**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

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

[2025] NZERA 262
3269259

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| | BETWEEN | GUIYU SU<br>Applicant |
| | AND | NZ INVESTMENT AND TRADING LIMITED<br>Respondent |

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| Member of Authority: | Robin Arthur |
| Representatives: | Mins Chang, advocate for the Applicant<br>Ram Narayan, advocate for the Respondent |
| Investigation Meeting: | 16 October 2024 in Auckland and by audio-visual link |
| Submissions: | From the applicant on 17 January and 14 February 2025 and from the respondent on 31 January 2025 |
| Determination: | 12 May 2025 |

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## DETERMINATION OF THE AUTHORITY

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### Employment relationship problem

[1] Guiyu Su's employment with NZ Investment and Trading Limited (NZITL) began on 7 March 2017 and ended when he was dismissed on 2 June 2023.

[2] Mr Su came to New Zealand from his home country of China on a three-year Essential Skills visa to work in a position described in his written employment agreement as a glazier. Immigration New Zealand (INZ) issued the visa under an approval in principle (AIP) granted to NZITL in August 2016 to recruit four overseas workers. Mr Su's visa required him to work only for NZITL.

[3] The terms of Mr Su's employment agreement with NZITL, provided to INZ in support of his visa application, included an hourly pay rate of $26 and a three-month trial period.

[4] Mr Su said he had paid an agent more than RMB105,000 (around NZD25,000) to arrange a visa and a job for him in New Zealand. There was no allegation or evidence NZITL received any part of that payment as an illegal premium.

[5] NZITL co-owner Angela Lee said she had selected Mr Su after watching a video of candidates for the role working in a factory to demonstrate their skills. The information Mr Su provided in support of his application said he had more than ten years' experience in aluminium installation work, including jobs in China, Costa Rica and Equatorial Guinea.

[6] NZTIL trades under the name Homerit. It is in the business of installing PVC-U framed double-glazed windows and doors, an alternative to aluminium frames, used in residential and commercial construction.

*Reduction of pay rate in 2017*

[7] When Mr Su began work at NZITL's Auckland factory the company's other co-owner Simon Yang was dissatisfied with Mr Su's ability to do the work required of him. Mr Yang proposed ending Mr Su's employment by using the trial period provision in his employment agreement. NZITL said Mr Su, through the agent who had arranged his visa and job with the company, then proposed a reduction of his hourly pay rate to $18 while he undertook training. NZITL said it accepted his proposal and the employment continued.

[8] Those changes to his work position and the payrate, which were items specified in INZ's approval for NZITL to recruit workers from overseas, were not recorded in any written variation to his employment agreement and were not reported to INZ by Mr Su or by the company. In his evidence for the Authority investigation Mr Su denied he had accepted the pay reduction. He said he did not complain about the situation at the time as he did not want to lose his job.

*Return to $26 hourly rate on renewal of visa*

[9] In late 2019 NZITL supported Mr Su's application for a further three-year Essential Skills work visa as a glazier. INZ initially declined the application because a new employment agreement, signed by Mr Su and Ms Li and provided as part of the required documentation, showed he was, by that time, being paid $23 an hour.

[10] The company had increased Mr Su's hourly rate to $19 an hour in July 2017, to $21 an hour in September 2017 and then to $23 an hour in October 2019.

[11] In assessing the 2019 visa renewal application INZ noted the AIP issued to NZITL in 2016 and Mr Su's work visa issued in February 2017 had both referred to a $26 hourly rate. It said INZ rules required those AIP conditions to continue to apply if an employer was supporting renewal of a visa, unless the employer could satisfy INZ there was a good reason for the change.

[12] An agent acting for Mr Su then wrote to INZ saying Mr Su and NZITL had agreed to the lower pay rate but had recently realised this was "a horrible mistake". After the agent lodged a new employment agreement, again signed by Mr Su and Ms Lee and now providing an hourly rate of $26, INZ issued a further three-year visa.

[13] Mr Su was paid at that rate from 9 February 2020. In subsequent years NZITL increased his hourly pay rate to $30, then $32 and, in mid-May 2023, to $34 an hour.

*Leave request refused and absent from work*

[14] In late May 2023 an issue arose over Mr Su applying for leave at very short notice. At 7.36pm on the evening of Sunday, 21 May Mr Su contacted NZITL's office administrator Lydia Peng by WeChat message. Ms Peng was responsible for scheduling work assignments and dealing with short term leave requests.

[15] The message exchanges which followed were in Chinese.

[16] Mr Su's message asked for leave for the next two days, Monday and Tuesday, to go "on holiday to Rotorua". He said he and the friends he was travelling with intended to leave at 3am and he "might" be back for the third day of the working week.

[17] Ms Peng responded within 15 minutes. Her reply said she was unable to approve the leave because the factory's schedule for the week was full and the company needed two weeks' written notice for annual leave.

[18] When Mr Su responded with a query about whether he was refused leave because he was Chinese and whether "white people" had to apply in advance, Ms Peng directed him to contact Ms Lee about his leave request. Mr Su responded to that directive with a message at 9.43pm saying: "I'm feeling unwell, I will go see the doctor

tomorrow". Ms Peng then sent Mr Su a further message saying she was only doing her job, was "not targeting anyone" and, if he was unhappy with her, he could apply for leave to "the boss directly".

[19] Mr Su did not respond to that message or contact Ms Lee about his leave request. He did not come to work the next day.

[20] On that Monday afternoon Ms Peng sent Mr Su a further message. She wrote that she had relayed his leave request to Ms Lee and "if you do not come to work without preapproved leave, it would be considered a voluntary resignation". She told Mr Su to contact Ms Lee "for further inquiries regarding this".

[21] Mr Su did not respond directly to that last message from Ms Peng but later that evening sent her a picture of a Covid-19 test kit showing a positive result. Ms Peng responded with a message telling Mr Su to send the picture to Ms Lee.

*Call to disciplinary meeting*

[22] On Tuesday, 23 May Ms Lee sent Mr Su an email message, again written in Chinese, calling him to a disciplinary meeting at 10am on Friday, 2 June. She wrote that the message was to discuss his absence from work without authorisation, a topic she said they had talked about many times, most recently in March. She said Mr Su could bring a lawyer or agent with him to the meeting.

[23] Attached to the email was a letter written in English. Its contents were largely the same as Ms Lee's email message in Chinese but included one significant additional point: "If the allegations are substantiated there is potential for disciplinary action to be taken up to and including dismissal".

[24] Mr Su did not respond to Ms Lee's email message. The following week Mr Su came to work on the Monday morning, on 29 May. Mr Yang told Mr Su to go home and to contact Ms Lee.

[25] Two days passed without Mr Su making any attempt to contact Ms Lee.

[26] On 31 May Ms Lee sent Mr Su a message, resending him the previous week's email about the disciplinary meeting scheduled for that coming Friday, 2 June. Ms Lee

asked Mr Su to confirm his attendance or to "provide a sick note" if he was unable to attend.

[27] In an exchange of messages during that day, again written in Chinese, Ms Lee told Mr Su that it was "not suitable" for him to return to work until he attended a meeting with her and provided an explanation for his absences. She again asked him to confirm he would attend the meeting on Friday, 2 June. Mr Su asked Ms Lee to reschedule the Friday meeting to Sunday. He said Sunday would be a better day because there would be no other people at the company's offices then.

[28] When Ms Lee declined Mr Su's request to delay the Friday meeting Mr Su advised her that he had travelled to Rotorua with friends. He said he would have difficulty travelling back to Auckland in time for the 10am meeting on Friday. Ms Lee offered to shift the meeting time to 1pm on Friday to give him time to return to Auckland. In a further message Ms Lee repeated her earlier advice that Mr Su could bring a lawyer or agent if he wished, or, alternatively he could provide a written response on the issue of his "failure to comply with work arrangements and unauthorized absence from work".

[29] Mr Su did not respond to those suggestions. He did not attend the 2 June meeting. Ms Lee said she tried to call Mr Su when he did not arrive for the meeting but he did not answer her call.

*Dismissal on 2 June 2023*

[30] On the evening of 2 June Ms Lee sent Mr Su a further email, in Chinese, advising him that his employment was terminated with immediate effect. Her email said the company had "lost confidence in your good faith intention to discuss and resolve the issues with us".

[31] After returning to Auckland in the following days Mr Su contacted Ms Lee with a request that the company pay out his annual leave as if he was still employed and on leave, rather than make a lump sum payment of his outstanding leave entitlements. He asked for this to be done until his application for a residency visa was finalised. In a further message, on 5 June, Mr Su apologised for his "complete error" and asked if Ms Lee and Mr Yang would give him "another chance". Ms Lee did not respond to that

request but the company did arrange for Mr Su's annual leave entitlements to be paid as if he remained on the company payroll.

*Claims in the Authority*

[32] Mr Su raised both a personal grievance for unjustified dismissal and a claim for wage arrears. His arrears claim sought payment of $26 an hour for the period from March 2017, when his pay rate was reduced to $18 an hour, until February 2020 when his hourly rate returned to $26 an hour.

[33] His subsequent application to the Authority also sought penalties for breaches of his statutory entitlements.

[34] NZITL's statement in reply said the company acted fairly in carrying out a disciplinary process and deciding to dismiss Mr Su for unauthorised absences.

[35] It also said the company had considered terminating Mr Su's employment during a three-month trial period that began in March 2017 because "he lacked the skill and experience that he had initially claimed". NZTIL said his employment had continued at the $18 hourly rate because the company accepted an offer Mr Su and his agent had made "in order to save his job". On that basis NZITL denied Mr Su was owed any arrears of wages. The company also denied any liability for breaching statutory obligations to keep and provide wage and leave records, to pay wages due and to act in good faith during the employment relationship.

**The Authority's investigation**

[36] Mr Su, his wife Yanmei Ma, Ms Lee, Mr Yang and Ms Peng each provided written witness statements for the Authority investigation.

[37] The statements from Mr Su and Ms Ma were written in Chinese, with English translations.

[38] Ms Lee attended the investigation meeting by audio-visual link from China where she was resident and pursuing studies there at the time.

[39] All witnesses answered questions under affirmation from me and the parties' representatives. In answering questions witnesses were assisted, where needed, by an Authority-appointed interpreter of Chinese.

[40] During the investigation meeting I identified a need for further information about Mr Su's visa applications and visa conditions, particularly the employment-related documents provided to INZ in support of those applications.

[41] In the following weeks INZ provided copies of relevant parts of its files concerning Mr Su, including those employment-related documents. Those documents were provided in response to a call for evidence made by the Authority under s 160 of the Employment Relations Act 2000 (the ER Act). Copies of the INZ files were then given to the parties' representatives with an opportunity to comment on any relevant information as part of their closing written submissions.

[42] As permitted by s 174E of the ER 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.

[43] Findings made and conclusions expressed are reached on the evidential standard of the balance of probabilities. This is an assessment of what was more likely than not to have been the case. Differences of account in the written and oral evidence given by the witnesses may be resolved by reference to documents made at the relevant time rather than relying on the subsequent recall and assertions made by the witnesses. In this case the WeChat and email messages exchanged between Mr Su and NZITL witnesses have proved particularly useful. Most of those messages were in Chinese, with translations provided for the Authority investigation.

[44] Equally, an absence of documentation or other corroborating information has meant some assertions made by each party lacked a sufficient evidential basis for some conclusions they sought.

[45] In respect of compliance with visa requirements, this determination concerns only those aspects which relate to whether changes to the terms of employment could lawfully be made and what effect that then had on obligations of the parties in the employment relationship.

**The issues**

[46] From the evidence heard and the events already briefly outlined, the following issues required determination:

(a) Was Mr Su suspended on 29 May 2023 and, if so, was that decision made fairly?

(b) Was NZITL's decision to dismiss Mr Su, and how that decision was reached, what a fair and reasonable employer could have done in all the circumstances at the time?

(c) If NZITL's actions were not justified (in disadvantaging and/or dismissing Mr Su), what remedies should be awarded, considering:

- Lost wages (assessing the period for which loss is claimed; what was done, if anything, in that period to find alternative work and income; and whether what was, or was not done over that period was reasonable in the circumstances); and
- Compensation under s123(1)(c)(i) of the ER Act?

(d) What reduction, if any, should be applied to any remedies awarded to Mr Su to account for any blameworthy conduct by him that contributed to the situation giving rise to his grievance?

(e) Was NZITL entitled to reduce Mr Su's wage rate in March 2017 and, if not, was he entitled to an award of arrears, with interest, for the period he was paid less than $26 an hour?

(f) Was NZITL liable to penalties for breaches of its statutory obligations to:

(i) Pay wages when due (Wages Protection Act 1983 (WPA) s 11);

(ii) Pay holiday pay (Holidays Act 2003 (HA) s 27);

(iii) Provide wage, time, holiday and leave records when requested (ER Act s 130 and HA s 81);

(iv) Provide a copy of his employment agreement and variations when requested (ER Act s 65);

(v) Be active and constructive in maintaining the employment relationship (ER Act s 4)?

(g) If NZITL is liable to penalties, what amount should be ordered and should any part of that amount be awarded to Mr Su?

(h) Should either party contribute to the costs and expenses of the other party?

*Additional claim on payment of hours not determined*

[47] In closing submissions Mr Su also sought a further award for wage arrears related to whether he was paid for all the hours referred to in his employment agreements as being either his minimum or ordinary hours of work.

[48] It was not a claim made in his statement of problem, referred to his written witness statements or examined in any depth through questions at the Authority investigation meeting.

[49] There was some information about variation of hours worked that related to the effect of lockdowns during the Covid-19 pandemic, closures of the workplace in the summer holiday period and fluctuations in business but the issue regarding payment for 'minimum' or 'ordinary' hours, rather than solely hours worked, was not properly before the Authority for determination and there was not, in any event, sufficient evidence to reach any findings or orders on that additional claim.

**Mr Su did not use an opportunity to comment on his suspension**

[50] Mr Su said he went to the company's premises on the morning of Monday, 29 May, and was ready to start work at 8am, but Mr Yang told him he had to leave and go home. He said Mr Yang did not give him a reason but asked him to call Ms Lee, who was not at the workplace at the time, and talk to her.

[51] Mr Yang agreed he had told Mr Su to leave the workplace and to contact Ms Lee. Mr Yang, however, said he had also told Mr Su that he could not work in the factory because he "had not provided a negative Covid test result" and he had to talk to Ms Lee about the "misconduct" of not coming to work. Mr Yang said Mr Su left without responding to his comments.

[52] In his evidence in the Authority investigation Mr Su accepted he had not carried out Mr Yang's instruction to contact Ms Lee, either on that day or the following day.

[53] On 31 May, the third day after he was sent home and told to contact Ms Lee, Ms Lee sent Mr Su a message that included a clear instruction amounting to a suspension from work until at least 2 June:

> You can provide an explanation at the meeting on Friday. Until you have explained it clearly, it is not suitable for you to return to work. …

[54] A term in his written employment agreement allowed NZITL to suspend him if a serious problem, such as suspected misconduct or wilful failure to follow instructions arose, but said this would usually be on pay.

[55] Mr Su submitted he was unjustifiably disadvantaged by the actions of Mr Yang and Ms Lee because he was "not provided a meaningful opportunity to comment in regard to the suspension" and NZITL had subsequently deducted days from his annual leave entitlement to pay him for those days.

[56] NZITL submitted its actions on 29 May and on 31 May were warranted given uncertainty about Mr Su's health status when he arrived at work on the Monday, his failure to respond to messages about the disciplinary meeting and, subsequently, not contacting Ms Lee as he was directed to do.

[57] Assessing all the circumstances, as they were at that time, NZITL had acted as a fair and reasonable employer could have done for the following four reasons.

[58] Firstly, NZITL had reasonable grounds to doubt the true reason for Mr Su's absence from work from 22 May. When Mr Su asked for leave at 7.36pm on a Sunday evening, the company could reasonably presume he considered he was well enough to be planning his holiday in Rotorua with friends. NZITL was then understandably dubious about his message later that evening, some 90 minutes or so after his short notice request for leave was declined, that he was "not feeling well" and implying he would absent on sick leave the next day.

[59] Secondly, Mr Su had provided a photograph of a Covid-19 test kit result on 22 May, with no information advising whether it was his own result or that of some other person. If it was a result for 22 May, his arrival at work on the morning of 29 May was within the seven-day mandatory isolation period in place at that time.[1] It was reasonable for NZITL to want that situation clarified before Mr Su returned to working alongside other employees.

[60] Thirdly, Mr Su had no explanation for his failure to contact Ms Lee on 29 May as he was asked to do. It was an instruction given to him as an employee. He gave no reason for why he did not comply with the instruction, immediately that day, or on the following day.

[61] Fourthly, this meant Mr Su had not used an opportunity to comment on whether or when he could return to work at the company's premises. More than 48 hours passed

[1] Revoked 14 August 2023.

before Ms Lee had confirmed, by WeChat message at 7.33pm on 31 May, that Mr Su was to remain away from work until the 2 June disciplinary meeting.

[62] In light of his failure to communicate with his employer to clarify the situation, NZITL was not obliged to pay Mr Su for the period from 29 May to 2 June when he was effectively suspended, either by his own actions or at the initiative of NZITL, until they could address the concerns raised with him. He had no grievance on the grounds of unjustified disadvantage in that period.

**Dismissal**

[63] Mr Su's claim he was unjustifiably dismissed had to be assessed in relation to both the substance of the concerns NZITL sought to address with him in its disciplinary process and how that process was carried out.

[64] The test of justification set by the Act for making that assessment considers whether NZITL's actions, and how it acted, met the objective standard of being what a fair and reasonable employer could have done in all the circumstances at the time.[2] Factors in that test include:

(i) Whether NZITL sufficiently investigated the allegations against Mr Su before dismissing him;

(ii) Whether NZITL raised its concerns with Mr Su and he then had a reasonable opportunity to respond to those concerns;

(iii) Whether NZITL genuinely considered any explanation Mr Su gave before making any decision on a disciplinary outcome; and

(iv) Whether there were any other factors appropriate to consider?

[65] Defects in the process followed by NZITL may result in the dismissal being found to be unjustified if those defects were more than minor and resulted in Mr Su being treated unfairly.[3]

[66] In applying the test of justification, the Authority does not substitute its own view for that of the employer but, rather, considers whether what NZITL in fact did and decided was within the range of responses open to a fair and reasonable employer in that situation.

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[2] Employment Relations Act 2000, s 103A.
[3] Section 103A(5).

*Long standing issue over arrangements to take leave*

[67] Mr Su's witness statement, written in Chinese with the assistance of his advocate and then translated into English, described the genesis of his grievance in this way:

> On 21 May 2023 I felt sick. I told my manager Lydia Peng. She said my leave was not approved and I was considered resigned.

[68] As apparent from the account already given in this determination, Mr Su's description omitted a substantial part of the context about his communication with Ms Peng on 21 May. It also omitted the context of longer standing concerns with Mr Su seeking and taking annual leave.

[69] Copies of messages between Mr Su and Ms Peng for the period between October 2021 and March 2023 showed 14 days of sick leave had been approved through an exchange of messages on the relevant day. For example, on 4 July 2022, Mr Su sent a message reading: "I caught a cold, requesting one day leave". Ms Peng replied "Okay".

[70] Another message from Ms Peng, on 18 July 2022, showed Mr Su knew that the company had different requirements for requests to take annual leave. He was rostered to work that day but had not arrived at the workplace. When Ms Peng rang Mr Su to check where he was, Mr Su told her he planned to take a week's leave. She sent him a WeChat message saying he should provide two week's written notice for annual leave requests and "the office will formally reply whether it is approved".

[71] On that occasion Mr Su did not provide any notice and was away for the whole week. He was also absent the following week, providing a copy of a Health Ministry text message to his wife which referred to her having Covid-19 and everyone in her household needing to stay home and isolate.

[72] According to Ms Lee's evidence, she met with Mr Su when he returned to work in late July 2022 and talked with him about the need to apply for annual leave in advance.

[73] Ms Lee said she also talked with Mr Su in January and March 2023 about taking unauthorised leave. Her discussion in March occurred after Mr Su told Ms Peng, during

a lunch break, that he planned to travel to the South Island in the following week. He had not applied for leave.

[74] In his oral evidence Mr Su said he could not remember Ms Lee talking to him about leave matters in July 2022 or in January and March 2023.

[75] Ms Lee said she met with Mr Su on 17 and 25 March to discuss issues with his work, including following instructions to carry out various tasks, following leave request procedures and providing a medical certificate for further sick leave. She said Mr Su was warned he could be dismissed if he breached the leave policy again. There was no written record of those meetings occurring or any formal warning being issued.

[76] An earlier message in March, when a leave request was refused because the factory was short staffed, did however indicate Mr Su had been advised that the company was taking a firm line on leave requests and unauthorised absences. A message Ms Lee sent Mr Su on 5 March read:

> I have said several times before, hope this is the last time, the company does not approve your leave request for next week's travelling. If you insist, it will be processed as voluntary resignation.

*The 23 May message about a disciplinary investigation*

[77] Taking account of that context, it was within the scope of actions open to a fair and reasonable employer for NZITL to ask Mr Su to attend a disciplinary meeting to respond to its concerns about his request for leave made on 21 May, wanting leave for the next day; saying he was feeling unwell when the request was refused; and whether his report of contracting Covid-19 was genuine.

*Adequate opportunity to respond*

[78] The notice given to Mr Su on 23 May for a disciplinary meeting on 2 June gave him a ten-day period to prepare and attend. The main reason he did not attend, as emerged in his evidence in the Authority investigation, was because Mr Su had travelled to Rotorua after 29 May and was relying on a lift from a friend to return to Auckland on 4 June.

[79] Mr Su, however, submitted responsibility for that situation lay with the company. The evidence from him and his wife Ms Ma confirmed they had a heated argument about the situation after he was sent home from work on 29 May. This led to

Mr Su deciding to go and stay in Rotorua the next day where "a friend attempted to cheer him up". He said, paraphrasing his evidence, this meant NZITL really caused his absence from the 2 June meeting because he would not have travelled to Rotorua if the company had not sent him home, with the result that he had an argument with his wife and felt the need to get away for a break.

[80] It was a plainly inadequate excuse. Mr Su was responsible for his own actions and decisions about being able to attend an important work meeting, for which he was given ten days' notice. His failure to contact Ms Lee when asked to do so also meant he had not explored the prospect of some agreement to return to work until the 2 June meeting occurred.

[81] Friday 2 June was a work day on which he would ordinarily be expected to be at work. It was not unreasonable for NZITL to expect to him to attend on that day.

*Flaw in decision made on 2 June*

[82] In those circumstances, where Mr Su knew the nature of the concerns that NZITL had about his conduct and had an adequate length of time to prepare and seek assistance if needed, the company could reasonably have continued with its disciplinary process. It had not ignored the logistical difficulty Mr Su had advised he had in returning to Auckland, once he disclosed that he was out of town. Ms Lee agreed to move the meeting to a later time on 2 June to provide additional travel time. Mr Su chose not to take advantage of that opportunity.

[83] It was within the range of responses reasonably open to an employer, taking account of the context of previous concerns raised with Mr Su about complying with the company's policy of seeking advance approval of leave, for NZITL to conclude this further instance of failing to do so was serious misconduct. It had information sufficient to support that conclusion.

[84] There was, however, a difficulty with the next step taken that day, to proceed to dismiss Mr Su.

[85] It was not clear Mr Su was fairly advised of the prospect of dismissal resulting from that disciplinary process. When Ms Lee advised him of the disciplinary process by email on 23 May, she attached a letter in English. This letter clearly stated the "potential for disciplinary action … up to and *including dismissal*" (italic emphasis

added). However Mr Yang and Ms Lee, as their evidence confirmed, knew his ability to read English was limited. It had been an initial and ongoing concern in the workplace. Even after several years there, Mr Su sought help from Ms Peng if he needed to look at documents written in English while he was at work.

[86] All the other messages Ms Lee sent Mr Su about the disciplinary meeting were in Chinese. Those messages referred to the meeting being about a "serious breach" of his employment agreement (23 May), "to discuss the explanation and solution to [his] absences from work without leave" (31 May), and a "chance to formally explain and solve the problem" (31 May), and Ms Lee's "hope this will be the last one" (1 June). None of those messages referred directly to any prospect that NZITL would terminate his employment if the company was not satisfied with any explanation he gave.

[87] This omission to clearly communicate this potential consequence of failure to attend and participate in the disciplinary process was more than a minor defect in the process followed by NZITL.

[88] While NZITL had good reason to be considering this ultimate disciplinary sanction, it could not fairly conclude its process without advising Mr Su of the prospect of dismissal and, if he was not aware of it before, giving him a reasonable opportunity to address the company's concerns in that light.

[89] By reason of that procedural defect, Mr Su had established a personal grievance of unjustified dismissal because NZITL did not give him a full opportunity to address the potential consequences of its concerns.

**Remedies**

[90] If a personal grievance was established, Mr Su sought remedies of lost wages and compensation for the distress caused by his dismissal and how it happened. There were, in his case, three limits to the extent of remedies which could be awarded.

[91] Firstly, Mr Su sought an award of 13 weeks' wages lost as a result of his dismissal. This claim required an assessment of what he had done to find alternative work and income in that period and whether whatever he did was reasonable in the circumstances. Mr Su's search for alternative work was limited by a decision he and his wife made for him to return to China in July, where he stayed until September 2023. He went to China to attend to family and other matters. He provided sparse evidence

of what he did between his dismissal and his departure to find another job and income. He gave no evidence on any job search, work or income for the time he was in China.

[92] Secondly, fixing the level of compensation for the effect on Mr Su of being dismissed had to consider and reflect the likelihood that, had the procedural defect in NZITL's process not occurred, he would still have been dismissed anyway. Where a fair process would likely, but not inevitably, have resulted in a justifiable dismissal, a 'loss of a chance' approach may be applied to assessing the level of any compensation awarded.[4]

[93] Thirdly, s 124 of the ER Act requires the Authority to consider whether any remedies awarded should be reduced because of conduct of Mr Su which contributed to the situation giving rise to his grievance.

*Lost wages*

[94] Mr Su's evidence showed limited job search in the weeks of June and July following his dismissal. After his return from China in September he also made inquiries, largely by WeChat message, to some employers. He said his confidence in seeking work was initially knocked by the shock of his dismissal.

[95] Weighing that evidence in relation to what Mr Su could reasonably have done in the circumstances, an award of lost wages is limited to four weeks of the period between his dismissal in early June and going to China in July, placing his job search for alternative employment in New Zealand on hold until after his return in September 2023.

[96] Mr Su's hourly rate at the time of his dismissal was $34. The relevant employment agreement with NZITL, signed on 29 January 2020 and provided to INZ in support of his visa application at that time, provided for 40 "ordinary hours of work" each week. On this weekly gross wage of $1,360, the sum awarded for four weeks' wages lost as a result of the grievance is $5,440.[5]

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[4] *Waitakere City Council v Ioane* [2004] ERNZ 194 (CA) at [19] and [22]-[26]; *Waitakere City Council v Ioane (No 2)* [2005] ERNZ 1043 (CA) at [28] and *Telecom NZ Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [81].

[5] Employment Relations Act 2000, s 123(1)(b).

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

[97] Mr Su said he was shocked by his dismissal and he could not accept the reality for a while. He also was upset by feeling he was a disappointment and a burden to his family.

[98] Fixing compensation for that distress had to allow for the likelihood that Mr Su would have still have been dismissed if NZITL had properly notified him, in Chinese rather than in English that he could not read, that the disciplinary process could end in his dismissal.

[99] The objectively assessable facts showed a repeated pattern of Mr Su disregarding NZITL's procedure for applying for leave. It was conduct which disrupted the company's schedules for installation work for its customers. There was no evidential corroboration of his accusation against Ms Peng, herself of Chinese origin, that there was any anti-Chinese discrimination in approval of leave.

[100] Mr Su's failure to attend the scheduled disciplinary meeting, notified well in advance and on an ordinary working day, was a further instance of his failure to comply with requirements which could reasonably be made of him.

[101] Those were circumstances in which it was open to a fair and reasonable employer to conclude it could no longer confidently rely on Mr Su to fulfil his obligations as an employee to carry out its lawful instructions.

[102] Given the likelihood NZITL could have justifiably reached that conclusion, if it had properly notified Mr Su about the prospect of dismissal, the award of compensation had to be adjusted on a loss of a chance basis. This adjustment also has to allow for the prospect that, had he participated appropriately, Mr Su might have been able to persuade NZITL to apply a lesser disciplinary sanction and continue his employment.

[103] Applying the broad judgement called for in making a loss of a chance assessment, the level of distress compensation that might otherwise have been awarded is adjusted by 50 percent.[6]

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[6] *Benton v Miller & Poulgrain* [2005] 1 NZLR 66 (CA), at [50].

[104] Weighing the range of awards made in similar cases, and Mr Su's evidence of the extent of distress caused by his dismissal, an award of $14,000 would have been under s 123(1)(c)(i) of the Act. Adjusting that amount, on a loss of a chance basis, the award made on those grounds is $7,000.

*Reduction for contributory conduct*

[105] Mr Su's submissions acknowledged he had contributed to the situation giving rise to his personal grievance, but did not specify what actions of his did so.

[106] The following actions or omissions by Mr Su all contributed to the situation where negative inferences about his conduct could reasonably be drawn:

(i) Late notice on 21 May of a leave request, knowing written requests for planned annual leave were required more than the day before;

(ii) Failing to comply with Mr Yang's direction to contact Ms Lee on 29 May, so the nature and extent of time he might remain off work was not promptly addressed;

(iii) Going to Rotorua in that week, creating a difficulty for himself in returning for the 2 June meeting; and

(iv) Not attending the disciplinary meeting.

[107] Those actions, each at his own volition, required a reduction of the remedies that would otherwise be awarded.

[108] Care needs to be taken in setting the amount or proportion of this reduction not to 'double count' for adjustments already made to the amounts set for awards of lost wages and distress compensation. The four-week period for lost wages related to how long Mr Su was in New Zealand after the termination of his employment, not his actions while still employed which might require a reduction for contribution. The adjustment to the distress compensation amount did relate to those actions because they were, in the counterfactual assessment of contingencies, instances of Mr Su's conduct which would have justified a decision to dismiss him if the procedural defect about the prospect of dismissal had not been made.

[109] Weighing those factors, a reduction of 25 per cent for contributory conduct is to be applied to the award for lost wages, that is a reduction to $4,080. No reduction is made to the distress compensation as the reduction already made on a loss of a chance

basis to that compensation has accounted for conduct of Mr Su that would otherwise have justified his dismissal.

**The wage arrears claim for reduced pay rate**

*The limitation period*

[110] Mr Su sought an award of wage arrears for the period of six years before his application to the Authority on 19 December 2023 so that he would receive payment at $26 an hour for the time he was paid less than that rate.

[111] His claim correctly applied the six-year limitation set by s 142 of the Act. It therefore concerned wages which Mr Su said he was entitled to be paid in the six years from 19 December 2017 to 19 December 2023. It excluded the months from March to mid-December 2017 when Mr Su was also paid less than the $26 hourly rate recorded in his 2017 employment agreement and referred to the INZ AIP granted to NZITL in 2016 to recruit employees from overseas.

*The arrears claim*

[112] By 19 December 2017 Mr Su was paid $21 an hour. According to a "Detailed Hours Worked Report" provided by NZITL Mr Su worked 3,239 hours from then until 6 October 2019 at this rate. For that period he claimed $16,195 for the $5 shortfall from the hourly pay rate set in his written employment agreement.

[113] From 7 October 2019 to 26 January 2020 Mr Su was paid $23 an hour for 517.5 hours worked. He claimed $1,714.50 for the $3 hourly shortfall from $26.

[114] He also claimed eight per cent holiday pay on the amounts claimed for those two periods of arrears, that is a further $1,432.76.

[115] From 27 January 2020 Mr Su was paid at $26 an hour or more, so his wage arrears claim ended from that date.

*NZITL's arguments*

[116] NZITL submitted no arrears were due because Mr Su, through his agent, had agreed in March 2017 to work for $18 an hour. It said the variation was appropriate because Mr Su had "deliberately misrepresented his skills and experience when applying for the job" and the employment agreement allowed for such a change to be

agreed. It relied on a letter from an agent acting for Mr Su in 2020, that is three years later, as confirming the change to the payrate in 2017 was mutually agreed. The company accepted it was obliged to inform INZ about changing Mr Su's pay rate but said not doing so was "an oversight which was forgiven by INZ".

*Wage arrears are due to Mr Su*

[117] For the following reasons NZITL is liable to pay wage arrears to Mr Su for the shortfall in his hourly pay during the six-year period:

(i) The conditions of the AIP held by NZITL and the terms on which his visa was granted in 2017 required payment of $26 an hour.

(ii) The description given in 2020, by a licensed immigration adviser attempting to get a renewed visa, about that change having been mutually agreed did not displace the obligation to pay the contractual rate.

(iii) The alleged misrepresentation of skills did not justify a change in the rate of pay.

(iv) Agreement to the change had to be considered in the context of the inherent inequality of power between the parties and the statutory requirement for employment terms to be recorded in writing.

[118] Those reasons are explained as follows.

*(i) AIP and visa conditions*

[119] The terms on which INZ granted NZITL an AIP to recruit overseas workers were unequivocal. INZ's letter of approval on 16 August 2016 said approval was subject to "**all** of the following" (bold emphasis added), which included these paragraphs:

> - Presenting an employment agreement to the employee that accurately reflects pay and employment conditions of the positions as outlined in this AIP request, including: pay rates, hours of work and holidays as per the Holidays Act 2003 …
> - Ensuring workers receive the full pay and conditions as outlined in the employment agreement submitted in support of this AIP request.
> …
> - Immediately advising INZ when a worker's employment status changes (i.e. when employment is terminated or the offer of employment is revoked or withdrawn).
> - Guaranteeing compliance with the conditions of this AIP, and with other relevant employment and immigration legislation.

[120] In closing submissions NZITL acknowledged its obligation to inform INZ about changes to the rate it paid Mr Su. It said the company did not intend to "deliberately breach" any INZ rules or to exploit workers. Its actions, however, did breach AIP conditions which were the basis on which Mr Su was granted a work visa to enter New Zealand and work exclusively for NZITL. There was no approval or release by INZ for anything but full compliance with the lawful requirements of those conditions.

*(ii) The 2020 letter did not displace obligation to pay the agreed rate*

[121] NZITL submitted that the 2020 letter of a licensed immigration adviser, acting for Mr Su, confirmed the change to the pay rate made in 2017 was made by agreement.

[122] Its proposition, regarding agreement, is not accepted.

[123] Firstly, the 2020 letter of a licensed immigration adviser did not solely advance the interests of Mr Su. There was clearly input from NZITL on the explanation given to INZ about a "mistake" by Mr Su and NZITL. The adviser's letter was accompanied by a letter of support from Ms Lee, addressed to INZ, explaining the company had genuinely believed it had the right to amend the employment conditions without notifying INZ. Ms Lee also signed the second version of Mr Su's employment agreement submitted to INZ in 2020 with a $26 an hour pay rate. This latter action by the company led to INZ then approving a further three-year visa.

[124] Secondly, the contents of the 2020 letter had to be read in the context of what both Mr Su and the company were seeking at that time. He wanted a visa renewal. NZITL wanted to retain an employee who, by that time, it considered was sufficiently trained and experienced in using its work materials and following its work processes to be worth keeping, rather than incurring the time and cost of recruiting and training a new employee. Put shortly, what was said in that 2020 letter about an "agreed" lower pay rate was a mutually convenient but not necessarily accurate description of what had happened three years earlier.

*(iii) The alleged misrepresentation of skills did not justify a change in the rate of pay.*

[125] NZITL submitted "the entire matter of pay rate reduction" was "solely caused by [Mr Su] providing false information in his job and work visa applications and deliberately misleading [NZITL] and INZ about his skills and experience".

[126] It was not, however, correct to describe Mr Su as "solely" responsible for the supposed mismatch between his description of his skills and experience and NZITL's expectations and view of his performance when he started the job in 2017.

[127] NZITL was the employer. It was responsible for taking sufficient, diligent steps to assess his skills before offering Mr Su a job. Ms Li chose him, from among other candidates, after watching his work on a video provided by the agent. She may also have interviewed him, as Mr Su said had happened, but Ms Lee could not remember doing. If Mr Su's capabilities did not measure up to the company's expectations when he arrived, the fault in part at least lay with the extent of inquiries and checking NZITL had carried out before making a job offer. If it relied on the assessment of the agent, again responsibility lies with the company for the choice it made to do so, not Mr Su.

[128] There was also, as Mr Yang accepted, some difference in the work materials and methods used in New Zealand compared to Mr Su's previous experience elsewhere. This difference, understandably, required some adjustment and training but did not, on the slim evidence from NZITL, necessarily warrant a pay cut made under threat of dismissal if he did not comply with that change.

*(iv) Inherent inequality of power imposed a change not recorded in writing*

[129] The Authority's assessment of this situation is guided by the object of the Act.[7] The object recognises obligations of trust and good faith in the employment relationship and seeks to address the inherent inequality of power in employment relationships.

[130] This concern is directly relevant to the circumstances in 2017 when Mr Su was told, as Mr Yang confirmed in his evidence, NZITL was considering terminating his employment under the trial period. Mr Su's position as a relatively vulnerable migrant worker amplified the inherent inequality between the employer and its employee in that situation.

[131] The supposed 'offer' then made to work for a lower pay rate as a 'trainee' had to be assessed in that light. Even if Mr Su made that suggestion, through his agent, it was a response to a proposal that NZITL was not lawfully entitled to make under the terms on which it had obtained permission for him to be working in New Zealand.

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[7] Employment Relations Act 2000, s 157(2)(d).

[132] Mr Su's employment agreement did allow for clauses to be "varied and updated by agreement between the parties at any time". He did not, however and as was well-known by NZITL, read English with any proficiency. And, significantly, no intended variation or subsequent agreement was made and recorded in writing, contrary to the expectations of the Act.[8]

[133] It is true that Mr Su did benefit from acceding to the change and INZ not being updated about it. He was able to remain in New Zealand on terms which did not appear to be consistent with the strict terms of his specialised visa, for someone to work in the essential skills role of a glazier. And he therefore retained, from his point of view, the benefit of the substantial price he had paid to an agent to secure a job and a visa.

[134] This benefit to him is one factor weighted in the assessment, made on an equity and good conscience basis, of the substantial merits of the case.[9] The balance falls, however, on the side of the scales upholding both the terms of the visa and the terms of Mr Su's signed written employment agreement. It is the same approach and conclusion taken in situations where workers have agreed to work for less than the minimum wage.[10] The obligation of the employer to pay at the level agreed in the written contractual entitlement and immigration requirements is, in principle, no less. NZITL had agreed to the conditions in the AIP which allowed it to recruit workers from overseas. It was not entitled, in that circumstance, to unilaterally alter those conditions for its own financial benefit without reference to INZ or without following the appropriate steps in employment law to record such changes.

*Arrears of wages due*

[135] NZITL defaulted in payment of wages due to Mr Su. By order made under s 137 of the Act, NZITL must pay him the following amounts by no later than 28 days from the date of this determination:

(i) $16,195 for the period from 19 December 2017 to 6 October 2019; and

(ii) $1,714.50 for the period from 7 October 2019 to 26 January 2020;

(iii) $1,432.76 as holiday pay due on the arrears for those two periods.

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[8] Sections 63A(1)(b)(ii) and (2), 64(1) and 65(1)(a).
[9] Section 157(1) and (3).
[10] Minimum Wage Act 1983 s 6 and s 11(3).

[136] Mr Su also sought an order for interest on the amounts due to him as arrears of wages and holiday pay. Those amounts, as confirmed by this determination, were due to be paid in full by no later than the last day of his employment in mid-2023. Allowing for a period of grace following that date, an award of interest is to be calculated from when his statement of problem was lodged in the Authority, having not earlier resolved this employment relationship problem in mediation - that is 20 December 2023.

[137] NZITL must pay Mr Su interest on the sum of $19,342.26, due to him as arrears of wages and holiday pay, from 20 December 2023 until the date that this amount is pay in full. This order is made under clause 11 of Schedule 2 of the ER Act. The amount of interest due on the date payment is made is to be calculated using the Civil debt interest calculator.[11]

**Penalties**

[138] Mr Su sought orders for penalties against NZITL in five categories of breach of statutory requirements listed earlier in this determination: failure to provide written employment agreements; failure to provide wage and leave records when requested; failure in good faith obligations to be active and communicative in maintaining the employment relationship; failure to pay holiday pay; and failure to pay wages when due.

[139] The evidence regarding the first three of those categories was not sufficient to confirm a breach or the shortcomings warranted a penalty.

[140] Mr Su was provided with written employment agreements in 2017 and 2020. Copies of two agreements were provided in the evidence lodged by the parties. Documents the Authority later sought from INZ, and provided to the parties, two further versions of the agreements signed on behalf of NZITL and submitted by the licensed immigration advisor assisting Mr Su and NZITL in the 2020 renewal of his visa. NZITL's explanation for not providing copies of those documents earlier was that the advisor had not provided the company with copies of those agreements after they were signed by Mr Su. In those circumstances, it was not a sufficiently serious breach of the obligation to keep and provide copies of employment agreements to warrant a penalty.

[11] www.justice.govt.nz/fines/civil-debt-interest-calculator.

[141] Similarly, concerns over the adequacy of wage and leave records provided by NZITL were not sufficiently serious to warrant a penalty. Those records were sufficient, in fact, for Mr Su's advocate to calculate his substantial wage arrears claim.

[142] The claim for a penalty for a breach of good faith lacked merit in light of Mr Su's own failure to be active and communicative in maintaining the employment relationship. There were, as summarised earlier in this determination, multiple instances where he failed to respond or participate appropriately in his employer's efforts to meet and discuss employment matters with him.

[143] The claim for a penalty in relation to holiday pay lacked sufficient evidential foundation to establish NZITL had breached his entitlements. This was, in part, due to the uncertain situation when Mr Su was absent from work from 22 May 2023, which he later said was because he was ill, and his failure to communicate promptly with the company after 29 May, during the days that became a suspension.

[144] A penalty is, however, warranted for NZITL's failure to pay Mr Su the entire amount of his wages following the reduction of his hourly rate to $18, in breach of his contractual entitlement and immigration requirements for payment of $26 an hour. For the reasons given in this determination, the deduction was unlawful.

[145] The following relevant matters made the sum of $6,000 an appropriate penalty to impose for NZITL's breach of s 6 of the WPA.[12] This penalty must be paid to the Authority, for transfer to a Crown account, within 28 days of the date of this determination.

[146] The object of the ER Act, to promote enforcement of employment standards and to address the inherent inequality of power in employment relationships, favours a penalty in circumstances where the terms of employment of a relatively vulnerable migrant worker are changed without proper regard to contractual entitlements and immigration requirements.

[147] The breach, in reducing the pay rate in this way for an extended period, was an intentional action with the effect of substantially reducing Mr Su's income. It has a

[12] Employment Relations Act 2000, s 133A.

substantial financial benefit to NZITL. NZITL took no steps to avoid the breach or mitigate its adverse effects on Mr Su.

[148] The level of penalty has been moderated to acknowledge no similar previous conduct by NZITL was known to have occurred. It is also to proportionate to circumstances involving one worker. A further reduction was not warranted as the company expressed no meaningful remorse for its actions. The penalty imposed is also at the lower end of the scale of similar cases. The breach has been treated as a single instance and set at 30 per cent of the maximum penalty of $20,000.

[149] A penalty is necessary as a deterrent both to this particular employer, and to employers generally, against acting in ways contrary to a worker's contractual entitlements and immigration requirements, without following appropriate steps to advise INZ of proposed changes to employment terms and to agree any such changes between the parties.

[150] The request for part of the penalty to be paid to Mr Su is declined. Other remedies ordered in this determination, including interest, address the wrong done to him. It is appropriate that the penalty is paid in whole to the Crown to mark the public interest in the maintenance of employment standards in all employment relationships.

**Summary and orders**

[151] Mr Su was not unjustifiably disadvantaged by suspension from work while awaiting a scheduled disciplinary meeting.

[152] NZITL's decision to dismiss Mr Su for serious misconduct was not justified due to a defect in its disciplinary process.

[153] In settlement of Mr Su's personal grievance NZITL must pay him the following sums within 28 days of the date of this determination:

(i) $4,080 as lost wages, an amount reduced by 25 per cent due to behaviour by Mr Su which contributed to his grievance; and

(ii) $7,000 as compensation for humiliation, loss of dignity and injury to his feelings.

[154] NZITL also owes Mr Su the sum of $19,342.26 as arrears of wages, and holiday pay due on those arrears, for the period from 19 December 2017 to 26 January 2020. It must pay him this sum by no later than 28 days from the date of this determination.

[155] NZITL must also pay Mr Su interest on those arrears of wages and holiday pay for the period from 20 December 2023 until the arrears are paid in full.

[156] NZITL must also pay $6,000 to the Authority as a penalty for breach of s 6 of the Wages Protection Act 1983. On recovery of the penalty, this sum must be paid to a Crown Bank Account.

**Costs**

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

[158] If unable to do so, and an Authority determination on costs is needed, Mr Su 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, NZITL would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[159] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[13]

Robin Arthur
Member of the Employment Relations Authority

[13] See www.era.govt.nz/determinations/awarding-costs-remedies.