

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 645
3263659

BETWEEN	SHAOLIN PAN Applicant
AND	L&S EARTHMOVING LIMITED First Respondent
	XIAOLIANG LIU Second Respondent

Member of Authority: Andrew Gane

Representatives: Amy De-La Cruz, advocate for the Applicant
No appearance for the Respondents

Submissions 6 August 2024 from the Applicant

Date: 31 October 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 17 January 2023 Shaolin Pan was employed by L&S Earthmovers Limited (LSE) as a truck driver. Mr Pan resigned from his employment with LSE on 30 July 2023.

[2] On 16 November 2023 Mr Pan lodged a statement of problem with the Authority claiming that he was unjustifiably disadvantaged in his employment because he was not paid at his contractual rate for a minimum of 40-hours per week, and that he was not paid for all the hours he worked for LSE. He also claims that he was constructively dismissed by LSE and seeks wages arrears and penalties.

[3] Mr Pan sought orders to recover non-payment of any arrears owing to him from LSE together with interest and costs. In the event LSE is unable to pay him any outstanding arrears, Mr Pan also sought orders to recover these arrears personally from LSE's sole director and shareholder Xiaoliang Liu.¹ He claims Mr Liu as manager of LSE was a person involved in the breaches.² Mr Pan also seeks penalties against Mr Liu for aiding and abetting breaches of his employment agreement.

[4] Mr Liu and LSE lodged a statement in reply denying Mr Pan's claims that he was unjustifiably disadvantaged and unjustifiably dismissed and said he resigned to take up employment elsewhere.

The Authority's investigation

[5] Mr Pan's claims are now before the Authority for determination. During the course of investigating this employment relationship problem I received written statements and supporting documents from Mr Pan. Mr Pan answered questions under affirmation from me with the assistance of a Mandarin interpreter. Mr Pan's representative also lodged written closing submissions with the Authority.

[6] 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 properly served by a process server on LSE and Mr Liu at the registered office of the company on 13 June 2024.

[7] 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. In determining this matter, I have carefully considered all the material before it, including all the evidence provided by the parties and their submissions.

¹ Employment Relations Act 2000, s 142W(1).

² Employment Relations Act, s 142W(2) & (3).

Issues

[8] The issues identified for investigation and determination are set out in Mr Pan's statement of problem and are as follows:

Mr Pan's grievance claim

- (a) Was Mr Pan constructively dismissed by LSE?
- (b) Was Mr Pan unjustifiably disadvantaged by LSE?
- (c) If LSE's actions were not justified, what remedies should be awarded, considering:
 - (i) Reimbursement of lost wages under s123(1)(b) of the Act-subject to evidence of reasonable endeavours to mitigate their loss; and
 - (ii) Compensation under s123(1)(c)(i) of the Act.
- (d) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Pan which contributed to the circumstances which gave rise to his grievances?

Arrears of wages and holiday pay

- (e) Did LSE fail to pay Mr Pan wages due in accordance with the employment agreement;
- (f) If so, is Mr Pan entitled to arrears of unpaid wages including payment of holiday pay and interest?
- (g) If LSE is found to have failed to pay Mr Pan his outstanding wages and/or his holiday pay, should a penalty be imposed on LSE and/or Mr Liu under:
 - (i) section 134 of the Act; and
 - (ii) section 75 of the Holidays Act?

Claims against Mr Liu

- (a) Is Mr Liu a person involved in a breach, or breaches, of employment standards in terms of s 142W of the Act? If so, should leave be granted under s 142Y for wages of other money to be recovered from him to the extent that LSE itself is unable to make payment?

Breach of Good faith

- (b) Did LSE breach the duty of good faith owed to Mr Pan under s 4 the Act?

(c) If a breach is established is a penalty warranted against LSE?

Wage, time and holiday records

(d) Did LSE fail to keep and provide appropriate wage, time and holiday records to Mr Pan in accordance with the Act and the Holidays Act?

(e) If LSE is found to have failed in its obligations to provide wage, time and holiday records, should penalties be imposed against LSE?

Costs

(f) What costs and disbursements should the successful party be awarded?

Background

[9] Mr Pan commenced employment with LSE as a truck driver on 17 January 2023 under an Accredited Employer Work Visa (AEWV). The specific terms and conditions of his employment were outlined in an individual employment agreement (employment agreement). Mr Pan's hourly rate was \$27.76 and was guaranteed a minimum of 40 working hours per week.

[10] The employment agreement stipulated that Mr Pan would be paid fortnightly, however Mr Pan said LSE did not consistently pay his wages on time, often stretching the payment period out to three or four weeks or even longer. He said despite his numerous attempts to address this matter with Mr Liu, the irregularity in wage payments persisted.

[11] Mr Pan said he had put himself in considerable debt to come to New Zealand and was forced to borrow money from colleagues and friends for day-to-day living expenses. He was unable to support his family in China who had to rely on borrowed funds to sustain themselves.

[12] During six months of employment with LSE, Mr Pan said LSE consistently failed to fulfil its contractual obligations regarding the agreed 40 hours work per week. As a result, he said his actual hours worked were significantly less than the 40 hours per week specified in the employment agreement. In one week, Mr Pan said he received only 6.5 hours of work.

[13] Although Mr Pan never personally met Mr Liu, he said he regularly engaged in communication with Mr Liu by phone and social media following up on the late payment of wages and reduced hours. Mr Pan stated he requested wage and time records from LSE so he could accurately calculate what he was being paid for and what he was owed. LSE failed to provide this information.

[14] Mr Pan said, the unilateral reduction in both work hours and corresponding wages rendered his financial position untenable, ultimately compelling him to tender his resignation on 15 July 2023.

[15] Mr Pan specifically mentioned his reduced income and lack of hours as the reason for his impending departure from LSE when communicating with Mr Liu. Mr Pan continued his employment for an additional two weeks' notice period to ensure a seamless transition to a new driver. His final day of employment with L&S Earthmoving Limited was 30 July 2023.

[16] On 27 October 2023 Mr Pan's advocate raised a personal grievance on his behalf with LSE. The advocate also requested copies of wage, time and holiday records. LSE failed to provide copies of the requested record.

Was Mr Pan unjustifiably disadvantaged?

[17] 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.

[18] Mr Pan claims that he was exploited by LSE. He said that LSE did not pay him for the actual hours he was contracted to work for.

[19] LSE's failure to provide the agreed minimum hours of work and timely wage payments placed Mr Pan at a significant financial disadvantage.

[20] There was no available evidence to explain why Mr Pan was not paid his contractual rate of pay when it was due to be paid. He had a reasonable expectation to receive payment of up to 40 hours a week in accordance with his employment agreement. He did not receive this and also was unjustifiably disadvantaged by ongoing delays and inconsistencies in wage payments which caused financial hardship to Mr Pan, as evidenced by his numerous WeChat messages to Mr Liu requesting payment.

Conclusion on unjustifiable disadvantage

[21] I find Mr Pan was disadvantaged by LSE's unjustifiable actions, by LSE failing to pay him his contractual pay as specified in the employment agreement and by LSE failing to correctly pay his public holiday entitlements. This was a breach of both Mr Pan's employment agreement and the requirements of the Wages Protection Act 1983 (Wages Protection Act).

Was Mr Pan unjustifiably constructively dismissed, or did he resign?

[22] It is well established that an employee may be constructively dismissed by his or her employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:³

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.

[23] Mr Pan claims the second and third categories apply to his case and that he was constructively dismissed due to a number of factors. He said the real reasons for his resignation was the ongoing delays and inconsistencies in payments of wages and that LSE unilaterally reduced his contractual hours.

[24] The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*. The Court of Appeal in examining the question of constructive dismissal observed that in examining whether a constructive dismissal under this heading has occurred two questions arise:⁴

[25] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employer, made in circumstances where he or she had no other option.

³ *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ERNZ.

⁴ *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW* [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA).

- (a) First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- (b) Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation?

[26] The underpayment of wages and delays in wage payments, constituting breaches of his employment agreement have previously been held by the Court to cause constructive dismissal, as the breaches were serious enough to make resignation a reasonably foreseeable consequence.⁵

[27] Mr Pan resigned by social media on 15 July 2023. He advised that his last day of employment would be 30 July 2023. Mr Pan specifically cited the late payment of his wages, his reduced hours and the lack of income as the reasons for his resignation. Despite being aware of these concerns, LSE neither took remedial action nor raised objections to the resignation.

Conclusion on unjustifiable dismissal

[28] Given Mr Pan's ongoing attempts to address the payment of his wages and his hours, LSE should have reasonably anticipated his resignation as a result of its failure to address Mr Pan's concerns. I find Mr Pan was unjustifiably constructively dismissed by LSE.

Remedies

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

Reimbursement of Lost Wages

[30] Mr Pan seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal pursuant to sections 123(1)(b) and 128 of the Act.

⁵ *Ling v Super Cuisine Group Ltd* 2023] NZEmpC 106.

[31] Following his dismissal Mr Pan mitigated his loss finding other work on 2 August 2023. In the circumstances it is reasonable that Mr Pan be paid one days lost salary as reimbursement of wages, being \$221.28.

Compensation for humiliation, loss of dignity and injury to feelings

[32] Mr Pan gave evidence about the effects that the uncertainty of hours of work had on him. The repeated failure to pay wages on time caused financial strain on Mr Pan and impacted on his ability to support his family, as evidenced by his constant need to request payment from Mr Liu.

[33] The uncertainty and anxiety associated with the financial instability and LSE's failure to provide consistent work further exacerbated Mr Pan's distress both physically and mentally. He said he found it hard to get over how he had been treated and it had damaged his confidence.

[34] I found Mr Pan 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 Pan gave evidence as to the combined effect the conduct had on his wellbeing, I will take a global approach in considering remedies.

[35] 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.⁶

[36] I determine that an appropriate award to compensate for the effects on him, is \$20,000.00. LSE is ordered to pay to Mr Pan compensation of \$20,000.00

Contribution

[37] As I have awarded compensation to Mr Pan for his personal grievance, under s 124 of the Act, I must consider the extent to which Mr Pan's actions contributed towards the situation that gave rise to the personal grievance and if the actions require,

⁶ *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.

then reduce remedies that would otherwise have been awarded. I do not consider Mr Pan's actions contributed to his situation.

Wage and holiday pay arrears

Recovery of contractual entitlement

[38] LSE failed to pay Mr Pan the wages owed, including failure to provide guaranteed hours of work, public holiday pay, and annual leave entitlements. Further LSE failed to provide accurate wage and time records.

[39] There was no written variation to Mr Pan's employment agreement reducing his hours of work, therefore, I find, Mr Pan is entitled to be paid for 40 hours per week as set out in his employment agreement. Mr Pan should have been paid \$27.76 an hour for forty hours per week pursuant to the employment agreement.

[40] I find Mr Pan was owed unpaid wages in sum of \$4,196.76 based on the agreed hourly rate and documented work hours.

[41] LSE is to pay Mr Pan \$4,196.76 (gross) in wage arrears.

Annual holiday pay

[42] Mr Pan's total earnings for the period he worked for LSE was \$36,199.04 gross (including the wage arrears). LSE failed to pay Mr Pan holiday pay, in breach of the Holidays Act 2003. LSE must also pay annual holiday pay of 8%, on Mr Pan's total earnings. LSE is to pay Mr Pan 2,895.92 (gross) in holiday pay.⁷

Public Holiday Pay

[43] LSE failed to pay Mr Pan for eight hours of wages during public holidays, and he did not receive the payment for the public holiday he was owed when he left the Company. Mr Pan has calculated he is owed \$1,332.48.

[44] I accept Mr Pan's calculation and find LSE must pay Mr Pan \$1,332.48 (gross).

⁷ Holidays Act 2003, s 23.

Interest

[45] Mr Pan can recover interest on his contractual entitlement as set out in paragraphs [41],[42] and [44] above, from the date of termination, being 30 July 2023, until the date of payment. The order for payment of interest is made under clause 11(1) of Schedule 2 of the Act. Interest is to be calculated by LSE using the Civil Debt Interest Calculator.⁸

Involvement in breaches of employment standards

Mr Pan's leave request under the Act

[46] Mr Pan sought leave from the Authority to pursue Mr Liu for payment of arrears of wages owed to him by LSE. If the leave sought was granted and LSE was unable to pay the arrears, Mr Pan may recover the money owed from Mr Lui.

[47] The Authority may grant Mr Pan leave if:⁹

- (a) There has been a default in payment due to him by LSE;
- (b) The default was due to a breach of employment standards; and
- (c) Mr Liu had done certain, defined things and is within one or more of the certain, defined categories of who can be held to be “a person involved in the breach”.

[48] A person involved in the breach of employment standards may include anyone who was “in any way, directly or indirectly, knowingly concerned in” the breach.¹⁰ In the case of a breach by a company, a person occupying a position in the company may only be treated as a person involved if that person is an officer of the entity. Officers include directors and any person “in a position to exercise significant influence over the management or administration of the entity”.

LSE's breach of employment standards

[49] Under the Act, minimum employment standards include:¹¹

- (a) minimum entitlements and payment for those under the Holidays Act;

⁸ <http://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

⁹ Employment Relations Act, s 142Y.

¹⁰ Employment Relations Act, s 142W.

¹¹ Employment Relations Act, s 5 definition of “employment standards”, paras (c), (d) and (f).

- (b) the requirement to keep and provide a copy (upon request) of employee wage and time records under the Act and holiday and leave records under the Holidays Act; and
- (c) the provisions of the Wages Protection Act.

[50] LSE failed to pay Mr Pan's wages and holiday pay when they were due under the Wages Protections Act and the Holidays Act. These breaches fell within the definition of employment standards under the Act.

Mr Liu's involvement

[51] For Mr Liu to be found to have been "involved" in LSE's breaches he had to have:

- (a) aided the breach or was "knowingly concerned" in it; and
- (b) held a position in the company of the type that meant he could be treated as a person involved in the breach of employment standards.

[52] The Court of Appeal endorsed the position that:¹²

"a person is knowingly concerned in a breach if they have actual knowledge of all the essential facts giving rise to that breach or are wilfully blind in relation to those facts."

[53] Mr Liu was a manager and director of LSE at the time the breaches. During the investigation meeting, Mr Pan was asked about the extent of his interactions with Mr Liu during his employment. Mr Pan said, he regularly engaged in communication with Mr Liu by phone and social media following up on the late payment of wages and reduced hours. He was given various reasons by LSE for why he was not paid on time.

[54] Mr Liu, as the director for LSE fell within the category of officer of the company who could be treated as a person involved. As the sole director, he was involved in the decision-making about the business.

[55] Mr Liu's influence on LSE's affairs was also evidenced by his decision for LSE (and himself) not to attend the Authority's investigation.

[56] I accept Mr Liu had direct knowledge of the business circumstances of LSE. This included knowledge of LSE's obligation to pay its employees' wages and holiday

¹² *A Labour Inspector v Southern Taxis Limited* [2021] NZCA 705 at [49].

when payment is due and to keep and provide holiday records. LSE had not met this obligation.

[57] Because Mr Liu was involved in LSE's breaches, Mr Pan is granted leave to recover the arrears of wages owed to him from him personally if LSE unable to pay those arrears.

Penalties

[58] Penalties have been sought against LSE for breaches of good faith and minimum standards. In making a penalty award I will consider other similar penalty awards in other cases.

[59] In assessing a penalty for a 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*.¹³

[60] These principles have been elaborated on and followed since. The law in respect of quantification is well established given the content of s 133A of the Act and requires that regard is had to the object of the Act; the nature and extent of any breach; whether the breach was intentional, inadvertent or negligent; the nature and extent of any loss or damage; steps taken to mitigate the effects of the breach; circumstances of the breach, including vulnerability of the employee; and previous conduct. This is a non-exhaustive list of considerations. The maximum penalty against a company is \$20,000.00 and \$10,000 for an individual.

[61] The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

¹³ *Borsboom (Labour Inspector) v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson v Ford* [2018] NZEmpC 132.

Breach of good faith

[62] The test for a penalty for breach of good faith is high. It was also submitted the good faith breaches were deliberate, serious and sustained and intended to undermine the employment relationship.

[63] 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 awarded¹⁴ and the Authority must be satisfied the failures were deliberate, serious and sustained, or that it was intended to undermine the employment relationship.¹⁵

[64] The lack of consultation and ongoing failure by LSE to be responsive and communicative to Mr Pan were intended to undermine the employment relationship. This was highlighted when Mr Liu told Mr Pan to look for another job.

[65] In the circumstances I believe the imposition of a penalty is appropriate, taking into account the vulnerability of Mr Pan, a Chinese immigrant who was brought out to New Zealand by LSE, an accredited employer.

[66] I have considered other similar penalty awards in other cases. In relation to this breach, I order a penalty of \$4,000, with \$2,000 being payable to Mr Pan.

Should penalties be awarded against LSE in respect of the breaches of minimum employment entitlements?

[67] LSE's failure to pay Mr Pan's wages when they were due was a breach of his employment agreement.

[68] LSE was required to keep wage and time records under the Act and holiday records under the Holidays Act.¹⁶ It was also required to provide these records upon request by Mr Pan. LSE failed to provide these records when requested by Mr Pan.

[69] I have also found that LSE's failure to pay Mr Pan his annual holiday pay when he resigned in breach of the s 24 of the Holidays Act and his failure to pay public holiday pay, in breach of the s 43 of the Holidays Act.

¹⁴ *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 179 at [60].

¹⁵ Employment Relations Act, s 4A.

¹⁶ Employment Relations Act, s 130.

[70] One of the objects of the ERA is to promote the effective enforcement of employment standards. There is a duty to maintain wage and time and holiday and leave records and provide these on request, and an employee is entitled to be properly recompensed throughout the period of their employment. LSE has failed to do so in respect of Mr Pan. I will take a global approach in considering penalties.

[71] I consider that a proportional penalty reflecting the failure to pay wages in full when it was due, to pay annual holidays and public holidays, and the failure to keep and be able to provide upon request the wage and time records and the holiday records to be represented by the sum of \$6,000.

[72] I order LSE to pay a penalty of \$6,000, with \$3,000 being payable to Mr Pan.

Should penalties be awarded against Mr Liu?

[73] Mr Pan has also sought penalties against Mr Liu personally, as a person who has aided and abetted in a breach of the employment agreement by unilaterally changing hours set out in his employment agreement.

[74] The factual matrix of the breaches of the employment agreement is the same as the personal grievances for which remedies have been awarded in Mr Pan's favour. In the circumstances I decline to exercise my discretion and award a/ penalty against Mr Liu.

[75] Mr Pan cannot claim a penalty for a breach of employment standards against Mr Liu.¹⁷

Summary of orders

[76] Mr Shaolin Pan was unjustifiably disadvantaged and unjustifiably dismissed for which remedies have been awarded. His claims for wage arrears have been upheld. Within 28 days of the date of issue of determination L&S Earthmoving Limited must pay:

(a) Mr Shaolin Pan the following sums:

(i) reimbursement of lost wages of \$221.28 (gross);

¹⁷ Employment Relations Act, s 142X.

- (ii) Compensation for humiliation, loss of dignity and injury to feelings of \$20,000.
- (b) Wage arrears of \$4,196.76 (gross); and
- (c) Annual holiday pay of \$2,895.92 (gross); and
- (d) Public holiday pay of \$1,332.48 (gross); and
- (e) Interest as calculated pursuant to para [45] above.
- (f) To the extent L&S Earthmoving Limited is unable to pay the arrears of wages, holiday pay and interest payable to Mr Shaolin Pan, Mr Shaolin Pan has leave of the Authority to recover that amount from Mr Xialiang Liu as a person involved in a breach of employment standards.

[77] For a breach of good faith L&S Earthmoving Limited is ordered to pay a \$4000 penalty, with \$2,000 payable to Mr Pan and the remainder payable to the Crown within 28 days of the date of issue of determination.

[78] For three breaches under each of the Act, the Holidays Act and the Wages Protection Act, L&S Earthmoving Limited is also ordered to pay a \$6,000 penalty, with \$3,000 payable to Mr Pan and the remainder payable to the Crown within 28 days of the date of issue of determination.

Costs

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

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

[81] 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.¹⁸

Andrew Gane
Member of the Employment Relations Authority

¹⁸ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

