,142.24 gross. The company also owed Mr Fan \$68.53 gross, being 8% of three weeks' pay. These figures total \$1,210.77 gross.

[147] JKD had paid Mr Fan \$872.37 as holiday pay. So JKD still owes Mr Fan \$338.40 gross as holiday pay which it is to pay him within 28 days of the date of this determination. Interest on that sum is to be paid from 12 December 2020, being the day after the date of dismissal, until the date of payment.<sup>5</sup>

[148] Failure to pay holiday pay in an employee's final pay is a breach of the s 27(2) of the Holidays Act so JKD is in breach. A penalty is sought, and this is discussed below.

[149] I make no finding against regarding pay in lieu of notice as Mr Fan was summarily dismissed.

### **JKD did not keep adequate wages and time records**

[150] Mr Fan asserts that the records do not comply with s 130 of the Act. JKD argues that its wages and time records were kept electronically and have been converted into written form and provided.

[151] JKD's payment sheet does not contain Mr Fan's postal address as is required by s 130(1)(c) of the Act, nor any reference to whether he is employed under an individual or collective agreement (s 130(1)(e)). In some instances, there is no information on the hours worked and therefore the method of calculation cannot be determined (s 130(1)(g) and (h)). The information therefore does not fully meet the requirements of s 130 of the Act – JKD breached that section.

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<sup>3</sup> Holidays Act, s 24.

<sup>4</sup> Holidays Act, s 25.

<sup>5</sup> Calculated as per the Civil Debt interest calculator - <https://www.justice.govt.nz/finances/civil-debt-interest-calculator/>.

### **JKD did not keep adequate holiday and leave records**

[152] JKD asserts that electronic records are acceptable. It relies on Mr Fan's evidence that he never took sick leave or holiday leave matching JKD's evidence from their records. The company says a nil record of leave is a nil record, so it need not have done more.

[153] There is information which under s 81 of the Holidays Act must be on the holiday and leave record regardless of whether any leave has been taken. This includes the date employment commenced, the number of hours worked in each pay period, the current entitlement to annual leave, the day the employee last became entitled to annual leave and their current sick leave entitlement. JKD's payment sheet does not fully specify those things. The company breached s 81 of the Holidays Act.

### **JKD should pay a penalty for statutory breaches**

[154] I have considered whether JKD should pay a penalty and conclude that it should. There are several breaches. The employee is a young person, relatively new to employment in New Zealand. The company describes its failures as accidental or inadvertent but when it became aware that it still owed Mr Fan part of his holiday pay it decided not to pay until questions about whether he owed the company anything were resolved.

### **JKD's penalty assessed**

[155] Looking at what the penalty should be, I have regard to the factors set out in s 133A of the Act, as well as the decisions in *Borsboom v Preet PVT Limited*, *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.<sup>6</sup>

[156] The breaches are:

- (i) No employment agreement provided on appointment, although Mr Fan was later provided with one;<sup>7</sup>

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<sup>6</sup> *Borsboom v Preet PVT Limited* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

<sup>7</sup> The Act, s 63A(2)(a) and (3) and s 65(1)(a).

- (ii) Non-payment of full holiday pay on termination, with initial payment taking some months and then there remaining an amount outstanding;<sup>8</sup>
- (iii) Failure to keep proper wages and time records;<sup>9</sup> and
- (iv) Failure to keep proper holiday and leave records.<sup>10</sup>

[157] Some consolidation should occur so the two provisions regarding failure to provide and have a written employment agreement become one breach and the two records matters regarded as one.

[158] There are now three breaches. With the maximum penalty against a company being \$20,000 per breach, the starting point is therefore \$60,000. I now look at relevant factors in assessing the level of penalty.

[159] Mr Chen focused on the fact Mr Fan had a written contract in place albeit not an employment one. Mr Chen's level of English comprehension also impacted. There was not a deliberate decision.

[160] The holidays non-payment concerns a minimum entitlement provision and employment standard.<sup>11</sup> These are important rights.

[161] JKD's decision not to pay Mr Fan even once it accepted, he was still owed holiday pay makes this now an intentional breach. It means that he has been without his full holiday pay for a considerable time after his employment finished. The amount owing is however relatively modest.

[162] JKD kept records but the conversion provided (the payment sheet) did not capture all the necessary elements. This could be seen as inadvertent. However, record keeping obligations are important as they enable employees and their representatives to assess whether proper entitlements have been provided.

[163] Mr Fan was a young migrant, having only been in New Zealand for a few years. There was some vulnerability. There is a need for general deterrence, as internships do lead on occasions to employment arrangements and companies should ensure that they

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<sup>8</sup> Holidays Act s 27(2). This could also be regarded as a breach of the Wages Protection Act but in that case would have been consolidated with the Holidays Act breach for purposes of penalty determination.

<sup>9</sup> The Act, s 130.

<sup>10</sup> Holidays Act, s 81.

<sup>11</sup> The Act, s 5.

are complying with their obligations under employment law rather than simply relying on a learning contract. There is also some need for specific deterrence to ensure JKD appreciates the significance of its obligations.

[164] There was no suggestion that JKD is in a financial position which would make it difficult to pay a penalty. There are however, as noted above, some mitigating factors. Standing back, looking at that figure, including in comparison to other cases and the total arrears, I conclude that a fair penalty is \$7,000.

#### *Payment of the penalty*

[165] I have considered whether Mr Fan should receive some of the penalty. The lack of adequate records contributed to his and his representative's difficulty in assessing whether his proper entitlements had been received. There is also a public interest element given employment standards are involved. JKD is to pay a penalty of \$7,000 within 28 days of the date of this determination, with \$3,000 being paid to the Crown and \$4,000 to Mr Fan.

#### **JKD must pay in accordance with orders**

[166] The Authority's orders require payment within the time specified. JKD is not entitled await the outcome of another proceeding to see if it needs to make payment.

#### **No liability for Mr Chen**

[167] The claims against Mr Chen are that he aided and abetted a breach of employment terms by failing to provide an employment agreement and failing to pay correct holiday pay. Submissions also referred to Mr Chen's actions regarding pressure on Mr Fan to enter into the written employment agreement, Mr Fan's dismissal and good faith.

[168] These claims are misconceived.

[169] The obligation to provide an employment agreement is a statutory obligation, with the employer liable to a penalty if there is a breach. Similarly with holiday obligations. There needs to be a specific provision allowing someone who is not an employer to be punished.

[170] Those who are not a party to the employment agreement but are involved in aiding and abetting breaches of agreements are liable under s 134(2) to the Act to a penalty but that does not apply to aiding and abetting breaches of the Act.

[171] There are provisions in Part 9A of the Act providing additional enforcement mechanisms for employment standards breaches. Those who are involved in breaches can be required to pay wages or other money due to an employee if the employer is unable to pay.<sup>12</sup> However, no orders under those provision are sought. Pecuniary penalty orders under this part of the Act are only able to be imposed by the Employment Court.<sup>13</sup>

[172] Dismissal claims must be brought against the employer, rather than a director of the employing company. The claims that JKD breached the employment agreement were not successful.

[173] I see no basis on which the Authority can impose a penalty on Mr Chen as director for the things sought for Mr Fan.

#### **JKD's counterclaim has two parts**

[174] There was some difficulty in establishing exactly the basis on which JKD was claiming that Mr Fan owed it money. Ultimately there are two amounts said to be owed:

- (i) A sum of \$3,497.97 gross in the final pay for the wage subsidy, which JKD says should not have been paid at all. An element of this relates to “contractor payments” which are said to have not been included when calculating what was owing to Mr Fan; and
- (ii) JKD paid Mr Fan “contractor payments” which it did not deduct PAYE on. Seemingly after the first two days of the investigation meeting, when Mr Fan gave evidence that he was not aware that the payments were made without PAYE deduction, the company decided to pay \$946.15 to IRD for PAYE.

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<sup>12</sup> The Act, s 142Y.

<sup>13</sup> The Act, s 142E.

## **JKD paid a wage subsidy component as part of the final pay**

[175] Mr Fan's final pay was calculated by JKD's external accountant. The company says that the accountant made an error in calculating the final pay, specifically whether there was any wage subsidy still due to Mr Fan over what had already been paid in 2020. The accountant concluded that wage subsidy of \$3,497.97 gross was owing. JKD says this was an overpayment which Mr Fan owes it.

[176] There seems to be two elements to the alleged error:

- (i) calculations done on the incorrect basis of Mr Fan getting all the subsidy money from the government regarding him, when government information states if normal wages are less than relevant wage subsidy, the employee only gets paid normal wages; and
- (ii) the accountant failed to include the contractor payments received by Mr Fan gross without PAYE deducted, thus understating the actual total earned by Mr Fan.

[177] There is no evidence from the accountant about the respective contributions of each element.

### *Payment of full subsidy*

[178] The Government's COVID-19 Guidance to Payroll Professionals indicates that where an employee's normal wages are less than the relevant wage subsidy rate, "*...the employee should be paid their normal wages and employers can use any excess subsidy to help pay the wages of other affected staff*".<sup>14</sup>

[179] JKD's claim faces hurdles. First, JKD did not offer evidence from the accountant, either in person or seemingly by way of her calculations. Those calculations provided appear to have been done by JKD's advocate in this proceeding, who used to be an accountant. I cannot therefore be certain that the error suggested by JKD is an error made by the accountant.

[180] Second, there is evidence that JKD decided to pay at the higher rate. Ms Guan followed up with Mr Chen and Ms Huang about Mr Fan's view that he was entitled to

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<sup>14</sup> Web page last reviewed 27 January 2022.

more wage subsidy. They were happy to use the “*maximum payment method*” at the time to pay Mr Fan any difference. Ms Guan later repeated that it was not very clear how to make the wage subsidy and the accountant said some employers pay it in full, some paid on average wages. Ms Guan acknowledged under questioning that Mr Chen and Ms Huang agreed to pass the full wage subsidy on to Mr Fan. The company was aware that it was paying the full amount, knowing that it was not necessarily obliged to do so but deciding that that was the option it wanted to take.

[181] This approach is reinforced in a 30 April 2020 message from Ms Huang that the accountant has said pay the higher rate of the average wage and the actual wage. She goes on to describe that as inequitable so the company “*made decision to pay for both, which is (JKD) will pay you a bit more of (\$)700 of wage subsidy and (\$)500 of online class*”.

[182] It is not evident that JKD has paid or will be required to pay back to the government the difference between the full wage subsidy and Mr Fan’s average wages.

[183] Submissions for JKD refer to Mr Fan receiving the payment knowing he was not entitled to it. I do not accept that. Ms Guan says she provided a full explanation to Mr Fan in early February 2021 of the final calculation. There were efforts to persuade Mr Fan that the accountant’s calculations were correct.

[184] JKD has difficulty satisfactorily establishing that this money was paid due to an error by accountant and not in circumstances where JKD had decided to offer the higher rate.

*Failure to exclude or include “contractor payments”*

[185] There were references to not excluding but also to not including these payments. This claim also suffers from some of the same difficulties as the one above.

[186] I do not have calculations from the accountant, and she did not give evidence. Ms Guan spoke of her understanding of what the accountant had done but did not have sufficient knowledge to cover that absence.

[187] When asked whether the accountant asked for documents, Ms Guan told the Authority that the accountant had information or should have asked JKD for it. When Ms Guan was asked whether the accountant’s final pay calculation was as per

information supplied by JKD or on JKD's instruction, Ms Guan said that she could not answer. She said she was not involved in the accountant's calculations.

### *Conclusions*

[188] Reference was made to s 6 of the Wages Protection Act. Section 6 is a provision designed to allow an employer to recover certain overpayments made during a recoverable period on giving the employee notice. The provision does not apply here, including because it only concerns overpayments which could not reasonably practicably be avoided by virtue of the methods or equipment usually used for payment.<sup>15</sup>

[189] There remains an unjust enrichment claim, traditionally referred to as money had and received. As already indicated JKD struggled to establish the evidential basis for its claim, with a lack of satisfactory evidence regarding the mistake/s and their contribution to the payment. There was little indication that the mistake could not have been avoided by thorough communication between the external accountant and Ms Huang. However, in case I am wrong on that I will go on to consider Mr Fan's situation.

### **Mr Fan changed his position**

[190] What needs to be examined is whether, in reliance on thinking the money was his, Mr Fan spent it on things he would not otherwise have done.<sup>16</sup>

[191] As noted, I am not persuaded that Mr Fan should have been aware that there was an overpayment. He thought he was entitled to a larger payment, with Ms Guan trying to explain why the lesser amount JKD thought should be paid was accurate. The lack of detail in the employment agreement about pay and hours, along with the absence of payslips did not assist with checking, either during employment or with the final pay. Mr Fan understood he should get the full wage subsidy which JKD had received regarding him.

[192] Having received the payment Mr Fan bought gifts for himself and others that he would not have otherwise done. He sent a significant proportion of the money to a friend in China to buy some clothes and other items on Ali Baba and ship them to New Zealand.

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<sup>15</sup> The Act, s 6(3)(a).

<sup>16</sup> *Lipkin Gorman v Karpnale Limited* [1991] 2 AC 548 HL.

Mr Fan also went on a trip which was only his second time of travel in New Zealand despite having been here for about six years.

[193] Submissions for JKD emphasised that Mr Fan did not provide full bank statements to support his submissions, rather only providing excerpts. It is suggested that the accounts would show the sources of the funding for each of the payments Mr Fan said he made. That ignores the reality of an individual's bank account which blends payments received from various sources over time and payments made for various purposes from the account. I was satisfied that Mr Fan provided sufficient documentary evidence to support his evidence that he spent money in reliance on the payment, which he would not have spent otherwise.

[194] I conclude that Mr Fan is able to raise this defence and did change his position by spending money he would not otherwise have done. He therefore does not have to pay JKD for any overpayment.

### **Mr Fan does not have pay JKD for tax money**

[195] The second amount of money claimed also relates to the "*contractor payments*". The company says that having become aware that Mr Fan had not paid tax on the amounts received as "*contractor payments*", it decided it should pay the tax itself. There appears not to have been any claim from the IRD for payment.

[196] I have not accepted that Mr Fan authorised the payment of the "*contractor payments*" to him without tax. The somewhat complicated arrangement of payment at different rates for different activities, the wage subsidy payments, the lack of payslips and the use of monthly pay combined to make it very difficult to assess what was being paid.

[197] It was JKD's responsibility to take out PAYE before paying Mr Fan. I do not accept that Mr Fan was aware that he was received untaxed payments. He gave up other work on the basis of his work and pay from JKD. It would be inequitable to require him to pay JKD for any additional tax it has decided to pay the IRD.

### **Summary of orders**

[198] The following orders have been made:

- (i) JKD failed to provide Mr Fan with an employment agreement on appointment as a permanent part time employee in November 2019;
- (ii) Mr Fan was unjustifiably dismissed;
- (iii) Within 28 days of the date of this determination JKD is to pay Mr Fan:
  - (a) \$4,004 gross as lost wages for his grievance;
  - (b) \$20,000 compensation for his grievance; and
  - (c) \$338.40 gross as outstanding holiday pay plus interest.
- (iv) JKD breached:
  - (a) the Employment Relations Act by failing to provide an employment agreement on appointment and failing to keep wages and time records; and
  - (b) the Holidays Act by failing to pay holiday pay in full and keep holiday and leave records,
- (v) For statutory breaches JKD is to pay a penalty of \$7,000, with \$3,000 to be paid to the Crown and \$4,000 to Mr Fan, within 28 days of the date of this determination;
- (vi) No orders are made regarding Mr Chen; and
- (vii) JKD's claims are not established.

### **Costs**

[199] Costs are reserved. The parties are invited to resolve the matter.

[200] Mr Fan has been largely successful in his claims whereas JKD has not. If the parties are unable to agree on costs, Mr Fan shall have 14 days from the date of this determination in which to file and serve a memorandum on the matter. JKD shall have a further 14 days in which to file and serve a memorandum in reply. The parties could expect the Authority's assessment to consider the notional daily tariff for a one-day investigation meeting which is \$4,500 and \$3,500 for each subsequent day.<sup>17</sup>

Nicola Craig  
Member of the Employment Relations Authority

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<sup>17</sup> Employment Relations Authority, Practice Note 2, Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi.