

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 756  
3373643

BETWEEN	WU XIAOJIANG Applicant
AND	SAN YUAN LIMITED First Respondent
AND	SONG SHENGHUA Second Respondent

Member of Authority:	Robin Arthur
Representatives:	May Moncur, advocate for the Applicant No attendance for the Respondents
Investigation Meeting:	12 September 2025 in Auckland and by audio-visual link
Determination:	24 November 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Wu Xiaojiang applied to the Authority for orders requiring San Yuan Limited (SYL) to pay arrears of wages and holiday pay he said he was owed for work as a chef in a restaurant operated by the company.

[2] He also asked for penalties to be imposed on SYL for its failure to pay those wages and holiday pay and a finding that SYL's sole shareholder and director, Song Shenghua, was a person involved in breaches of employment standards. Mr Wu asked for leave to pursue Mr Song personally for payment of the arrears claimed if SYL was not able to pay any wages or other money the Authority ordered to be paid.

**The Authority's investigation**

[3] SYL and Mr Song did not respond to Mr Wu's application.

[4] Authority records show Mr Wu's statement of problem was sent in May 2025 to the registered office of SYL at an address in Invercargill. It was also sent to an address in Hamilton listed in Companies Office records as Mr Song's residential address as a director and shareholder in SYL and in another company.

[5] A property management company in Invercargill sent a message to Authority about the envelope delivered to the Invercargill address of SYL. The property manager said SYL and Mr Song had not been tenants at that address since December 2023 and had left no forwarding address.

[6] The Hamilton residential address was used in an update of Companies Office records for SYL lodged by an accounting firm in February 2025. It gave the address as an update to Mr Song's particulars as a shareholder. An annual return lodged in April 2025 for a different company, in which Mr Song is registered as a director and shareholder, also listed that address as his residential address.

[7] Attempts were also made to contact Mr Song on an email address and a mobile phone number provided as part of Mr Wu's application to the Authority. Mr Wu provided some additional documents showing Mr Song has used the number to call him and the email address had been used for company business.

[8] An exchange of messages between Mr Song and Mr Wu's representative on 9 April 2025 showed Mr Song used the email address to which the Authority had sent documents and messages for him and SYL. In his email messages on 9 April Mr Song said SYL had applied for liquidation and Mr Wu's representative should contact the liquidator. On the date of the investigation meeting and as of the date of this determination, the Companies Office register shows SYL remains registered and is not in liquidation. The register does show the Registrar of Companies has begun the process of removing SYL from the register.

[9] Mr Song did not respond to email and voice mail messages Authority Officers left for him about the Authority's investigation of Mr Wu's application.

[10] The requirements of the Employment Relations Authority Regulations 2000 for service of notices and documents were met by sending the statement of problem, Authority directions and the Notice of Investigation Meeting to SYL's current

registered office address.<sup>1</sup> SYL appears not to have updated its address but service there nevertheless met the requirements of the regulations.

[11] The further steps of serving those documents to Mr Song's last known residential address, as drawn from Companies Office records updated in February and April 2025, along with messages to the email address and mobile phone number Mr Song was known to have used, provided further assurance that reasonable steps were taken to give SYL and Mr Song fair notice of Mr Wu's claim and their opportunity to reply to it and take part in the Authority investigation.

[12] In August 2025 the Authority convened a case management conference to set directions for an investigation meeting. The respondents did not respond to messages about arranging the conference and did not attend.

[13] Under the directions made at the conference Mr Wu was required to lodge a witness statement providing further detail of his claim for arrears, specifying the hours he claimed he had worked, and the difference between what he was paid and what he believed he was owed.

[14] As directed, Mr Wu's witness statement did provide those details and, from them, calculated the amounts he said were due as wages, holiday pay and public holiday pay. The statement was sent to the Authority and to the email address used by Mr Song.

[15] Shortly before the investigation Mr Wu's representative advised that Mr Wu had returned to China after his work visa expired. He sought and was granted leave to attend the investigation meeting by audio-visual link.

[16] No-one attended the investigation meeting on behalf of SYL and Mr Song.

[17] The investigation meeting continued as the Employment Relations Act 2000 (the ER Act) permits the Authority to proceed where no good cause is shown for a party's absence.<sup>2</sup> None was.

[18] Mr Wu answered questions with the assistance of an interpreter of Mandarin, provided by the Authority. His representative made submissions on the issues for determination.

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<sup>1</sup> Regulation 16(3).

<sup>2</sup> Employment Relations Act 2000, s 173(2) and Schedule 2 clause 12.

[19] At my direction in the investigation meeting Mr Wu's representative also provided an updated calculation of his arrears claim. An earlier version had marked some weeks as paid when Mr Wu's evidence was that he was not paid in those weeks. His evidence on that point appeared consistent with IRD information, based on company returns, about what payments were made to him in relevant months. This information showed the tally for some months was lower than would have been the case if he was paid for all weeks in those months.

## **Issues**

[20] The issues for investigation and determination:

### *Arrears*

- (a) Does SYL owe Mr Wu arrears of wages, holiday pay and public holiday pay?
- (b) If so, what amounts are due as arrears?
- (c) Should an award of interest also be made on any arrears found to be due to Mr Wu (for the period from the end of the employment until arrears due are paid in full)?

### *Penalties*

- (d) If arrears are due, should penalties be imposed on SYL for failure to pay those amounts (in breach of the Wages Protection Act 1983 (the WPA) and the Holidays Act 2003 (the HA)) and on Mr Song for aiding and abetting breaches in the terms of Mr Wu's employment agreement (which included terms about the payment of his wages, holiday pay and public holiday pay)?

### *Breaches of employment standard and leave to recover arrears*

- (e) If arrears are due, did this result from a breach of the employment standards?
- (f) If so, was Mr Song (as director of SYL) a person involved in a breach of employment standards?
- (g) If so, should Mr Wu be given leave to seek recovery from Mr Song personally for any arrears SYL is not able to pay?

### *Costs*

- (h) Should either party contribute to the costs of representation of the other party?

### **Mr Wu was employed on a work visa**

[21] Mr Wu arrived in New Zealand from China in February 2023. According to his oral evidence his visa at that time allowed him to work for a different employer. The business of his first employer closed soon after he arrived. Mr Wu then gained employment with SYL as a Chinese cook in its restaurant in a northern suburb of Hamilton.

[22] Mr Wu signed his employment agreement with SYL on 27 April 2023. Immigration New Zealand issued him with a new visa from the period from 1 June 2023 to 8 February 2026. This visa allowed him to work as a “fast food cook in Waikato for San Yuan Limited”. He had already begun working for SYL before then. He said he began work on 13 May under what he said he was told was a trial. His claim for arrears included what he says was a shortfall in his pay during that time.

[23] The employment agreement said Mr Wu would be paid fortnightly by direct credit to his bank account for a “guaranteed minimum” of 30 hours a week at the pay rate of \$27.76 an hour and, if he chose, for any additional hours offered by the employer up to a maximum of 60 hours a week.

[24] Clauses on holiday pay and public holidays provided the standard statutory requirements.

### **Work done**

[25] Mr Wu said up to eight workers had been employed in the restaurant during his time there but by the end of his employment this had dwindled to only two others. He said Mr Song also worked in the business, serving in the restaurant.

[26] Mr Wu said he worked six days a week, with one day off, for at least 57 hours each week. He said the restaurant was open from 9.30am to 3pm and 5pm to 9pm each day and his working hours matched those opening hours.

[27] For those hours Mr Wu said he was entitled to be paid \$1582.32 a week (gross) based on his contractual hourly rate of \$27.76. SYL, however, paid him only \$900 net a week, which was the equivalent of \$119.54 gross.

## Arrears due

[28] Mr Wu provided a detailed table setting out his calculation of wages arrears due for his work for SYL over a period spanning 98 weeks, from 13 May 2023 to 27 March 2025. His table listed the hours work, wages owed and the wages paid for each week. The information about wages paid to him relied on IRD records and the amounts recorded in his bank statements as transferred to him by SYL.

[29] His claim included additional payments for time-and-a-half for three public holidays he worked but for which he was not properly paid. As his full ordinary hours are covered by his wage arrears calculations, this claim really comprised the additional ‘half’ time pay owed for each of those three days and the value of the lieu day entitlement he had earned but not taken or been paid for before the end of his employment.

[30] His holiday pay entitlement was calculated by applying eight per cent to a corrected tally of his gross earnings in the 98-week period. Mr Wu said he had not taken any annual holidays or other leave during his employment.

[31] The following table summarises the calculations:

Total hours worked	5,557.50
Gross wages due (for those hours at \$27.76 an hour)	\$154,276.20
Gross wages received	\$100,198.83
<b>Shortfall</b> (gross arrears due)	<b>\$54,077.37</b>
Unpaid public holiday entitlement	+ \$1,186.74
Unpaid holiday pay entitlement	+ \$12,342.09
<b>Total arrears owed</b>	<b>\$67,606.20</b>

[32] Because SYL did not engage in the Authority investigation there was no evidence it had kept wage and time records of the type required by s 130 of the ER Act. Mr Wu’s evidence was that no time sheets were kept at the workplace as each week’s working hours were the same.

[33] In that situation the Authority has the discretion to accept the employee’s account of hours and days worked.<sup>3</sup>

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<sup>3</sup> Employment Relations Act 2000, s 132(2).

[34] As the account Mr Wu provided was consistent with the IRD records, based on company returns, and the payments recorded in his bank statement as being received from SYL, his calculations and tallies are accepted as meeting the evidential standard of being accurate on the balance of probabilities.

[35] Accordingly, Mr Wu's claim for wage arrears is accepted. SYL owes him arrears of \$67,606.20, comprising the wages, public holiday pay and annual holiday pay set out in the table above.

[36] His employment ended on 27 March 2025. He was entitled to payment of the amount of \$67,606.20 from that date, at the latest. Because he has been deprived of the use of the money, it was appropriate to order that SYL also pay interest on the arrears for the period from 28 March 2025 until the money due to him is paid in full. This order is made under clause 11 of Schedule 2 of the ER Act. Interest is to be calculated by using the Civil debt interest calculator.<sup>4</sup>

### **Penalties for breach of statutory requirements**

#### *Penalty for breach of s 4 of the WPA*

[37] SYL was liable to a penalty under s 4 of the WPA for failing to pay Mr Wu the entire amount of wages, including his holiday pay, due to him while employed or at the end of his employment. Mr Wu, as a migrant worker new to New Zealand and its laws, relied heavily on his employer to do the right thing. SYL's failure to pay Mr Wu his full wage entitlements, as and when they fell due, was not inadvertent but plainly part of how the company intentionally operated its business. Mr Wu was harmed by being denied the use of money he was entitled to have, either during his employment or at its end.

[38] Weighing the relevant factors for determining the amount of a penalty under s 133A of the ER Act, and the range of penalties in similar circumstances, SYL must pay a penalty of \$3,000 for its breach of s 4 of the WPA.

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<sup>4</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator).

### *Penalty for breaches of the HA*

[39] Under s 75 of the HA SYL was also liable to penalties for three breaches – failing to pay Mr Wu’s annual holiday entitlements at the end of his employment, in breach of s 27; failing to pay the additional half time payment required for work on three public holidays, in breach of s 50; and failing to pay him for the three alternative holidays due to him at the end of his employment, in breach of s 60.

[40] Weighing the relevant factors for determining the amount of a penalty under s 133A of the ER Act, and the range of penalties in similar circumstances, SYL must pay a further penalty of \$4,000 for its breaches of the HA. The penalty of \$4,000 comprises \$2,000 for breach of s 27, \$1,000 for breach of s 50 and \$1,000 for breach of s 60.

### *No Penalty for aiding and abetting a breach of employment agreement*

[41] Mr Wu also sought a penalty to be imposed on Mr Song personally for aiding and abetting breaches of his employment agreement.<sup>5</sup> The breaches were of terms requiring fortnightly pay for hours worked and payment of annual holidays and public holidays. Those terms mirrored the requirements of the statutory provisions (to pay wages, annual holiday pay and public holiday pay) for which penalties have been imposed on SYL.

[42] In the circumstances of this case, the personal penalty claim has an element of ‘double jeopardy’ given those penalties already awarded against SYL, a company in which Mr Song is the sole director and sole shareholder. Although technically separate legal personalities, imposing a penalty against him as well as the company would really be punishing him twice for the same wrongs, so imposing an additional personal penalty was not appropriate. In part this was because, as explained later in this determination, Mr Song may eventually have to personally pay the substantial amounts awarded for arrears of wages and holiday pay if SYL is not able to do so.

### *Penalties to the Crown*

[43] Penalties imposed on SYL for the breach of statutory requirements total \$7,000. There was no information about SYL’s capacity to pay those penalties, which were modest and proportionate in the context of more than \$67,000 being due and unpaid to Mr Wu.

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<sup>5</sup> Employment Relations Act 2000, s 134(2).

[44] Those penalties express two aspects of the public interest in matters of this type. Firstly, there is the overarching public interest in maintaining employment standards for workers. Secondly, there is a public interest in protecting businesses who do comply with those standards from the unfair competitive advantage gained by businesses who reduce their costs of operation through failing or avoiding their obligations to meet the statutory standards regarding pay and other entitlements. This relates specifically to the object of the ER Act at s 3(ab) to promote effective enforcement of employment standards through the Authority.

[45] SYL must pay those penalties of \$7,000 to the Authority within 28 days of the date of this determination. On recovery the penalty must be paid to a Crown account.<sup>6</sup>

### **Breaches of employment standards**

[46] The orders made for arrears and penalties demonstrate breaches of employment standards occurred.

[47] As sole director of SYL, and a working proprietor in the company's restaurant business, Mr Song was responsible for the decisions and arrangements that caused those breaches.

[48] He is, as defined by s 142W of the ER Act, a person involved in breaches of employment standards.

[49] Accordingly, on the basis of the information available to the Authority, it was appropriate to give prior leave to Mr Wu under s 142Y of the ER Act to recover from Mr Song any arrears in wages or other money SYL is unable to pay. If enforcement action is required because SYL does not meet orders made in this determination for payment of arrears, with interest, Mr Wu may proceed against Mr Song personally to recover those amounts.

### **Costs and expenses**

[50] As Mr Wu had successfully pursued his claim for arrears and other orders he was entitled to an award contributing to his costs of representation.<sup>7</sup>

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<sup>6</sup> Employment Relations Act 2000, s 136.

<sup>7</sup> Employment Relations Act 2000, Sch 2, cl 15.

[51] The investigation meeting required one half day. Applying the Authority's usual daily tariff to that portion of a day, Mr Wu is awarded \$2,250 as a contribution to the costs of preparation and representation in this investigation. The respondents must also reimburse Mr Wu for the expense of paying the Authority filing fee of \$71.55. It was also appropriate, in light of the outcome, that both SYL and Mr Song are liable for those amounts.

[52] Accordingly, on a joint and severable basis, SYL and Mr Song must pay the sum of \$2,321.55 as costs and expenses to Mr Wu, also by no later than 28 days from the date of this determination.

### **Summary and orders**

[53] SYL must pay the following amounts to Mr Wu within 28 days of the date of this determination:

- (i) Arrears of \$67,606.20 due as wages, annual holiday pay and public holiday pay; and
- (ii) Interest on those arrears, calculated on the Civil debt interest calculator for the period from 28 March 2025 until the amount due is paid in full.

[54] SYL must also pay to the Authority, for transfer to a Crown account, penalties of \$7,000 for the company's breaches of the WPA and HA.

[55] Mr Song was a person involved in a breach of employment standards. Mr Wu has leave under s 142Y of the ER Act to recover from Mr Song personally any arrears of wages or other money owed to Mr Wu, to the extent SYL is unable to pay those arrears.

[56] SYL and Mr Song, jointly and severally, must also pay to Mr Wu within 28 days of the date of this determination, a further \$2,321.55 as a contribution to his costs and expenses for this claim.