

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 409
3235339

BETWEEN	ZE HOU Applicant
AND	HD CONTRACTOR LIMITED First Respondent
	CHENG CHENG FOONG Second Respondent
	YANGZHENG GUO Third Respondent

Member of Authority:	Peter Fuiava
Representatives:	Applicant in person Simon (Qing Yao) Song, counsel for the Respondents
Investigation Meeting:	25-26 March 2024 in Auckland
Submissions received:	9 April 2024 from the Respondents
Determination:	9 July 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Ze Hou requests the Authority to investigate his claims of unjustified disadvantage, wage arrears and unjustified dismissal by his former employer, HD Contractor Limited (HDCL or the company).

How did the Authority investigate?

[2] Mr Hou was initially represented by counsel but due to legal costs, represented himself at the investigation meeting and was the sole witness for his case. Prior to the investigation meeting, his written witness statement and reply statement were lodged with the Authority. For the company, I received witness statements and heard evidence

from its two directors, Cheng Cheng Foong and Yangzheng Guo, the factory in charge, Sheng Chen, with whom Mr Hou worked directly, and supervisor, ShuTao Liu.

[3] All witnesses answered questions under oath or affirmation from me and Mr Hou and Mr Song as counsel for the company. At the end of the investigation meeting, timetabling directions were made for the filing of written closing submissions. No further submissions however were received from Mr Hou. HDCL lodged and served its closing written submissions on 9 April 2024.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What happened?

[5] Mr Hou first arrived in New Zealand on 2 January 2002 as the partner of an Entrepreneur work visa holder. He has since obtained New Zealand permanent residence. HDCL provides construction services in Auckland.

[6] Prior to obtaining employment with HDCL on 27 July 2022, Mr Hou worked as a countertop installer for Emperor Group Limited (Emperor) which was placed into liquidation on 23 August 2023. Mr Hou stated that his previous salary with Emperor was \$115K per annum.

[7] Mr Hou's individual employment agreement (IEA) with HDCL initially stated that his hours of work were 35 hours per week. However, this appears to have been in error as Ms Foong stated that salaried employees like Mr Hou usually worked 60 hours per week which aligns with the company's timesheets for him.

[8] The IEA required HDCL to pay Mr Hou a base salary of \$9K per month plus a two percent medical allowance of \$180 per month. Although not recorded in the IEA, Mr Hou's payslips show that from time to time, he received an additional payment in the form of 'performance-related pay' (PRP) that varied from zero to 10 percent of his base salary depending on his individual performance for the month.

[9] It is part of Mr Hou's wage arrears claim against HDCL that it was verbally agreed he would receive an additional 10 percent payment to his base salary or \$900 per month. Without that additional payment, Mr Hou stated that he would never have agreed to leave Emperor to work for HDCL because he was on a salary of \$115K with his previous employer.

[10] Both Ms Foong and Mr Guo deny the existence of such an agreement which was never evidenced in writing. Further, Ms Foong stated that the first she knew about Mr Hou having worked for Emperor, a direct competitor to her company, was at the investigation meeting.

[11] On 27 September 2022, Mr Hou and HDCL mutually agreed in writing to vary the IEA to reflect the fact that he worked 60 (and not 35) hours per week. The change to the IEA was at Mr Hou's request. It was Ms Foong's evidence that had he not done so, she would never have realised that his work hours per week had been recorded incorrectly in the agreement. She further stated that Mr Hou had requested the change after visiting his bank for a home loan. This was denied by Mr Hou. While it is not clear what the rationale or motivation was for the variation to the IEA, apart from the change of hours, the agreement remained the same.

[12] On or about October 2022, Mr Hou sustained an injury to his waist and back. How the injury was sustained or whether it was a pre-existing injury remains unclear. During cross-examination, Mr Hou appears to have accepted that the injury predated his employment with HDCL. In any event, he did not report it to anyone in the company including his supervisor Mr Liu and the factory in charge, Mr Chen.

[13] The first HDCL became aware of Mr Hou's injury was when he provided Ms Foong and Mr Guo with an ACC medical certificate on 22 November 2022. Mr Hou was subsequently on ACC from that date to 28 December 2022 during which time he did not work but continued to receive his salary without reduction.

[14] Mr Hou alleges that once he was on ACC, this disadvantaged HDCL and that the company's response was to reduce his salary. He further stated that the reason for his dismissal was because he did not agree to the company's proposal of a salary reduction. The claims are denied.

[15] Both Ms Foong and Mr Guo state that they received Mr Hou's ACC medical on 22 November 2022 immediately after it was proposed that he be placed on a performance improvement plan. This was because of his poor work attitude in being late to work, not informing his supervisor that he would be late, not following instructions, and answering his mobile phone while running the cutting machine which was not safe.

[16] Mr Hou subsequently provided HDCL with additional ACC medical certificates that covered the period from 22 November to 28 December 2022 and which stated that he was fully unfit to work. On 20 December 2022, Mr Liu, Mr Guo and Ms Foong had a meeting with Mr Hou at HDCL to discuss his physical condition. Mr Liu summarised that meeting in a subsequent letter of 28 December 2022 in which he stated that due to Mr Hou's physical condition, HDCL wished to redesign his work around his health and proposed to reduce the scope of his job and pay him an hourly wage of \$28 rather than keep him as a salaried employee.

[17] Mr Liu's letter further recorded Mr Hou's disagreement to the proposal and his preference to remain on his current salary. In response, Mr Liu stated that his salary was relative to the job content and that it would not be fair for those who worked more hours to be paid less than him. If Mr Hou wished to remain in his current role, the company did not want his health to be affected and was therefore prepared to give him another role in the business or compensate him with one month's salary to find another job.

[18] On 28 and 29 December 2022, Mr Hou provided HDCL with two ACC medical certificates, the last of which stated that he was fit to work commencing 29 December.

[19] Ms Foong and Mr Guo both state that Mr Hou's employment with the company ended by way of redundancy. It had been part of the company's investment plan to expand into the manufacture of engineered stone bench tops as a new area of business. Mr Hou had been employed with that project in mind in light of his previous work experience. However, in order to do that work safely, new premises were required but the company was unsuccessful in that endeavour and ultimately decided to cancel the project altogether.

[20] By letter of 10 May 2023, Ms Foong wrote to Mr Hou to inform him that due to a change in the company's business development plan, the new line of business for which he had been employed as a countertop installer was no longer being pursued. However, she wished to offer him a redeployment opportunity to continue working for HDCL as a cabinet maker at \$28 per hour. Mr Hou did not accept the redeployment opportunity.

[21] On 15 May 2023, the parties met to discuss matters further. Ms Foong took notes which she summarised in a letter she sent to Mr Hou that same day. That letter records Mr Hou's preference to stay on until March or April 2024 or to work for four days per week without salary reduction. At the investigation meeting, Ms Foong recalled a third option, which was a payout to Mr Hou of six months' salary.

[22] None of Mr Hou's options were viable because it was not fair for other workers or would come at significant cost to the company. Ms Foong stated in her letter to Mr Hou that she was prepared to give him one to two months' notice during which time he would be allowed to take time off from work to search for a new job. She hoped that he would consider that as a solution or take up the company's redeployment offer.

[23] On 18 May 2023, the parties met again and Mr Hou confirmed his decision not to accept the company's offer of redeployment. Consequently, Ms Foong advised him in writing that his employment was terminated due to his role becoming redundant but that he would be given a two-month notice period. Mr Hou's last day of employment with HDCL was 17 July 2023.

What is the relevant law?

[24] The test of justification at s 103A of the Act requires the Authority to assess on an objective basis whether an employer's dismissal or action was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. As part of this process, the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act which are whether having regard to the resources available to the employer: the allegations against the employee were sufficiently investigated; whether the employer raised the concerns with the employee before taking action; whether the employer gave the employee a reasonable opportunity to respond to the concerns before taking action; and whether the employer

genuinely considered the employee's explanations before dismissing or taking action against the employee.

[25] The issues I was required to investigate and determine can be consolidated into three broad questions: whether Mr Hou was unjustifiably disadvantaged during the course of his employment; whether he is owed wage arrears by HDCL; and whether his dismissal was unjustified.

Was Mr Hou unjustifiably disadvantaged in his employment?

[26] Under s 103(1)(b) of the Act, an unjustified disadvantage is a personal grievance where an employee's employment, or one or more conditions of their employment, is affected to the employee's disadvantage by some unjustifiable action by the employer. Mr Hou must therefore establish that there was some unjustifiable action by HDCL which affected his employment or the conditions of his employment to his disadvantage.

[27] Mr Hou's amended statement of problem states that HDCL's letter of 28 December 2022 informing him that his role and scope of work would be reduced, was an action that disadvantaged his employment. The amended statement of problem further stated that the company changed Mr Hou's employment unilaterally by reducing his wages to \$28 per hour.

[28] However, Mr Hou is plainly wrong about both his job and salary being reduced. The letter in question was instead a proposal to change the content of his employment which did not eventuate because the company was subsequently provided with an ACC medical certificate dated 29 December 2022 that he was fully fit to work.

[29] Relying on that certificate, HDCL did not proceed with the proposal and the scope of Mr Hou's work and salary remained unchanged. The Authority was provided with a copy of Mr Hou's payslips for the period from 1 January to 31 May 2023 which make clear that he was paid his base salary of \$9K per month and monthly medical allowance of \$180. Having regard to the information and evidence before the Authority, there was no action by HDCL that affected Mr Hou's employment or conditions of employment to his disadvantage. The claim is not made out.

Is Mr Hou owed wages by HDCL?

[30] It was pleaded in Mr Hou's amended statement of problem that he worked a 35-hour week which equated to \$64 per hour. Using that hourly rate, it was pleaded that HDCL owed Mr Hou wages in the total amount of \$84,431.56.

[31] However, the calculation is flawed because Mr Hou's IEA makes clear that he was a salaried employee for the company whose salary compensated him fully for all hours worked. As such, the conversion of a monthly salary to an hourly rate is an incorrect method of calculation as there was never an agreement for HDCL to compensate Mr Hou on an hourly basis. In fact, he resisted the company's efforts to move him to an hourly wage which underscores the point that throughout his employment with HDCL, he remained a salaried employee.

[32] Related to Mr Hou's wage arrears claim is his assertion of a purely verbal agreement with his employer of an additional 10 percent payment to his monthly \$9K base salary. Mr Hou stated that without this payment he would never have left his previous employment with Emperor to work for HDCL.

[33] The contention is not supported by Mr Hou's own evidence. Mr Hou provided me with his income record from Inland Revenue (IR) for the period 1 August 2022 to 31 August 2023. Interestingly, this information shows that he earned considerably less from Emperor when compared to what he was paid by HDCL. For example, in August 2022, Mr Hou earned a total of \$7,927.20 (gross) working for Emperor which was less than the \$10,080 (gross) he earned in September 2022 working for HDCL.

[34] Concerningly, Mr Hou's IR information showed that he was still working for Emperor in September 2022 and had earned \$6,912 (gross) while also working for HDCL. On its face, this was a conflict of interest for him as Emperor was (then) a direct competitor of HDCL operating in the same construction industry in the same city.

[35] Apart from Mr Hou's own assertion of a purely oral agreement of a 10 percent additional payment to his monthly base salary, there is a paucity of corroborative evidence and supporting information. It may be noted that cl 14.1 of the IEA requires any variation to the agreement to be in writing for it to be effective or binding on either party.

[36] Not only was the alleged verbal agreement never evidenced in writing but it was never formally incorporated into the parties' IEA when it was varied two months later in September 2022. It could be argued that the alleged verbal agreement was never incorporated into the IEA because it was never made or agreed to in the first place.

[37] Employees at HDCL did receive PRP (performance-related pay) which was not fixed but varied from month to month depending on an employee's performance. I heard evidence that the rate could be as high as 12 percent of an employee's base salary. Mr Hou's payslips show that the rate could be zero at other times. Mr Guo stated in evidence that Mr Hou has simply mistaken his PRP for a fixed 10 percent monthly bonus. Based on all the information and evidence before me, I cannot discount that explanation as being correct.

Was Mr Hou unjustifiably dismissed?

[38] In relation to a dismissal for redundancy the Court of Appeal has described the test of justification in this way:¹

... If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

[39] Mr Hou states that he was summarily dismissed because he did not agree with HDCL's proposal to reduce his salary and that he could only continue working for the company if he agreed. Mr Hou further stated that the company did not follow a proper process and only considered its own interests.

[40] It is not the Authority's role to step into the shoes of the employer and substitute its decision for that of the employer. The Authority's role is to look at the process and an employer's dismissal or action through the lens of s 103A of the Act – the test of justification.

¹ *Grace Team Accounting v Brake* [2014] NZCA 541 at [85].

[41] When Mr Hou was employed, he was the first and only person brought on to produce engineered stone bench tops. That work is potentially dangerous because of exposure to silica dust which has been linked to lung disease silicosis if inhaled. HDCL was in the process of looking for another warehouse in order to do this new line of work safely.

[42] HDCL provided emails to the Authority of its efforts to find a new warehouse but in the end, it was Ms Foong's evidence that the company decided not to proceed with the project. Her fellow co-director, Mr Guo, stated at the investigation meeting that looking back, this was the right decision because of a likely ban being implemented in New Zealand on engineered stone benchtops due to health and safety concerns.

[43] I have no difficulty finding that HDCL had genuine business reasons not to proceed with its investment plan. As Mr Hou was the only affected employee, it made commercial sense for the company to redeploy him into an alternative role as a cabinet maker. On 15 May 2023, Ms Foong and Mr Guo met with Mr Hou to discuss his three options of staying on until March or April 2024, working for four days per week without salary reduction, or paying him six months' salary for him to leave. However, I find that these options were not viable because of unfairness to other workers and because of cost implications to the company.

[44] Mr Hou declined to take up the redeployment opportunity afforded to him and he was made redundant on 18 May 2023 as a result. Under ss 4(1A) and 103A of the Act, the process HDCL followed was one that gave Mr Hou access to relevant information concerning the continuation of his employment, an opportunity for him to comment on the proposal before a decision was made, and for genuine consideration of his comments by his employer. I find that the decision to dismiss Mr Hou as a countertop installer on the grounds of redundancy was procedurally and substantively justified and that his claim of unjustified dismissal has not been established and is dismissed.

Any other matters?

[45] During the course of the investigation meeting, Mr Hou asserted for the first time that he was pressured to sign his second employment agreement with HDCL. This matter was not previously pleaded or mentioned in the statement of problem, amended

statement of problem, Mr Hou's written witness statement, and in his witness statement in reply to the Authority. While I accept that English is a second language for Mr Hou, he was represented by a law firm that provides numerous communication channels for its clients including Mandarin. Because of the late raising of this matter by Mr Hou, I regard this additional claim with caution.

[46] It remains that the IEA was not onerous, one-sided or oppressive. Mr Hou was fairly compensated for his 60 hours of work per week as a countertop installer. Not only was his salary well above the minimum wage but was within the market range for his occupation. The claim that Mr Hou was rushed into signing his IEA has not been established and cannot be taken further.

[47] Also during the course of the investigation meeting, Mr Hou stated that he had a secret recording of what his supervisor, Mr Liu, had said to him after he informed him that he was suing HDCL. Mr Hou contended that the recording would show that the company's decision to dismiss him was predetermined.

[48] While the company objected to the recording, s 160(2) of the Act enables the Authority to take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. While the recording was admitted into evidence, Mr Liu was neither mentioned nor recorded for it to be helpful to my investigation.

[49] Mr Hou made a subsequent application to have a second secret recording played at the investigation meeting to which HDCL objected. Mr Hou stated that the recording was of a comment made by Ms Foong on 20 December 2022 in which she had said to him in front of Mr Guo and Mr Liu that he had committed ACC fraud. I declined to hear the recording because Ms Foong's comment was made jokingly so would not have affected Mr Hou's case either way in any event.

How do I find?

[50] The difficulty for Mr Hou is the lack of corroborative evidence to support any of his claims. However, the evidence of HDCL's witnesses were not only internally consistent with each other but was also consistent with Mr Hou's IEA and the letters he received from the company. When this information and evidence are individually and

cumulatively considered, I find that Mr Hou’s claims of unjustified disadvantage, wage arrears, and unjustified dismissal have not been established and must be dismissed as a result.

What about costs?

[51] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are unable to do so, and an Authority determination on costs is needed, HD Contractor Limited may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, Mr Hou will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[52] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” unless circumstances or factors, require an adjustment upwards or downwards.²

Peter Fuiava
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1