

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 427
3173683

BETWEEN	GANG CHEN Applicant
AND	CHULONGJI NZ LIMITED First Respondent
AND	DEWEI YANG Second Respondent

Member of Authority:	Peter Fuiava
Representatives:	David Kim, advocate for the Applicant Martin Lyttelton, advocate for the Respondents
Investigation Meeting:	15-18 August 2023 and 4 March 2024 in Auckland and by audio-visual link
Submissions received:	6 March 2024 from the Applicant 15 April 2024 from the Respondents
Determination:	15 July 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Gang Chen, a citizen of China and a New Zealand resident, has approached the Authority to investigate his claim that he is owed wages and unpaid annual leave when he worked as a chef for a Chinese restaurant under the then ownership of Chulongji NZ Limited (Chulongji or the company).

[2] Mr Chen's representative, Mr Kim, subsequently sought to join Mr Yang as a second respondent on the basis that as Chulongji is no longer actively trading and as its sole company director and shareholder, he was a person involved in a breach of employment standards (the non-payment of wages) under s 142W of the Employment

Relations Act 2000 (the Act). By preliminary determination of 4 October 2022,¹ the Authority joined Mr Yang to this employment problem as a second respondent under s 221 of the Act.

How did the Authority investigate?

[3] Mr Chen gave evidence for his case and called no other witnesses. For the respondents, I heard from Mr Yang, former pastry chef at Chulongji, Fantao Chen (Fantao), former front-of-house waitress Yun Xiong and chartered accountant, Peili Picard, a family friend of Mr Yang.

[4] Because Mr Yang resides in China, leave was granted for him to attend the investigation meeting by audio-visual link (AVL). Leave was also granted for Fantao and Ms Xiong to give their evidence in the same manner because of their work commitments to their respective employers. Before the investigation meeting, Mr Kim expressed concerns that Fantao and Ms Xiong would be contacted by a third party during the course of them giving evidence. Steps were taken to ensure that this did not occur.

[5] At 4.30 pm on the first day of the investigation meeting, I was advised by Mr Kim that Mr Chen was unable to personally attend the remaining two days of the investigation meeting because of his work commitments to a new employer. The Authority was not made aware of this earlier which meant that witnesses needed to be called out of order in order to accommodate Mr Chen's request that he attend by AVL when he was available. While not ideal, leave was granted for Mr Chen to attend the next two days remotely. However, a request by Mr Kim to attend by AVL also was declined as that would have left me without a representative for Mr Chen in the meeting room.

[6] At the beginning of the third day of the investigation meeting, I advised the representatives that I was prepared to hear from a witness for Mr Chen, a former chef, Zhenggou Feng. I had previously excluded Mr Feng as a witness on the basis that he was party to a record of settlement with Chulongji certified under s 149 of the Act. However, after further consideration and noting that Mr Feng's evidence was likely to

¹ *Gang Chen v Chulongji NZ Limited* [2022] NZERA 503.

be relevant, I granted him leave to give evidence on the condition questions were not asked of him about his record of settlement with the first respondent.

[7] As it turned out however, at the resumption of the investigation meeting on 4 March 2024, Mr Kim advised that Mr Feng had for his own personal reasons decided not to give evidence as part of Mr Chen's case. As he was not available to answer questions about his written statement to the Authority, it has been afforded no weight.

[8] As part of the Authority's investigation, a request for information from Immigration New Zealand (INZ) under s 160(1)(a) of the Act was made. INZ provided a trove of documents which included Mr Chen's visa history, movements to and from New Zealand, electronic notes, and copies of visa applications including variations of work visa conditions that were made on his behalf by his previous licensed immigration advisors. Where relevant, that information was provided to Mr Kim and the respondents' representative, Mr Lyttelton, for their information.

[9] All witnesses answered questions under oath or affirmation from me and the parties' representatives. As permitted by s 174E of 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 were the issues?

[10] At the beginning of the investigative process into this employment problem, the initial issues for investigation included Mr Chen's wage arrears claim for the following periods of time:

- i. 1 to 10 June 2018 totalling \$1,292.12;
- ii. 24 to 31 December 2018 totalling \$1,745.04;
- iii. 27 to 30 December 2019 totalling \$1,163.36; and
- iv. 29 January to 17 February 2020 totalling \$5,327.66.

[11] By email of 25 September 2023 from Mr Kim to the Authority, it was confirmed that Mr Chen was no longer pursuing his wage arrears as noted above. What remained of his arrears claim was, in broad terms, unpaid wages and annual leave as a result of being remunerated for 54 hours of work per week when he had (allegedly) worked 66 hours per week during the course of his employment. In addition, Mr Chen had also requested the Authority to investigate a further claim that Mr Yang had subsequently

changed his individual employment agreement (IEA) without his knowledge or consent.

The Applicant's Case

[12] In late May 2017, Mr Chen and Mr Yang met for the first time at a fast food establishment with Mr Yang wishing to employ him as a chef. In early 2018, INZ granted Mr Chen a work-to-residence visa the terms and conditions of which were later varied in order that he could lawfully work for Chulongji whom he commenced working for on 11 June 2018.

[13] The terms and conditions of Mr Chen's employment are set out in a written employment agreement that he and Mr Yang both signed on 8 May 2018. That IEA recorded Mr Chen's normal work hours were 40 hours per week and that his salary was \$55,000 per annum which covered all time worked.

[14] On 24 June 2018, Mr Chen says that that Mr Yang varied his IEA without his knowledge or agreement. Mr Chen stated that during a meeting with his employer on 18 June 2018, he was required by Mr Yang to write sign and date the IEA in three different places namely at:

- i. the start date of his employment (changed from 1 June 2018 to 11 June 2018);
- ii. his normal hours of work (changed from 40 hours to 54 hours per week); and
- iii. at the requirement for Chulongji to pay Mr Chen overtime which was removed.

[15] Mr Chen stated that he signed, dated and initialled an unamended IEA which was subsequently varied by Mr Yang as described above without his consent. When asked why he would sign an unchanged IEA at three different places, Mr Chen explained that he was his boss and that Mr Yang had removed the overtime provision because he had promised to pay him a dividend and a bonus instead once the company became stable. Mr Chen further stated that, in China, he would add his initials to a document to indicate that no subsequent additions or changes had been made.

[16] In November 2019, Mr Chen via WeChat asked Mr Yang to send him another copy of the amended IEA. Despite his request, Mr Chen stated he had not been emailed a copy of the agreement by Mr Yang.

[17] Mr Chen claimed that he worked 11-hour days for Chulongji for six days per week however he did not keep a personal diary or a logbook of his work hours. He worked in the morning from 9 am to 2.30 pm and returned to work later that same day when the restaurant reopened. Mr Chen stated that he worked from 4.30 pm to 10 pm and that, in total, he worked 66 hours per week but was paid for 54 hours only. Mr Chen says that he is owed a significant amount in wage and holiday pay arrears by Mr Yang who is a person involved in the breach of employment standards under ss 142W and 142Y of the Act.

[18] During the course of the investigation meeting, the respondents' representative Mr Lyttelton produced a handwritten note in Mr Chen's own handwriting that recorded his work duties during different periods of the day from: 9 am to 11 am; 11 am to 2.30 pm; and 5 pm to 9 pm. On its face, the handwritten note indicated that Mr Chen had worked for nine-and-a-half hours per day and not 11 hours as claimed. However, Mr Chen's response was that when he wrote the note, Mr Yang was standing by him and instructed him what to write. Mr Chen denied he was responsible for the contents of the note.

[19] A number of photograph stills taken from closed circuit television (CCTV) within the restaurant were produced by Chulongji which included photographs of:

- i. a clean kitchen at 9.29 pm on 15, 19, 20, and 23 January 2020;
- ii. a clean front-of-house with no customers at 9.21 pm on 2 March 2020;
- iii. a clean pastry room at 9.18 pm on 4 March 2020;
- iv. Mr Feng eating his dinner in the front of the restaurant at 9.21 pm on 11 July 2020;
- v. Mr Feng and Mr Chen having their lunch at 2.37 pm on 16 July 2020 in the front of the restaurant; and
- vi. staff having an evening meal in the front of the restaurant at 9.10 pm on 9 July 2020.

[20] Mr Chen's response was that there were signs such as the steamer, pots on the stove, bowls on the microwave, and a plate on a bench which indicated that while the restaurant appeared to be cleaned, it had not closed and was still operating.

[21] Mr Chen's employment with Chulongji came to an end on or about 5 March 2020. On 6 May 2022, Mr Kim wrote to Chulongji informing it of his wage arrears and unpaid holiday pay claim. On 31 May 2022, Mr Chen's statement of problem was

lodged in the Authority. The parties have attended mediation but the matter did not resolve there.

The Respondents' Case

Mr Yang, restaurant owner

[22] In 2012, Mr Yang moved to New Zealand. He is a painter by trade but in 2017, decided to open his own Chinese restaurant in Wairau Valley, Auckland. This was the first restaurant business he had owned. He denies making any subsequent changes to Mr Chen's IEA without his agreement. Mr Yang points to his covering letter (18 June 2018) that accompanied the amended IEA which stated:

Review and Update Individual Employment Agreement

As per our meeting discussed about working hour requirement for our business, I am pleased here to update your individual employment agreement dated on 08 May 2018. I propose that the terms of employment will be those in the attached draft updated individual employment agreement.

Please note that you are entitled to discuss this offer and to seek advice on the attached updated agreement with your family, union, a lawyer, or someone else you trust. If you would like information about your employment rights, see the Department of Labour's website www.ers.dol.govt.nz or phone the Department's free information line on 0800 20 90 20.

If you disagree with, or do not understand or wish to clarify anything in this offer, please contact me to discuss.

If you are happy with the proposed terms updated and wish to accept the change of employment, please sign the duplicate copy of this letter and return it to me by **24th of June 2018**. If I have not heard from you by that date, this offer will be automatically withdrawn.

[23] At the foot of the covering letter was Mr Chen's handwritten signature and date "24 June 2018" in blue pen confirming that he had read the terms of employment set out in the IEA, that he also fully understood its terms and implications, and accepted the changes to his employment.

[24] The draft IEA was amended at three different places by Mr Yang, first under the heading of "Type of employment agreement", the commencement date of Mr Chen's employment (1 June 2018) was crossed out with a black pen and substituted with the date of 11 June 2018 instead. Beside that date, in blue pen, were Mr Chen's handwritten initials which he had dated "24.06.2018".

[25] The second variation to the IEA was under the heading of “Hours of work” where Mr Yang had struck out 40 hours per week for 54 hours per week with a black pen. Above that amendment were Mr Chen’s initials and date as described above.

[26] The third and final amendment was with the “Overtime” provision which Mr Yang crossed out altogether in black pen and which Mr Chen had endorsed in the same way as described above.

[27] Mr Yang denies deleting the overtime provision in exchange for a dividend or bonus payment to Mr Chen which was not necessary because he was paid for overtime in any event in the amount of \$5K-\$6K. Further, if such an arrangement existed, it would have been a term or condition of the IEA which it was not.

[28] In November 2019, Mr Chen via WeChat asked Mr Yang to send him another copy of his amended IEA which Mr Yang emailed on 15 November 2019. Although Mr Chen denies ever receiving that email, Mr Yang provided a copy of it to the Authority which included the amended IEA as an attachment. In any case, Mr Yang stated that Mr Chen never told him that he had not received his email.

[29] Mr Yang denies that Mr Chen worked 11-hour days for 66 hours per week. He worked 54 hours per week instead because the kitchen would be closed for cleaning by 8 pm. Mr Yang further stated that he recorded his work hours in writing which he later transferred to an Excel spreadsheet within hours of Mr Chen completing his work.

[30] Mr Yang did accept that he (Mr Chen) prepared food for the next day but that work was minimal and involved cutting large pieces of food such as pork into smaller pieces for frying when required. He would also boil duck for stewing which was stored in the fridge. The rest of the dishes were served on the day. The food preparatory work for the next day and the cleaning of the kitchen would generally be completed by Mr Chen by 9 pm but from Friday to Sunday, that work could finish a little later by 9.30 pm. Sometime in 2021, Mr Yang sold Chulongji’s restaurant business to a third party.

Ms Xiong, waitress

[31] Ms Xiong worked front-of-house as a waitress. It was her evidence that the restaurant would generally close and not be open for business by 10 pm after which

staff were free to stay behind to have an evening meal. She further explained that because the front of the restaurant was connected to the kitchen, both finished at the same time. During the early days of the COVID-19 pandemic (January to March 2020) the restaurant finished even earlier. When questioned by Mr Kim about food orders after 10 pm, Ms Xiong stated the business had stopped taking any orders by then.

Fantao, chef

[32] Fantao a former chef for Chulongji from August 2018 to approximately August 2022, gave evidence that Mr Chen, who he had worked alongside with, had never told him that he was underpaid. Fantao stated that he was happy with his own wages for his work. He recalled that in August 2018, starting work at 9 am and that the restaurant would be closed in the afternoon from 2 pm to 5 pm during which time staff were free to have a meal or go home. The restaurant re-opened for the evening at 5 pm until 9-to-9.30 pm when he would stop working and have an evening meal before going home. Fantao stated that he worked nine hours per day.

Ms Picard, chartered accountant

[33] Peili Picard and her husband are family friends of Mr Yang. She is a chartered accountant and has checked Chulongji's records namely its bank account statements, PAYE information and wages and time record and is of the opinion that the restaurant has paid Mr Chen correctly.

[34] Although Ms Picard was not able to check the primary or originating documents used by Mr Yang to create his summarised wages and time record for Mr Chen, she spent hours manually double checking Chulongji's payroll records. If there was something to pay, her advice to Mr Yang would have been for the company to pay any shortfall but in this case there was none.

Whether Mr Chen's IEA was varied without his consent?

[35] Mr Chen's explanation for signing an otherwise unchanged IEA ignores the detailed covering letter that accompanied it. The letter offered him the opportunity to seek advice from a family member, union, lawyer, somebody whom he could trust, and the Department of Labour for further information about his employment rights.

[36] If as Mr Chen contends he was cheated “in a dirty way” by his employer, it is unlikely that Mr Yang would have provided him with such a covering letter. An unscrupulous employer would not have gone to the trouble.

[37] The signing of the amended IEA in different coloured pens is consistent with Mr Yang’s sequence of events of first amending the original agreement in black which was later endorsed in blue pen by Mr Chen. While it is still possible that Mr Yang may have made the amendments in different coloured pen after Mr Chen had signed the agreement, such a scenario does not account for the covering letter which refers specifically to a “draft updated individual employment agreement” and not an unchanged agreement as has been claimed.

[38] Mr Chen never pursued his alleged wage arrears and unpaid holiday pay claims with urgency or impetus. His employment ended in early March 2020 but he did not inform Chulongji of his claims until some 24 months later in a letter from Mr Kim of 6 May 2022. Mr Chen’s explanation for the delay was fear that Mr Yang could adversely affect his application for residence.

[39] However, INZ’s records indicate that Mr Chen applied for residence under the 2021 Resident visa category on 2 December 2021. That application was approved on 11 March 2022. Both the date of the application and the date of approval occurred long after Chulongji ceased being Mr Chen’s employer in early March 2020. Further, there is nothing in the INZ documents that indicate that Mr Yang or Chulongji have done anything but support Mr Chen’s previous variation of his work visa conditions. Based on the information and evidence before me, the assertion that Mr Yang would have adversely affected Mr Chen’s visa status in New Zealand is without merit.

[40] Standing back and looking at the information and evidence before the Authority on an individual and cumulative basis, it has not been established that the respondents have subsequently changed Mr Chen’s amended IEA without his knowledge or consent. The claim is not made out and is dismissed.

Whether Mr Chen is owed unpaid wages and holiday pay?

[41] Given that I have found that the varied IEA was not unilaterally varied without Mr Chen’s agreement, it was effective and binding on the parties. The claim that Mr

Chen worked six 11-hour days per week for a total of 66 hours of work per week is inherently flawed for two reasons. First, the IEA makes clear that Mr Chen was paid a salary of \$55,000 per annum and that his salary compensated him for all hours worked.

[42] Second, it has not been established on the facts that Mr Chen worked 11-hour days for six days per week during the course of his employment with Chulongji. His evidence was self-reported and not corroborated with other independent evidence such as another witness or documentary evidence such as a logbook or photographs.

[43] I heard evidence from four witnesses for Chulongji, received several CCTV photo stills of the restaurant and a handwritten note from Mr Chen himself of his work duties at different times of the day. The weight and internal consistency of this evidence is such that I prefer the respondents' case over that of Mr Chen.

[44] Although Ms Xiong believed the restaurant closed at 10 pm, she was employed as a waitress and worked front-of-house and not in the kitchen where Mr Chen worked as chef. I am not persuaded by Mr Chen's explanation that his handwritten note were Mr Yang's instructions to him. The note was translated into English by a very competent and highly skilled Mandarin interpreter and it contains very detailed cooking instructions that could only have come from someone experienced in Chinese cuisine like Mr Chen and not a first-time restaurant owner and painter such as Mr Yang. It was the evidence of fellow chef, Fantao, that he worked nine hours per day six days per week for a weekly total of 54 hours. As Fantao worked alongside Mr Chen, it is more likely than not that the pair worked the same number of hours per week.

[45] I have not taken into account the wages and time record from Mr Yang as I was not persuaded by its provenance especially as he had initially told me that this information was stored in a separate document which he later summarised in electronic form. Mr Yang later stated that he recorded Mr Chen's work hours into an Excel spreadsheet in the first instance. Given the mobility with this part of Mr Yang's evidence, it must be approached with some caution. In any case, I have drawn on other information and evidence as noted above to conclude that Mr Chen has inflated the hours he claims to have worked.

Conclusion

[46] Standing back from all the information and evidence before the Authority, for the reasons given above, Mr Chen's claim that he worked 66 hours per week for Chulongji has not been made out. Both his application for wage and holiday pay arrears is declined and his claim that Mr Yang is a person involved in a breach of employment standards are dismissed.

What about costs?

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[48] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the respondents 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 Chen 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.

[49] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis 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