

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 488
3144963

BETWEEN	JUNSU KIM Applicant
AND	CROATIAN TILERS LIMITED First Respondent
AND	IVAN SALIC Second Respondent

Member of Authority:	Sarah Blick
Representatives:	Dave Cain, advocate for the applicant Ivan and Ivy Salic for the first respondent Ivan Salic in person
Investigation meeting:	11 and 12 April 2024 in Auckland
Information and submissions received:	At the investigation meeting, 26 and 30 April and 15 May 2024 14 May 2024 from the respondents
Determination:	16 August 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Junsu Kim worked as a labourer for Croatian Tilers Limited (CTL) on the Britomart Rail Development Project between November 2020 and February 2021. He says at a job interview with CTL he was offered a permanent position and started working without a written employment agreement.

[2] Mr Kim says in February 2021 CTL told him it had no more work for him, without any notice or consultation. He says he was unjustifiably dismissed, following which he was unable to obtain alternative work for over a year.

[3] He also seeks leave to raise a personal grievance outside the statutory timeframe based on exceptional circumstances. That grievance relates to an unjustified disadvantage claim on the basis he was not provided with rest and meal breaks in accordance with statutory requirements.

[4] Further, Mr Kim wishes to recover arrears of wages from CTL on the basis he was paid less than the minimum rate of wage per hour during his employment. He seeks to recover public holiday pay and annual holiday pay, and interest. Following the investigation meeting, based on CTL's oral evidence regarding its straitened circumstances, Mr Kim lodged an amended statement of problem applying for leave to recover monies from CTL's director and shareholder Mr Salic to the extent CTL cannot not pay them.

[5] Finally, Mr Kim applies for penalties for breaches relating to the failure to provide an employment agreement and produce wages and time records when requested. He also asks the Authority consider imposing a penalty on the respondents for obstructing or delaying the Authority's investigation.

[6] CTL acknowledges Mr Kim undertook work for it but has variously said he was offered work on a casual or fixed term basis, and/or alternatively he abandoned his employment. CTL acknowledges no employment agreement was ever provided. It says its aim was to help Mr Kim out as a favour, by giving him some work.

The Authority's process

[7] The Authority granted two earlier adjournments of the investigation meeting at the request of CTL, for health reasons.

[8] The Authority received witness statements for Mr Kim and his partner Adrian Noda. For CTL, the Authority received a statement for Mr Salic and a CTL foreman who supervised Mr Kim. The CTL foreman did not attend the investigation meeting to be questioned due to a stated personal matter, so this has affected the weight that can be given to the comments in his statement. Mr Kim, Mr Noda, Mr Salic and Achilles Fong, a work broker from the Ministry of Social Development who attended at CTL's request, all answered questions under oath or affirmation at the investigation meeting. The parties had the opportunity to question and cross-examine each other's witnesses,

and give submissions. Ivy Salic, Mr Salic's partner who is also involved in CTL's business, spoke on CTL's behalf at the meeting.

[9] Mr Kim's claim in relation to Mr Salic as a person involved in breaches of employment standards was first raised at the conclusion of the investigation meeting. Concern was prompted by evidence given by Mr Salic about CTL's financial circumstances and that he may place it into liquidation. Timetabling directions were given resulting in Mr Kim being granted the opportunity to lodge an amended statement of problem including Mr Salic as a second respondent. Mr Salic was given the opportunity to lodge a statement in reply. Mr Salic ultimately provided a response in email format. I confirm Mr Salic has been joined as a party.¹ Given the fulsome evidence heard at the investigation meeting, it has not been necessary to hold a further investigation meeting.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The issues

[11] The following are the issues for investigation and determination:

- a. Was Mr Kim dismissed from his employment?
- b. If so, was the dismissal unjustified?
- c. Should leave be granted to Mr Kim to raise a personal grievance for unjustified disadvantage?
- d. If he has personal grievances what remedies if any should be awarded to Mr Kim and are there issues of contribution?
- e. Is Mr Kim owed wages and annual and public holiday pay?
- f. Should leave be granted to recover monies owing due to breaches of employment standards from Mr Salic in the event CTL cannot pay them?
- g. Should penalties be imposed, partly payable to Mr Kim?

¹ Employment Relations Act 2000, section 221.

Background

[12] One of Mr Kim's friends made an acquaintance with Mr Salic and after learning what Mr Salic did for work, she asked him if any jobs were going. Mr Salic gave the friend Mrs Salic's phone number and told her Mr Kim could get in touch if he was interested in work. Mr Kim says he called Mrs Salic shortly after and he attended an interview with her. Mr Kim says he was offered a permanent position at this interview. He says there was never any mention of his employment being on a casual or fixed-term basis, and was told he would be working on the Britomart Rail Development Project and then onto another project once this had finished. CTL does not dispute Mr Kim was offered \$20 per hour and it was agreed his days of work were to be Monday to Saturday.

[13] CTL says it had never had employees before, only "subbies". It says it was trying to help Mr Kim out, having been told he had a bad experience with his last employer. Mr and Mrs Salic say they had only good intentions for him.

[14] It is common ground Mr Kim started working on 16 November 2020. Mr Kim was never given an employment agreement to sign, but says he asked for one. He says CTL told him that it was not required to do this. Mr Kim is from Korea and says he did not have much knowledge about Aotearoa New Zealand's employment laws.

[15] Mr Kim gave evidence that he started doing general labouring and worked with concrete in the role. Text messages show him reporting to Mrs Salic that he worked upwards of 10 hours daily, Monday through Saturdays.

[16] Mr Kim says he did not receive sufficient rest and meal breaks. CTL says the period over which Mr Salic worked was a real chaos or "panic" time, Mr Salic having been unwell in hospital. CTL was sure everyone was allowed to, and did, take three breaks a day. Mr Salic says there was "no chance under the sun" that Mr Kim did not take breaks. He said the whole site went quiet three times a day, while all workers had their breaks.

[17] A text message shows Mr Kim first sent a record of the hours he worked to Mrs Salic on 21 November 2020, which said he worked 58 hours, starting at 7.30am until 7pm or 7.30pm Monday to Thursday doing 10.5 to 11 hours, and 9.5 hours on the Friday with 5.5 hours on the Saturday. Mrs Salic responded asking for Mr Kim's Inland

Revenue number and tax code, which Mr Kim sent back. In the weeks following until Christmas, text messages from Mr Kim show his hours per week were 52.5 to 53 hours. The messages show he continued to report long hours six days a week in the New Year, largely between 48 to 54 hours, but on one occasion 61.5 hours, to 7pm or 7.30pm at night. In response to the messages, Ms Salic confirmed “Paid thanks” without commenting on Mr Kim’s stated hours. CTL however says there is no way Mr Kim worked beyond 5.30pm at the site, in light of health and safety rules on site and exemptions were required by site management to work beyond that time.

[18] In December 2020 Mr Kim texted Mrs Salic asking for a payslip to check the money he was paid. She responded they were not compulsory but if he needed one she could get one done, but said she was very busy with organising Christmas payments. Mr Kim responded that he would wait until the New Year.

[19] Mr Kim notes there were then six public holidays on which he was not required to work but was not paid for.

[20] Mr Kim says on Thursday 18 February 2021 Mr Salic approached him near the end of his shift. He was told CTL did not get a new contract they were expecting to at the Project and there was no more work for Mr Kim. At the investigation meeting, Mr Salic explained CTL was at the point that it had too many guys on site and not enough work. He says he told Mr Kim CTL would be running out of work but they would discuss it further on Monday. Mr Salic’s evidence is that Mr Kim then abruptly left the site.

[21] Mr Kim says he was confused after this interaction. He and Mrs Salic then had the following relevant interaction by text message that afternoon/evening:

Mrs Salic: Please give me a call, Ivy.

Please bring CV on Wednesday to meeting at the Store
(across from Ortolana)
At 12 o’clock.
There you will meet Achilles to talk about new job thanks

Mr Kim: Okay.
Is that job till before starting next project?
So is it till today in this construction correct?
...

Hullo IVY, I have completed 90 days. Are you happy with my work?

...

Mrs Salic We are happy with your work, that's why I am working into getting you in a new Construction job. We missed out on next contract.

I can explain it thanks to you Wednesday.

Mr Kim: Thank you 🙏🏻🙏🏻

Mrs Salic: your welcome
And when the next contract comes we will call you promise.

[22] Mr Salic gave evidence that he expected Mr Kim to return to work the next day, being a Friday, but Mr Kim failed to attend. Mr Salic says he tried on multiple occasions over the following days to telephone Mr Kim but that Mr Kim's mobile phone appeared to be turned off. Mr Salic says he asked another CTL employee to try and call Mr Kim, and that attempt was also unsuccessful. Mr Kim says CTL's suggestion that he was expected to continue working after being told his employment had ended is simply untrue. He says neither Mr or Mrs Salic communicated this to him. He denies having received calls from CTL in the days following 18 February 2021. Mr Noda believes there is no way Mr Kim would have had his phone turned off given Mr Kim's need and wish to stay in contact with his mother in Korea due to her medical condition. No evidence has been provided by CTL showing its attempts to call Mr Kim.

[23] Mr Kim also says if work had been offered, there is no way he would have turned it down at that point, as he could not afford to.

[24] On 24 February 2021, the next Wednesday, Mr Kim says took the train into town for the 12pm meeting with Mr Fong, as agreed with Mrs Salic. Mr Kim sent a text apologising and saying the train was running late and he anticipated being there at "12.10ish". When he arrived at the store (a café) he sent a text to Mrs Salic saying so, and followed up with a "Hello" and "??". Mr Kim then waited and waited. He says he eventually called Mrs Salic who told Mr Kim "oh right, he cancelled". Mrs Salic sent a text message at about 2pm saying Mr Fong was in a meeting and would contact her that afternoon, and after that she would get back to Mr Kim. Mr Kim says he was given Mr Fong's phone number, but after what happened at the café he decided he was better off finding employment on his own, and he did not trust Mrs Salic anymore.

[25] Mr Kim and Mrs Salic exchanged further text messages at a later date, during which he again requested payslips and queried why there was work for other “overseas boys” with CTL, but not him. Mrs Salic responded:

The overseas boys only have visas to work for CTL. We also were led to believe [sic] that we had 2 years off [sic] at the station then to another station.

Why don't you want to work for some other company?

All you have to do is call Achilles and say you worked for us you will get into a Labourers job.

I can get you payslips, you might end up having to pay more tax but we're on leave for 3 weeks so I can get them for you.

[26] Mrs Salic again suggested Mr Kim contact Mr Fong about him going into a work programme. CTL says its intention was not to “sack” Mr Kim, it was to get him in the same scheme as other of its workers.

[27] No payslips were provided to Mr Kim nor has the Authority been provided with any. It is common ground Mr Kim was not paid annual holiday pay at the end of the employment nor has he received it since.

Relevant law

The test for justification

[28] When the Authority considers justification for the actions of CTL, including the dismissal decision, it does so by applying the test of justification in s 103A of the Act. In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of CTL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal or other action. CTL could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

Unjustified dismissal claim

Whether dismissal occurred

[29] At no stage before or during his period of employment did CTL provide a written employment agreement. This was in breach of s 63A of the Act.

[30] CTL's suggestion that Mr Kim's employment was casual is not supported by any evidence. He says he needed to be at work when CTL told him to be and understood

he was not able to turn any work down. The evidence amply demonstrates Mr Kim was a full time employee, not a casual.

[31] CTL's suggestion that Mr Kim was employed on a fixed term is also not supported by the evidence. Obviously there is no written employment agreement stating the way in which Mr Kim's employment would end or the reasons for it ending that way, in accordance with the requirements of the Act.² Accordingly, Mr Kim was entitled to elect to treat any purported fixed term as having been ineffective to end his employment. His employment was as a permanent fulltime employee.

[32] A dismissal occurs when there is a "sending away" of a worker so the termination of the employment occurs at the initiative of the employer. The context and content of the communication between the worker and the employer are considered on an objective standard to discern what was more likely than not to have occurred in the facts of any particular case.

[33] Mr Kim says he was left in no doubt that his employment was terminated on 18 February 2021. The exchange of text messages between Mr Kim and Mrs Salic amply supports that claim. CTL's expected next contract did not come to fruition and work was not available for Mr Kim. The text messages do not support CTL's claim that Mr Kim was expected back on site the next day or following days. In fact, they show quite the opposite – that the next interaction would be on 24 February 2021 with Mr Fong, about a "new job". CTL's claimed attempted calls are not supported by any evidence. If there were in fact any calls, CTL had already sent Mr Kim away in any event. Mr Kim's employment was terminated effective from 18 February 2021. That CTL took steps to assist Mr Kim in finding alternative work through Mr Fong does not change the fact of dismissal.

Whether dismissal justified

[34] CTL followed no process or consultation requirements in accordance with s 4 of the Act. Considering the tests in s 103A of the Act, it was not open to a fair and reasonable employer to terminate the employment this way. These failures of fairness were not minor defects in the process and resulted in Mr Kim being treated unfairly. The dismissal is clearly unjustified.

² Employment Relations Act 2000, section 66(4).

Unjustified disadvantage claim

[35] Mr Kim's unjustified disadvantage claim relates to CTL not providing him with sufficient breaks. Mr Kim's statement of problem was lodged on 2 July 2021. Although it contained a generic heading "Unjustified disadvantage and Unjustified dismissal", it made no reference to what the unjustified disadvantage claim was. There was no reference to rest and meal breaks, nor was there a reference to these in Mr Kim's representative's letter of 29 March 2021, which first raised his personal grievance for unjustified dismissal. The issue of rest and meal breaks was eventually raised by way of an amended statement of problem lodged on 14 November 2022.

[36] CTL has not clearly impliedly consented to Mr Kim raising the disadvantage grievance after the expiry of 90 days. Leave of the Authority is therefore required to raise it.³

[37] Although CTL failed to provide an employment agreement containing dispute resolution procedures as required by the Act, I am not satisfied the very long delay in raising this grievance was occasioned by that circumstance. Mr Kim has been represented since March 2021, and there is no suggestion Mr Kim made reasonable arrangements with his representative to have the grievance raised on his behalf and that there was an unreasonable failure to do so by his representative. In these circumstances the Authority declines leave to raise the grievance out of time.

Remedies for personal grievance

[38] Mr Kim is entitled to a consideration of remedies in relation to his unjustified dismissal.

Compensation under s 123(1)(c)(i) of the Act

[39] Mr Kim says his dismissal came out of the blue and was very hurtful. He felt completely let down and lost confidence. He said he felt depressed and no longer felt like seeing friends or going out. It was a dark time for him. Mr Noda gave evidence corroborating these impacts.

[40] I have considered the extent of the harm Mr Kim suffered, where it sits when compared with other cases, then stepped back and assessed what I consider a fair and

³ Employment Relations Act 2000, section 114(3)-(4) and section 115.

just amount in the circumstances. Taking into account the circumstances and the general range of awards, a compensation award of \$16,000 to Mr Kim is appropriate.

Reimbursement of lost income under s 123(1)(b) of the Act

[41] Mr Kim's last day of employment with CTL was 18 February 2021. He says he was not eligible for financial support from WINZ being on a work visa, and was totally reliant on his partner to support him. He says he did what he could to try to secure alternative employment but was not successful in finding paid employment elsewhere until March 2022. One example of an unsuccessful attempt was given.

[42] Section 128 of the Act requires me to order an employer pay an employee the lesser of a sum equal to the remuneration lost as a consequence of the personal grievance or three months ordinary time remuneration. Despite that, I may use my discretion to award a sum greater than that. The Court of Appeal has emphasised that moderation is required when exercising the Authority's discretion to give an increased award for lost remuneration.⁴ Mr Kim gave limited evidence of attempts to secure work. In the circumstances I decline to exercise my discretion to award the full sum sought over 12 months.

[43] It is possible Mr Kim may have found alternative employment through Mr Fong, but it is understandable that he chose not to engage further with CTL or Mr Fong, having lost trust in CTL. I consider it reasonable to award the equivalent of three months ordinary time remuneration in the circumstances. Taking into account Mr Kim's hours and earnings during his employment, a reasonable assessment of lost income is \$13,980.00.

Contribution

[44] I have considered whether Mr Kim contributed to the circumstances giving rise to his personal grievance. CTL has focused on the way Mr Kim left work on his final day, its claimed attempts to contact him in the days following and trying to get him into the work programme via Mr Fong. On his last day Mr Kim attempted to understand more about what had happened to his employment by contacting Mrs Salic, and in good faith attended the meeting set a few days later to no avail. Although it is unfortunate Mr Kim did not follow up the opportunity with Mr Fong, this was after the dismissal

⁴ *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA 608 at [36].

and did not contribute to the situation giving rise to the dismissal. I do not consider a reduction in remedies is required.

Arrears of wages and holiday pay

Mr Kim's evidence of hours and pay is accepted

[45] CTL has failed to either keep or produce any wages and time records and holiday and leave records relating to Mr Kim when requested by Mr Kim, including when directed to do so by the Authority. This failure has prejudiced Mr Kim's ability to bring an accurate claim for wage arrears and holiday pay. He has calculated what he believes is owing. On the balance of probabilities, and the complete absence of any documentary evidence showing his claimed hours, days and pay are incorrect, I accept Mr Kim's arrears of wages and holiday pay claims as proved.⁵

[46] According to Mr Kim's Inland Revenue income records, CTL paid a gross total of \$9,782.00 to him. Mr Kim's text messages record he worked 639 hours, and at the agreed \$20 per hour rate, this should have resulted in a gross total of \$12,780.00. This results in a shortfall of \$2,998.00. He is owed that amount as arrears of wages.

[47] There were six public holidays during Mr Kim's employment which were days he would ordinarily have worked and ought to have been paid for. He has calculated 10 hours of work per day at \$20 per hour resulting in a gross total of \$1,200.00 for these days. He is entitled to public holiday pay at that amount.⁶

[48] Mr Kim submits he should therefore have been paid a gross total of \$13,980.00. On termination he ought to have been paid 8% of that amount, being \$1,118.40. I accept that amount is owing to him as annual holiday pay.

Interest

[49] Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. It is appropriate where a person has been deprived of the use of money to make an award for interest. Mr Kim is entitled to an award of interest on the arrears of wages and holiday pay due to him. Interest must be calculated using the Ministry of Justice civil debt interest calculator.⁷ Interest should be calculated from

⁵ Employment Relations Act 2000, section 132 and Holidays Act 2003, section 83.

⁶ Holidays Act 2003, section 46.

⁷ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

14 November 2022, being the date he first made clear in his first amended statement of problem that he was seeking arrears of wages and holiday pay. Interest accrues until full payment is made.

Persons involved claim

[50] CTL has breached employment standards by failing to pay the applicable minimum rate of pay for his hours under the Minimum Wages Act 1983. Sections 4 of the Wages Protection Act 1983 and section 23 and 27 of the Holidays Act 2003 have also been breached. The evidence points to Mr Salic having management control over Mr Kim's terms and conditions of employment, along with Ms Salic. He is a person involved in a breach within the meaning of s 142W of the Act – he was an officer of CTL and was knowingly concerned in the breaches (having knowledge of the essential facts establishing the breaches). Leave is granted to Mr Kim to recover amounts owed to the extent CTL is unable to pay them. I also order that Mr Salic is liable to pay the arrears and interest on arrears to the extent CTL defaults in payment of those amounts.

Penalties

[51] In his original statement of problem Mr Kim sought a penalty against CTL for a breach of s 64 of the Act, although it was made clear the breach related to s 63A. An employer who fails to comply with s 63A is liable to a penalty, so I assess the penalty claim under that section. Mr Kim also sought a penalty for a breach of 130 of the Act against CTL.⁸

[52] In his second amended statement of problem, lodged after the investigation meeting on 26 April 2024, Mr Kim also sought a penalty against the respondents for obstructing or delaying the Authority's investigation. Although CTL's requests for adjournments and delay in provision of information has been frustrating at times, I am not satisfied that conduct reaches a level at which it or Mr Salic should be penalised. Costs unnecessarily incurred by Mr Kim, if there are any, can be addressed as a costs issue if the Authority is required to determine costs.

[53] CTL has clearly breached both s 63A and s 130 of the Act in failing to provide a copy of an intended employment agreement to Mr Kim and access to a copy of wages and time records (requested in the form of payslips).

⁸ Through his representative, Mr Kim later sought other penalties, but each of those were brought out of time. See Employment Relations Act 2000, section 135(5).

[54] In assessing a penalty for these two breaches I have had regard to the factors in s 133A of the Act and additional relevant considerations.⁹ This included the importance of promoting effective enforcement of employment standards; CTL's apparent ignorance of its obligations as an employer; the prejudice the breaches caused Mr Kim in being able to calculate wages and holiday pay owed to him; and Mr Kim's vulnerability as a migrant employee. I have also taken note of the fact CTL has not appeared before the Authority before; its stated financial circumstances; penalties imposed in other cases; and stepped back and looked proportionality. CTL is liable to a penalty of \$4,000 in relation to the breach of s 63A of the Act and \$3,000 in respect of the breach of s 130 of the Act. \$1,000 of penalty is payable directly to Mr Kim.

Outcome

[55] Croatian Tilers Limited is ordered to pay the following amounts within 21 days of the date of this determination to Junsu Kim:

- (a) \$16,000 as compensation under s 123(1)(c)(i) of the Act;
- (b) \$13,980.00 in lost wages under s 123(1)(b) of the Act;
- (c) \$2,998.00 as arrears of wages;
- (d) \$1,200.00 in public holiday pay;
- (e) \$1,118.40 in annual holiday pay;
- (f) Interest on the amounts at (c) to (e); and
- (g) \$1,000 as a penalty.

[56] By the same date Croatian Tilers Limited is to pay a penalty of \$6,000 into the Authority, to be paid to the Crown bank account.

[57] Ivan Salic is liable, as a person involved, to pay the monies at [54](c) to (f) above to the extent Croatian Tilers Limited default in payment on those amounts.

Costs

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

⁹ *Borsboom (Labour Inspector) v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson v Ford* [2018] NZEmpC 132.

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

[60] 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.¹⁰

Sarah Blick
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1