

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 778  
3260439

BETWEEN CHUANQIN ZHANG  
Applicant

AND NEW WINDSOR 2017  
LIMITED T/A NEW  
WINDSOR CARE  
First Respondent

QIANG XU  
Second Respondent

Member of Authority: Marija Urlich

Representatives: May Moncur, advocate for the Applicant  
Nancy Wang, representative for the Respondents

Investigation Meeting: 20 September and 17 December 2024

Determination: 24 December 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Chuanqin Zhang was employed by New Windsor 2017 Limited (NWC) from 10 June until 13 June 2023, when she says she was dismissed. She says the actions of NWC unjustifiably disadvantaged her in her employment and that she was unjustifiably dismissed. She seeks remedies to compensate lost income and injury to feeling suffered consequent to her dismissal and a contribution to costs. She also seeks wage and holiday pay arrears, an order for interest of any such award and holiday pay on any award of lost income. Penalties are sought. During the course of the investigation meeting, Ms Zhang withdrew her claim of a premium for fees paid offshore to a recruitment agent and consequent penalty.

[2] NWC operates a rest home. Ms Wang is the manager and she interviewed Ms Zhang for the job with NWC and supervised her during her employment. NWC denies Ms Zhang was unjustifiably dismissed or unjustifiably disadvantaged in her employment. It says she abandoned her employment after issues with her work were drawn to her attention and it believes she found another job. Qiang Xu is the sole director of NWC.

### **The Authority's investigation**

[3] On 5 June 2024 and following a case management conference held on 4 June with the representatives, the Authority issued directions timetabling the filing of information and scheduling an investigation meeting. The parties filed information in accordance with that timetable. Directions dated 4 October 2024 detail the Authority's accommodation of NWC's late attendance at the first investigation meeting and include the reasons the investigation was unable to conclude that day when during the course of the Authority questioning Ms Wang said she had to go and left the provided audio-visual link without leave of the Authority. At the subsequent investigation meeting during my introduction and summary of the matter to date, Ms Wang said she was leaving because in her view the matter had nothing to do with her and she wished to speak directly to Ms Zhang. She then left the audio-visual link, again without leave of the Authority. I was satisfied Ms Wang had chosen to leave the investigation meeting and that it was appropriate to continue to conclude the investigation meeting in the absence of NWC and Mr Xu's representative, having had a fair opportunity to participate in these proceedings.

[4] In the course of investigating this employment relationship problem the Authority heard evidence from Ms Zhang and Ms Wang. The Authority was assisted by an interpreter of the Mandarin language. 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.

## **The issues**

[5] The issues identified for investigation and determination are:<sup>1</sup>

- i. Was Ms Zhang unjustifiably disadvantaged and/or unjustifiably dismissed?
- ii. If so, is she entitled to a consideration of remedies sought including:
  - a. Reimbursement of lost wages; and
  - b. Compensation from \$30,000 under s 123(1)(c)(i) of the Act.
- iii. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Zhang which contributed to the circumstances which gave rise to their grievances?
- iv. Are wage and holiday pay arrears owed?
- vi. If so, should a penalty be awarded against NWC for breaching the parties' employment agreement by failing to pay wage and/or holiday pay arrears?
- vii. Should a penalty be awarded against Qiang Xu for aiding and abetting any found breach of s 134 of the Act?
- viii. Is either party entitled to an award of costs?

## **Relevant law**

### *The test for justification*

[6] When the Authority considers justification for the actions of NWC 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 NWC and how it acted were what a fair and reasonable employer could have done in all the circumstances including at the time of the alleged dismissal.

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<sup>1</sup> No claim of and penalty for breach of good faith are before the Authority – refer directions 5 June 2024 setting out the issues for investigation and determination.

[7] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations set out in s 4 of the Act. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action “because a fair and reasonable employer will comply with the law”.<sup>2</sup>

### **The parties’ employment agreement**

[8] On 6 May 2023 NWC and Ms Zhang entered a written individual employment agreement as evidenced by the signatures of Ms Zhang and an authorised officer of NWC who is understood to be Ms Wang. Prior to this Ms Zhang had attended an interview with Ms Wang. The employment agreement provides Ms Zhang’s position was kitchen hand with a pay rate of \$28.18 per hour and that the commencement date would be within 2 weeks of approval of her work visa. Clause 4 provides the employment was subject to a 90-day trial period. Clause 8 provides Ms Zhang would be required to work 35 to 50 hours per week. Clause 10 of the employment agreement is titled ‘Remuneration’ and includes Ms Zhang was to be paid fortnightly into her nominated bank account.

### **Background**

[9] Ms Zhang is a qualified pastry chef with many years’ experience, including in her home country China, and six years in Singapore where she worked until 2023 when a work mate introduced her to an agent recruiting for jobs in New Zealand. She paid this agent about \$16,000. Ms Zhang said she paid this because it was the fee charged to find a job in New Zealand. She said she wanted to come to New Zealand because the agent told her she would be able to bring her husband and child. On 24 May 2023 Ms Zhang was granted an accredited employer work visa. The conditions of the visa included Ms Zhang could only work for NWC as a kitchen hand and that the visa would expire 24 months after the first date of arrival in New Zealand. The grant of the visa occurred after Ms Zhang was offered and signed the written employment agreement on 6 May 2023.

[10] Ms Zhang described the circumstances of how she came to sign the employment agreement. She said she was contacted on WeChat by a person who said they were a

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<sup>2</sup> *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

licensed agent of NWC who asked her to sign the employment agreement and upon signing they would proceed with the visa application. She said the content of the employment agreement was not explained to her and that she cannot read English. This is accept by the Authority.

[11] On 9 June 2023 Ms Zhang arrived in New Zealand to take up employment with NWC. This was her first time in New Zealand. She had no contacts here other than the recruitment agent and NWC. Ms Zhang was picked up from the airport by a person arranged by the recruitment agent and taken to rental accommodation also arranged by the agent. Arrangements were made for her to purchase an electric bike and having located NWC on a map, she biked there the following day to start work. She said she worked on 10, 11 and 12 June and did not return to work after that date because on the evening of 12 June, during a telephone conversation, Ms Wang told her that her work was no good and she was dismissed. Ms Zhang said she had rung Ms Wang that evening to ask for a half day's leave the next day because she needed to meet the recruitment agent to assist with opening a bank account and getting an IRD number.

## **Discussion**

*Was Ms Zhang unjustifiably disadvantaged and/or unjustifiably dismissed?*

[12] NWC says the allegations made by Ms Zhang are false and misleading.<sup>3</sup> Ms Wang said in her evidence to the Authority that after three days of supervised work it was found Ms Zhang's work was of an unacceptable quality and she then forfeited her employment of her own volition. Ms Wang said she suspects Ms Zhang found a different job. Ms Wang accepts training fees and compensation for losses suffered by NWC were discussed with Ms Zhang in association with the quality of her work but the fees and compensation were not demanded even though she was supervised by experienced staff and complaints were received from residents about the food.

[13] The first question is – did Ms Zhang's employment end during the telephone conversation? The answer is yes. The WeChat messages exchanged between Ms Zhang and Ms Wang in the days following confirm the employment had ended. Ms Zhang asked for her pay and provided her bank account and IRD number, secured on 13 June and as required under the employment agreement. As the exchange continues it is clear

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<sup>3</sup> Refer statement in reply lodged 10 November 2023.

the pay request was made because Ms Zhang's employment had ended, and this had occurred during the course of the telephone conversation when issues with her work performance were raised.

[14] The second question is - did Ms Zhang's employment end because she resigned or was she dismissed? Ms Zhang says she was dismissed and that this occurred after Ms Wang's expression of dissatisfaction with her work and requirement that she pay NWC training fees and compensate it for wasted food. For the following reasons I find Ms Zhang's employment ended at the initiative of NWC on 12 June 2023 and was an unjustified dismissal. It is plainly stated in the WeChat message exchange that NWC sought to change the fundamental nature of the agreement between the parties from employment to training and reimbursement based on dissatisfaction with work performed. It was reasonable, in the all the circumstances of this matter for Ms Zhang to understand she was dismissed. NWC is unable to demonstrate its actions were those a fair and reasonable employer could have taken in all the circumstances. The concerns about Ms Zhang's work were not raised with her in a reasonable manner which would allow her to fair opportunity to consider and respond. Further, NWC has provided no compelling evidence to support its claim Ms Zhang resigned because she had found another job. The dismissal was unjustified. The matters said to amount to an unjustified disadvantage fold into the grounds of dismissal.

#### *The effect of the trial period*

[15] The parties' employment agreement provides for a 90-day trial period. Section 67A of the Act provides an employment agreement entered by an employer and an employee who has not previously been employed by that employer may contain a 90-day trial provision. Section 67B of the Act sets out the effect of a s 67A trial provision in an employment agreement - within the trial period an employer is able to give notice to the effected employee of termination of employment and the employee is unable to bring a personal grievance for unjustified dismissal or other legal proceedings in respect of the termination.

[16] Trial periods must be mutually agreed in writing and the prospective employee must then be given a reasonable opportunity to seek advice about the terms of the offer

of employment including the trial period.<sup>4</sup> On Ms Zhang's evidence she was not provided a reasonable opportunity to seek advice about the terms of the offer of employment – she was contacted by way of a social media application by a person purporting to be a licensed agent of NWC and asked to sign the proffered employment agreement so the visa application process could commence. Neither Ms Zhang nor Ms Wang could identify to the Authority the person who offered Ms Zhang the employment agreement though Ms Wang accepted NWC had used a licensed immigration agent in the visa process with Ms Zhang. Given Ms Zhang's inability to read English, her unchallenged evidence that the trial period was not explained to her prior to signing, and the agent's request that she sign the agreement to start the visa process, NWC cannot now rely on the trial period because it is not enforceable.

## **Remedies**

[17] Ms Zhang has established a personal grievance for unjustified dismissal. She is entitled to a consideration of the remedies sought.

### *Reimbursement of lost wages*

[18] After reviewing the evidence of loss and Ms Zhang's attempts to mitigate that loss the Authority is satisfied she is entitled to an award of lost wages of 10 weeks being \$9,863.00.<sup>5</sup> Holiday pay of \$789.04 (gross) is to be paid on that sum.<sup>6</sup> I am not minded to make a greater award of lost wages because Ms Zhang started a new job on 21 August 2023 and though her hourly rate was lower (\$22.70) than that at NWC the difference was neutralised by the number of hours she worked.

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

[19] The circumstances of Ms Zhang's personal grievance have had a profound and negative impact on her. She gave compelling evidence of the undermining effect of her dismissal on her confidence and courage, and the disappointment she experienced having come to New Zealand to work for NWC with the intention of bringing her family. It is accepted this has had an ongoing negative impact on Ms Zhang including the distress caused because she was unable to meet obligations to her family including

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<sup>4</sup> Employment Relations Act 2000, s 63(2)(c).

<sup>5</sup> Ms Zhang's hourly rate of \$28.18 x 35 (minimum guaranteed hours of work per week) x 10 weeks = \$9,863 (gross).

<sup>6</sup> Holidays Act 2003, s 23.

her dependent children. She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$18,000.00.

*If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Ms Zhang that contributed to the situation giving rise to her grievance?*

[20] No deduction from the remedies awarded is to be made under s 124 of the Act. The Authority has found Ms Zhang did not abandon her employment and her version of events leading up to her employment ending is preferred and amounted to a dismissal. She has not contributed in a blameworthy manner to the circumstances of his dismissal.

[21] There are no deductions from the monetary remedies for reasons of contribution.

### **Arrears**

*Are arrears of wages due and owing?*

[22] Ms Zhang is entitled to be paid by NWC for hours worked at the agreed rate of pay, which was \$28.18 per hour. She has provided evidence of the actual hours she worked for which she has not been paid which is accepted.

[23] NWC is ordered to pay Ms Zhang wage arrears totalling \$845.40 (gross) because the evidence establishes between 10 – 12 June 2023, she worked 30 hours for NWC for which she should have been paid at the rate of \$28.18 per hour and these arrears remain unpaid. NWC is ordered to pay these arrears to Ms Zhang within 28 days of the date of determination.

*Are holiday pay arrears due and owing?*

[24] As an employee Ms Zhang was entitled to be paid termination holiday pay when her employment ended.<sup>7</sup> She is entitled to be paid holiday pay on the wage arrears calculated at eight per cent of total gross earnings.

[25] NWC is ordered to pay Ms Zhang \$67.63 in holiday pay entitlements within 28 days of the date of this determination.

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<sup>7</sup> Holidays Act 2003, section 27.

*Should interest be ordered on the arrears?*

[26] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[27] It is appropriate where a person has been deprived of the use of money to make an award for interest. Ms Zhang is entitled to an award of interest on the wage arrears awarded including the holiday pay component.

[28] NWC is ordered to pay interest, using the civil debt interest calculator, within 28 days of this determination, as follows:<sup>8</sup>

- (i) Interest on the sum of \$913.03, being the total of arrears awarded, calculated from 13 June 2023 until the date payment is made in full.

[29] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

## **Penalty**

*Is NWC liable for a penalty?*

[30] NWC failed to pay Ms Zhang for hours worked as required by clause 10 of the parties' employment agreement. She first asked NWC for her wages by WeChat message to Ms Wang following her dismissal and provided her bank account details and IRD number. The wages remain unpaid. This failure was a breach of the employment agreement.<sup>9</sup>

[31] The maximum penalty against a company is \$20,000 per breach.<sup>10</sup> There is one found breach of statutory obligations. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.<sup>11</sup>

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<sup>8</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator).

<sup>9</sup> Employment Relations Act 2000, s 134.

<sup>10</sup> Employment Relations Act 2000, s 135.

<sup>11</sup> *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

[32] Where a breach is not a minor or a technical breach, the question of whether a penalty is warranted turns to whether the conduct was deliberate or negligent, warranting the imposition of a penalty.<sup>12</sup> The level of harm occasioned by the breach is also relevant.<sup>13</sup>

[33] NWC's actions in failing to pay wages must be seen as intentional and its culpability high. As the employer it was its obligation and responsibility to pay wages when they became due. The failure to do so is, in all the circumstances of this employment relationship problem is a serious breach.

[34] There is evidence of direct loss suffered by Ms Zhang as a result of NWC's breach – she had to borrow money from friends and family in the period after her employment ended when she was unpaid, and she has spent time and resources seeking to enforce these obligations.

[35] There is no specific evidence before the Authority of any financial difficulty NWC may have in paying any penalty.

[36] Standing back and including comparison to other cases and the relevant matters listed in s 133A of the Act, a fair penalty is \$3,000. Ms Zhang seeks an award of penalties, all or a portion of any paid to her. NWC is ordered to pay half the penalty to Ms Zhang to compensate her for the inconvenience and resources expended in pursuing these statutory entitlements.

[37] New Windsor 2017 Limited is ordered to pay the \$3,000 penalty within 28 days of the date of this determination half to Ms Zhang and half to the Crown.

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<sup>12</sup> See *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151, [2019] ERNZ 438 at [169]; *Xu v McIntosh* [2004] 2 ERNZ 448.

<sup>13</sup> *Xu*, *ibid.*

### **Aiding and abetting breach of the employment agreement**

[38] While Qiang Wu is the sole director of NWC there is no direct evidence before that Authority that they were directly involved in NWC's ongoing failure to pay Ms Zhang her wages. The penalty sought against Qiang Wu is not granted.

### **Costs and reimbursement of filing fee**

[39] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

[40] Ms Zhang seeks an award of \$8,000 as a contribution to total costs of representation incurred after mediation which it is accepted exceed that amount. She submits the award sought is warranted given she was the successful party, costs should follow the event and the investigation meeting was scheduled for two full days.

[41] Ms Zhang was the successful party and it is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs.

[42] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500 with each subsequent day at \$3,500. Taking the adjournments into account his matter involved no more than one full day investigation meeting so the starting point is \$4,500.

[43] An uplift is not warranted. While it is unfortunate NWC did not engage more fully with the investigation process this has not significantly impacted on Ms Zhang's ability to bring her claim.

[44] A fair costs award, given all the relevant circumstances is in Ms Zhang's favour at the daily tariff of \$4,500 plus reimbursement of the filing fee of \$71.55.

### **Summary**

[45] The following orders are made in Chuanqin Zhang's favour:

- a) Within 28 days of the date of determination New Windsor 2017 Limited is to make the following payments to Chuanqin Zhang:
  - i) \$18,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
  - ii) \$10,652.04 (gross) pursuant to section 123(1)(b) of the Employment Relations Act 2000;
  - iii) \$845.40 (gross) in wage arrears;
  - iv) \$67.63(gross) holiday pay arrears calculated on the lost remuneration award pursuant to s 123(1)(b) of the Employment Relations Act 2000;
  - v) interest is to be calculated and paid on the arrears ordered per [28] above;
  - vi) \$3,000 penalty half to be paid to Ms Zhang and half to the Crown; and
  - vii) \$4,500 in costs and \$71.55 to reimburse the filing fee.

Marija Urlich  
Member of the Employment Relations Authority