

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 622  
3264119

BETWEEN                      SHUJIANG GONG  
Applicant

AND                              L&S EARTHMOVING  
LIMITED  
First Respondent

AND                              XIAOLIANG LIU  
Second Respondent

Member of Authority:      Andrew Gane

Representatives:            May Moncur, counsel for the Applicant  
No appearance for the First and Second Respondent

Investigation Meeting:     23 July 2024 at Auckland and by AVL

Submissions:                23 July 2024 from the Applicant

Date:                            16 October 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Shujiang Gong was recruited in China, by an agent engaged by L&S Earthmoving Limited (LSE), and came to New Zealand under an Accredited Employer Work Visa (AEWV) sponsored by LSE.

[2] Mr Gong said he was employed as a construction labourer in a full-time capacity and signed an individual employment agreement (IEA) with LSE. Mr Gong never started working for the company. He says as an employee he is entitled to be paid for

the hours he was contracted to work and holiday pay. He also claims he was unjustifiably disadvantaged and unjustifiably dismissed for which he seeks remedies.

[3] Mr Gong seeks leave to recover any arrears of wages from Mr Liu, the shareholder and director of LSE personally.<sup>1</sup>

[4] Mr Gong claims he paid the equivalent of about RMB 70,000 (Chinese currency) to LSE's agent in China and seeks to recover that money from LSE. Mr Gong sought an order for the recovery of an illegal premium under s 12A of the Wages Protection Act 1983, together with the recovery of a penalty against both respondents under s 13 of the Wages Protection Act.

[5] LSE and Mr Liu lodged a statement in reply denying Mr Gong's claims but did not participate further in proceedings.

### **The Authority's Investigation**

[6] For my investigation I received a written statement and supporting documents from Mr Gong. I also received documents from Immigration New Zealand regarding LSE's accredited employer status and Mr Gong's immigration status.

[7] I heard evidence from Mr Gong who answered questions under affirmation from me with the assistance of an interpreter of Mandarin. I also heard evidence from Mr Nan Li, a licensed immigration advisor who processed the immigration documents on behalf of LSE.

[8] LSE and Mr Lui were not represented in the proceeding. I am satisfied that a copy of the notice of investigation meeting and witness statements were served properly on Mr Liu and LSE.

[9] 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.

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<sup>1</sup> Employment Relations Act 2000, ss 142W and 142Y.

## Issues

[10] The issues for investigation and determination are:

- (a) Was Mr Gong employed by LSE?
- (b) If so was Mr Gong unjustifiably disadvantaged and/or unjustifiably dismissed by LSE?
- (c) If so is Mr Gong entitled to a consideration of remedies sought including:
  - (i) compensation for humiliation, loss of dignity, and injury to feelings under s123(1)(c)(i) of the Act;
  - (ii) lost wages pursuant to section 123(1)(b) of the Act?
- (d) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Gong which contributed to the circumstances which gave rise to his grievances?
- (e) Was a premium payment requested and made to LSE?
- (f) If Mr Gong was an employee did LSE breach Mr Gong's employment agreement by failing to pay him for all hours worked?
- (g) If so, is Mr Gong entitled to arrears of unpaid wages including payment of holiday pay?
- (h) Was Mr Gong entitled to recover any contractual entitlements?
  - (i) Did LSE breach any obligation owed to Mr Gong under the Minimum Wage Act 1983, Holidays Act 2003 or Wages Protection Act 1983 ?
- (j) If Mr Gong was an employee of LSE, did it breach the duty of good faith owed to him under s 4 the Act?
- (k) Should leave be granted to join Mr Liu as a person involved in a breach?
- (l) Is either party entitled to an award of costs?

## **Relevant law**

[11] Section 6 of the Act sets out the meaning of employee and includes a person employed to work for hire or reward under a contract of service and excludes volunteers who do not expect and do not receive reward:

s.6 Meaning of employee:

(1) In this Act, unless the context otherwise requires, Employee –

(a) Means any person of any age employee by an employer to do any work for hire or reward under a contract of service; and

(b) includes –

(i) a homemaker

(ii) a person intending to work; but

(c) excludes a volunteer who –

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer

(2) In deciding ... whether a person is employed by another person under a contract of service, the .... Authority-... must determine the real nature of the relationship between them.

## **Background**

[12] LSE engaged Mr Li to assist LSE in becoming an accredited employer. A service agreement was signed by Mr Liu, on behalf of LSE and Mr Li. On 12 July 2022 the company's accreditation was approved, and an unknown number of job tokens were issued by Immigration New Zealand.

[13] Mr Li stated that following LSE being approved as an accredited employer LSE engaged an agency in China to recruit workers for LSE. LSE provided Mr Li's contact details to the agents in China. Mr Li claims that he did not know the agents' names except for their WeChat nicknames.

[14] In August 2022 Mr Gong contacted Meilan Lin, a representative of Shandong Sencheng International Economic and Technical Cooperation Co. Limited (Shandong) expressing his interest in working abroad. He said he was told he must pay RMB 70,000 plus third-party costs for the employment opportunity.

[15] Mr Gong alleges that between August 2022 and April 2023 he paid a total of RMB 70,000 to agents of Shandong in China to secure his employment with LSE.

[16] On 8 March 2023 Mr Gong underwent a brief interview with an agent from New Zealand. The interview lasted only a few minutes. Mr Gong was given an IEA which he signed and returned to the agent. Mr Gong's IEA stipulated he was to be paid \$26.69 (gross) an hour and was required to work 40 hours per week from Monday to Saturday. The IEA did not set down a commencement of work date.

[17] On 13 March 2023 Mr Li claimed that he entered a service agreement with Mr Gong for the work visa application. Mr Li provided a copy of the signed service agreement at the investigation meeting. Mr Gong denied signing any immigration service agreement with anyone and did not know who processed his work visa application. He further stated that the signature on the purported immigration service agreement was not his.

[18] On 27 March 2023 Mr Gong's work visa was approved and Xi Wan, an agent from Shandong contacted Mr Gong via WeChat, instructing him to inform her when he had paid the final payment so she could confirm his departure date with the employer and allow him to buy a plane ticket. On 13 April 2023 Xi Wan contacted Mr Gong again, stating that if he did not leave in May 2023, the employer would no longer want him.

[19] On 15 April 2023 agent Xi Wan sent more messages, indicating the urgency of settling the final payment by 20 April and buying airline tickets to New Zealand by 8 May 2023.

[20] On 28 April 2023 Xi Wan informed Mr Gong via WeChat that the employer requested him to buy a car upon arrival.

[21] On 10 May 2023 Mr Gong arrived in New Zealand and was picked up by someone arranged by Dongqiang Yang, known as Johnson Yang, a NZ-based agent.

[22] On 11 May 2023 Mr Gong advised Mr Yang he was ready and willing to commence work.

[23] On 22 May 2023 Mr Gong obtained Mr Liu's WeChat contact details from Mr Yang. Mr Gong said he contacted Mr Liu directly through WeChat and Mr Liu promised to arrange a job for Mr Gong.

[24] On 1 June 2023 Mr Gong contacted Mr Liu again via WeChat, asking when work would be arranged. Despite receiving assurances from Mr Liu, no work was provided.

[25] Mr Liu then contacted Mr Gong via WeChat, telling him he should find another job and stated that the LSE would pay him wages for the period between 22 May and 23 June 2023, however no payment was received.

[26] On 24 June 2023 after receiving no work or wages for one and a half months, Mr Gong instructed an employment advocate. On 26 June 2023 Mr Gong's advocate raised a personal grievance on his behalf with LSE.

[27] On 7 August 2023 Mr Gong was granted a migrant protection visa, allowing him to legally work for other employers. In September 2023 Mr Gong obtained part-time work.

[28] After January 2024 Mr Gong began working full-time hours, and his income improved significantly.

### **Was Mr Gong employed by LSE?**

[29] Section 6(1)(b)(ii) of the Act includes an extended definition of "employee" to include "a person intending to work". A person intending to work "means a person who has been offered, and accepted, work as an employee".

[30] I find that Mr Gong accepted an offer of employment made to him by LSE. When Mr Gong signed the IEA on 8 March 2023 Mr Gong became a person intending to work.

[31] When he arrived in New Zealand, Mr Gong had an AEWV and although he did not have a commencement of work date, he could legally work for LSE. On 22 May 2023 Mr Gong first contacted Mr Liu directly and Mr Liu promised to arrange a job for him. This is also the date that Mr Liu, on behalf of LSE, agreed to pay Mr Gong from.

### **Unjustified disadvantage claim**

[32] Section 103(1)(b) of the Act, states that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[33] Mr Gong claimed he was unjustifiably disadvantaged when LSE failed to provide any hours of work.

[34] There was no written variation to Mr Gong's IEA reducing his hours of work, Mr Gong's expectation was that he would be working at least 40 hours per week. Although Mr Gong did not have a commencement of work date stipulated in his IEA he received assurances from Mr Liu that work would be arranged, however no work was provided. This caused Mr Gong significant financial hardship.

[35] I find Mr Gong was unjustifiably disadvantaged by LSE's inaction in failing to provide the hours of work LSE had agreed to and Mr Gong had travelled to NZ to carry out.

### **Was Mr Gong unjustifiably dismissed by LSE?**

[36] Mr Gong was instructed to be ready to work for LSE by May 2023. The delay and failure by LSE to provide Mr Gong work essentially constitutes an unjustified dismissal, as Mr Gong was left without work or income, despite being available and willing to work.

Mr Liu, on behalf of LSE contacted Mr Gong on 1 June 2023 via WeChat, telling him there was no work and to find another job. He also stated that the company was prepared to pay him wages for the period between 22 May and 23 June 2023. No payment was processed. This is a dismissal.

[37] LSE had offered Mr Gong employment which he had accepted. Then, before he had commenced working it took the role away from him. This amounted to an unjustified dismissal as he was not allowed to work in the job he had agreed to. LSE's actions deemed Mr Gong unemployed, causing significant financial and personal stress.

[38] The test of justification is whether, objectively, LSE acted as a fair and reasonable employer could have done in all the circumstances.<sup>2</sup> As LSE failed to carry out any process with Mr Gong regarding its withdrawal of work and as there was no substantive basis for the decision to withdraw the work, LSE's actions have not met the test for justification. In conclusion LSE unjustifiably dismissed Mr Gong.

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<sup>2</sup> Employment Relations Act, s103A(1) and (2).

## **Remedies**

[39] As Mr Gong has been successful with his unjustified disadvantage personal grievance and unjustified dismissal personal grievance, I will turn to consider what remedies he is entitled to.

### *Reimbursement of Lost Wages*

[40] Mr Gong seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal pursuant to sections 123(1)(b) of the Act.

[41] Following his dismissal Mr Gong could not mitigate his loss finding other work as his AEWV tied him to LSE. In the circumstances it is reasonable that Mr Gong be paid 3 months' salary as reimbursement of wages, being \$12,811.20 (gross) and holiday pay of \$1,024.90 (gross).<sup>3</sup>

### *Compensation for humiliation, loss of dignity and injury to feelings*

[42] Compensation is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act. Mr Gong seeks a total of \$35,000.00 in compensation.

[43] In assessing the level of compensation, I need to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of LSE's unjustified actions and the dismissal. Recent decisions of the Employment Court provide guidance on this exercise of quantification.<sup>4</sup>

[44] I found Mr Gong has two personal grievances. One of unjustifiable disadvantage and one of unjustifiable dismissal. As the two personal grievances stem from the same factual matrix and course of conduct, and Mr Gong gave evidence as to the combined effect the conduct had on his wellbeing, I will take a global approach in considering whether remedies are appropriate.

[45] Mr Gong gave evidence about the effects the dismissal had on him. He stated the dismissal caused significant stress, both physical and mental. He said he found it hard to get over how he had been treated and it had damaged his confidence. Mr Gong

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<sup>3</sup> Holidays Act, s 23.

<sup>4</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

gave evidence of the difficulty of finding alternative employment due to his AEWV status.

[46] Reflecting on this I assess the level of harm and loss described to be around the middle of the spectrum and consider that the compensation should reflect this.

[47] I determine that an appropriate award to compensate for the effects on him, accepting his evidence, was \$20,000.00. LSE is ordered to pay to Mr Gong compensation of \$20,000.00.

#### *Contribution*

[48] As I have awarded compensation to Mr Gong, I must now consider whether Mr Gong contributed to the situation that gave rise to his grievances. Given the circumstances of his recruitment and employment I am satisfied that there is no behaviour by Mr Gong that amounts to contribution and warrants a reduction in remedies.<sup>5</sup>

#### *Was a premium payment requested and made?*

[49] Under New Zealand employment law a payment to secure employment is not permitted. Section 12A of the Wages Protection Act 1983 prohibits such payments being sought or received by an employer or a person on behalf of an employer. The person who paid the money may recover that amount from the employer as a civil debt due to that person.

[50] Mr Gong stated he was asked to pay RMB 70,000 in order to secure his position at LSE.

[51] Mr Gong said that between 16 August 2022 and 13 January 2023 he made a number of payments in China to the agent's account via WeChat.

[52] On 17 April Mr Gong stated he paid the balance of RMB 70,000, in cash, to an agent in China. He said he received a handwritten receipt with the agents fingerprint on it.

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<sup>5</sup> Employment Relations Act, s124.

[53] These payments if proven would amount to being a premium payment. However, the documentary evidence does not substantiate what payments were for, who actually received them, or prove any link to LSE or Mr Liu.

[54] Mr Gong has submitted that he understood that a portion of the alleged premium payments “might” have been received by LSE or Mr Liu. However, there is no evidential link to prove that the alleged payments made in China were actually paid to LSE or Mr Liu. I am not satisfied on the evidence provided by Mr Gong that the alleged premium payments were received by LSE or Mr Liu.

[55] As the alleged payments were made in China it is outside the jurisdiction of the Wages Protection Act 1983.

[56] I find Mr Gong cannot succeed in his claim against LSE or Mr Liu for recovery of the alleged payment of a premium.<sup>6</sup>

*If Mr Gong was an employee did LSE breach Mr Gong’s employment agreement by failing to pay him for all hours worked?*

[57] Mr Gong was an employee of LSE but did not have an agreed commencement date of work in his IEA and did not complete any hours of work for LSE. LSE was not in breach of his IEA by not paying him for hours worked.

*Did LSE breach any obligation owed to Mr Gong under the Minimum Wage Act, Holidays Act or Wages Protection Act ?*

[58] LSE was not in breach of the Minimum Wage Act, Wages Protection Act or Holidays Act, for not correctly paying Mr Gong wage arrears or holiday pay, as Mr Gong, an employee of LSE, never actually carried out any work for LSE. Therefore, there was no underpayment of wages and there were no wage arrears or holiday pay owing.

*Should leave be granted to join Mr Liu as a person involved in a breach?*

[59] LSE was not involved in a breach of employment standards. Therefore, Mr Liu cannot be joined to proceedings as a person involved in a breach of employment standards.<sup>7</sup>

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<sup>6</sup> *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451.

<sup>7</sup> Employment Relations Act 2000, ss 142W and 142Y.

### *Recovery of contractual entitlement*

[60] Mr Gong is also entitled to recover one month's salary in lieu of notice, because that was a contractual entitlement, which fell due the moment LSE dismissed him. His entitlement arises independently of any statutory claim for lost earnings.<sup>8</sup>

[61] Payment in lieu is not a payment in reimbursement of lost wages under s 128 of the Act but is payment of a liquidated sum agreed to by the parties upon entry into the employment agreement. If Mr Gong had found paid work the day after his dismissal he would still have been entitled to the agreed payment in lieu.

[62] In the circumstances it is reasonable that Mr Gong be paid one months' salary as contractual notice from 1 June 2023, when he was dismissed, being \$4,270.40 (gross).

*If Mr Gong was an employee of LSE, did it breach the duty of good faith owed to him under s 4 of the Act?*

[63] LSE had a duty to deal with Mr Gong in good faith and be active and constructive in maintaining a productive employment relationship. There is also an implied duty on employers to be fair and reasonable. Other implied duties include the duty not to damage the relationship of confidence and trust between and employer and employee.

[64] I am satisfied LSE's actions fell short of what a fair and reasonable employer could have done in the circumstances and these failures breached the duty of good faith and the implied duty not to seriously damage and destroy the trust and confidence inherent in an employment relationship. These breaches caused Mr Gong to resign.

[65] LSE's non-compliance with its good faith obligation played a substantial role in the finding that Mr Gong was unjustifiably dismissed.

### **Penalties**

[66] A penalty was sought for breach of good faith against LSE. The test for a penalty for breach of good faith is high.

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<sup>8</sup> *Atwill v Tanners Timberworld* 1 ERNZ 321, page 325 in particular.

[67] In relation to the breach of good faith egregious bad faith is not required under s 4A of the Act before a penalty can be awarded<sup>9</sup> and the Authority must be satisfied the failures were deliberate, serious and sustained, or that it was intended to undermine the employment relationship.<sup>10</sup>

[68] Given the lack of consultation and ongoing failure to provide Mr Gong with work despite repeated requests, I conclude LSE's actions were intended to undermine the employment relationship with Mr Gong. This was highlighted when Mr Liu told Mr Gong to look for another job.

[69] In the circumstances I believe the imposition of a penalty is appropriate, taking into account the vulnerability of Mr Gong, a Chinese immigrant who was brought out to New Zealand by LSE, an accredited employer, and was tied to working for only LSE.

[70] In assessing a penalty for this breach, I have had regard to the factors set down in s 133A of the Act. The Employment Court provided guidance over the application and weighting of those factors in *Borsboom (Labour Inspector) v Preet PVT Limited* and further refinements have been subsequently made by the Court, including in *Nicholson v Ford*.<sup>11</sup> There has been no previous conduct for consideration. I am not aware of the financial situation of the company. The maximum penalty against a company is \$20,000.00. I have considered other similar penalty awards in other cases. In relation to this breach, I make an award of \$10,000, with 50 percent of this award being payable to Mr Gong.

### **Summary of orders**

[71] Mr Gong was unjustifiably disadvantaged and unjustifiably dismissed, for which remedies have been awarded. The Authority orders as follows:

[72] L&S Earthmoving Limited is ordered to pay Shujiang Gong the following sums:

- a. Wages of \$12,811.20 (gross) and holiday pay of \$1,024.90 (gross) being reimbursement of 3 months remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000: and

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<sup>9</sup> *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 179 at [60].

<sup>10</sup> Employment Relations Act 2000, s4A.

<sup>11</sup> *Borsboom (Labour Inspector) v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson v Ford* [2018] NZEmpC 132.

- b. \$20,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- c. \$4,270.40 (gross) contractual notice.

[73] L&S Earthmoving Limited is also ordered to pay a \$10,000 penalty, with \$5,000 payable to Mr Gong and the remainder payable to the Crown.

### **Costs**

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

[75] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Gong 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 LSE 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.

[76] 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.<sup>12</sup>

Andrew Gane  
Member of the Employment Relations Authority

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<sup>12</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)