

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 757  
3321701

BETWEEN	YAN ZHANG Applicant
AND	FRAMES DIRECT NZ LIMITED First Respondent
	ZHOU WANG Second Respondent

Member of Authority:	Marija Urlich
Representatives:	Michael Kim, advocate for the Applicant Doreen Wu, representative for the Respondents
Investigation Meeting:	29 May and 1 August 2025
Further information and submissions received:	12 August 2025 from Applicant 8 and 25 August 2025 from the Respondent
Determination:	25 November 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Yan Zhang worked at a timber truss and frame business located in a yard at 253 Mill Road, Bombay from 18 January to 27 May 2024, when he says he was unjustifiably dismissed. His work at the business involved building wooden frames and trusses and he worked as part of a team of carpenters. He is a qualified and experienced carpenter. Mr Zhang seeks remedies to compensate lost income and injury to feelings consequent to his dismissal. He also seeks wage and holiday pay arrears, an order for interest on any award of arrears, holiday pay on any award of lost income and penalties.

[2] In March 2024 Frames Direct NZ Limited (Frames Direct) bought the business Mr Zhang worked at from Starlight Construction Limited (Starlight Construction). Zhou Wang was the sole director and shareholder of Starlight Construction and at or around the sale of the business became a shareholder in Frames Direct. He was involved in the day-to-day operation of the business throughout the time Mr Zhang worked there. Frames Direct and Mr Wang say Mr Zhang was not their employee and that he worked in the frame and truss business located at the Mill Road yard as a contractor through a labour hire company, MMS Construction Limited (MMS).<sup>1</sup>

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

[3] By consent the first investigation meeting scheduled for 15 April 2025 was adjourned. Following the in-person investigation meeting on 29 May 2025 further information was filed by the parties which required the resumption of the investigation meeting on 1 August. By agreement the resumption was conducted by audio-visual technology. The Authority investigation was assisted by an interpreter of the Mandarin language.

[4] At the investigation meeting Mr Zhang and Doreen Wu, the director of Frames Direct gave evidence to the Authority. Martin Chen attended in support of Ms Wu. Mr Wang did not attend. He has had a fair opportunity to participate in the investigation – he lodged a statement in reply and was notified of the investigation meeting. 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 the information received.

### **Issues**

[5] The issues identified for investigation and determination are:

- i. Was Yan Zhang unjustifiably dismissed on or about 27 May 2024?
- ii. If so, is he entitled to a consideration of remedies sought including:
  - a. Reimbursement of lost wages (11 weeks at \$16,038.00); and

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<sup>1</sup> Statement in reply lodged on behalf of Frames Direct and Zhou Wang 28 May 2025.

- b. Compensation for humiliation, loss of dignity and injury to feelings 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 Yan Zhang which contributed to the circumstances which gave rise to his grievance?
- iv. Are arrears of wages (of \$2,916.00), holiday pay (of \$1,923.52) and public holiday entitlements (of \$1,292.00) owed?
- v. Should payment of interest be ordered on any award of arrears?
- vi. Should leave be granted to recover from Zhou Wang any default in minimum standard entitlements?
- vii. Should penalties be awarded for any found breach of the following and paid, in part or all to Yan Zhang:
  - a. Failure to pay public holiday ( ss 50 and 56 of Holidays Act 2003);
  - b. Failure to pay annual holiday pay ( ss 24 and 25 of Holidays Act 2003);
  - c. Failure to provide wage and time records ( s 130 of Employment Relations Act 2000); and
  - d. Failure to provide a written employment agreement (s 65 of Employment Relations Act 2000).
- viii. Is either party entitled to an award of costs?

## **Relevant law**

### *Meaning of employee*

[6] Section 6 of the Employment Relations Act 2000 sets out the meaning of employee and includes a person employed to work for hire or reward under a contract of service and excludes volunteers who do not expect and do not receive reward:

s.6 Meaning of employee:

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

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

...

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

(3) In deciding for the purposes of subsection (1)(a) whether a person is employed by another under a contract of service...the Authority...must determine the real nature of the relationship between them.

[7] The following sets out how the Authority should assess the real nature of the relationship:<sup>2</sup>

“All relevant matters” certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test.

#### *The test for justification*

[8] When the Authority considers justification for the actions of Frames Direct 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 Frames Direct 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.

[9] 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

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<sup>2</sup> *Bryson v Three Foot Six Limited (No. 2)* [2005] NZSC 34 at [32].

to justify a dismissal or other action “because a fair and reasonable employer will comply with the law”.<sup>3</sup>

## **Background**

[10] Mr Zhang first came to New Zealand as a holder of an accredited employer work visa in June 2023. His employment with the employer to whom his visa applied ended in January 2024. Through the agent who had assisted with his first job he was referred to another carpenter who worked in the yard known as Master Huang. Master Huang referred Mr Zhang to Mr Wang with whom he met on 18 January.

[11] At the meeting, which was held at the yard, Mr Zhang told Mr Wang he would need to transfer his work visa and would need a written employment agreement, that his pay rate was to be at least \$29 per hour and that he should be paid public holiday and annual leave entitlements. I accept this because Mr Zhang was aware of the requirements for him to work in New Zealand including with a compliant work visa. Mr Zhang said Mr Wang agreed to all this on condition Mr Zhang worked a trial period of a few days at \$25 per hour. Mr Zhang then started work. Mr Zhang was not provided with a written employment agreement prior to his employment starting or subsequently. I find Mr Zhang commenced employment with Starlight Construction that day.

[12] Mr Zhang said Mr Wang was the boss of the yard. He said Mr Wang directed work in the yard, that he sometimes sent him his record of hours worked and understood his hours of work were passed onto Mr Wang, he made a pay query to Mr Wang who dealt with it, that when he was injured at work it was Mr Wang who contacted him to see if he could work the following day and leave requests were made to Mr Wang for approval. Mr Zhang has provided WeChat messages which support these matters. Mr Zhang said he raised with Mr Wang why, after some time, his pay had not increased as discussed and that this did occur in April when his hourly rate was increased to \$27. It was also Mr Wang who Mr Zhang followed up with about a written employment agreement and the transfer of his visa. Mr Zhang said Mr Wang told him the visa could not be processed at that time due to procedures in the company. This was about the time of the business sale.

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<sup>3</sup> *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

[13] Mr Zhang said he was not aware of MMS until after his personal grievance was raised and has no knowledge of any labour hire arrangement between MMS and Starlight Construction and/or Frames Direct. He said he was paid weekly along with the other yard workers in cash and has provided photographs of the envelopes he received containing his pay. Mr Zhang said he understood one of the other workers collected the weekly pays from an accountant in Flatbush who then returned to the yard and distributed the pays.

[14] On 15 March 2024 Frames Direct purchased the business located at 253 Mill Road from Starlight Construction. Mr Wang is a director and 50% shareholder of Starlight Construction. Starlight Construction is a 30% shareholder of Frames Direct. The company office records show it was allocated those shares in Frames Direct on 11 March 2024. I accept Ms Wu's evidence that Frames Direct took control of the business on 1 April 2024. This is consistent with MMS's invoices to Frames Direct which dealt with below.

[15] On 27 May Mr Wang called Mr Zhang into his office. He told him he was too slow, and he wanted to decrease his hourly rate. Mr Zhang said when he told Mr Wang he was not happy with that Mr Wang dismissed him with immediate effect.

[16] Mr Wang did not make himself available to the Authority to give evidence. The Authority was advised his resides offshore. Ms Wu has no direct knowledge of the events of which Mr Zhang has given evidence. She said she went to the site twice before Mr Zhang finished working there and he was one of the carpenters for whose hours of work MMS invoiced Frames Direct. The respondents have provided the following documents to the Authority:

- (i) a labour hire agreement between MMS and Starlight Construction dated 5 July 2023 and signed by Derek Qin as director of Starlight Construction and "Jack, manager";<sup>4</sup>

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<sup>4</sup> MMS Construct Limited was removed from the companies register on 20 February 2025. I accept the labour hire contract was signed by a director of Starlight Construction.

- (ii) invoices from MMS to Frames Direct for the periods 2 - 13 April 2024, 15 – 28 April 2024, 29 April – 12 May 2024 and 13 – 25 May 2024;<sup>5</sup>
- (iii) proof of payment of the sums invoiced from account name “Frame Truss NZ Limited” to payee “MMS Construct”;
- (iv) WeChat messages between “MMSJack” and Mr Wang dated 1 and 23 January, 5 and 6 March and 24 and 27 May 2024; and
- (v) part of the sale and purchase agreement for the frame and truss manufacturing business located at 253 Mill Road, Bombay with a settlement date of 15 March 2024.

## **Discussion**

### *Who employed Mr Zhang?*

[17] The evidence establishes:

- (i) Mr Zhang worked at the frame and truss manufacturing business located a yard located at 253 Mill Road Bombay from 18 January to 27 May 2024;
- (ii) Mr Wang ran the yard and directed day to day work including that of Mr Zhang throughout the time he (Mr Zhang) worked there;
- (iii) Starlight Construction entered a labour hire agreement with MMS in July 2023;
- (iv) Frames Direct paid invoices tendered to it by MMS for hours of 6 unidentified carpenters between 2 April and 25 May 2024; and
- (v) Mr Wang communicated with MMS about Mr Zhang starting and ending work at the yard.

[18] Mr Zhang denies any knowledge of MMS or that he was employed by an entity different to those operating the timber yard. There is no direct evidence such as an employment agreement as what entity may have employed Mr Zhang.

[19] On balance I find it is more likely than not Starlight Construction and then its purchaser Frames Direct contracted with MMS to provide labour hire services and that

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<sup>5</sup> I accept these are a record of Mr Zhang’s hours of work. At the investigation meeting he was identified as ‘carpenter 3’ on the MMS invoices. These are not a wage and time record as required by s 130 of the Act. Such a record was requested in writing on Mr Zhang’s behalf on 10 July 2024 and I find not provided.

those services included those of Mr Zhang. On the information before the Authority the labour hire services MMS provided were no more than a placement and payroll service for Starlight Construction and Frames Direct.<sup>6</sup> There is no direct evidence MMS employed Mr Zhang for example there is no written employment agreement and Mr Zhang's Inland Revenue records show no PAYE returned for him by MMS.<sup>7</sup> No written communications have been provided between Mr Zhang and MMS for example WeChat messages, a platform frequently used at the work site. I accept Mr Zhang's evidence that there was no employment relationship between him and with MMS.

[20] I find Mr Zhang was employed by Starlight Construction and that when the business was sold to Frames Direct he became an employee of that entity from that date, being 1 April 2024, as a consequence of that commercial transaction.<sup>8</sup> At all relevant times the actions of Mr Wang, a shareholder of both companies was as of the agent of the employer of Mr Zhang – Mr Wang negotiated terms of employment with Mr Zhang including a rate of pay for and after the trial period, discussed with him the transfer of his visa and a written employment agreement and reached an understanding about those matters, directed the day to day work of the yard where Mr Zhang worked, increased Mr Zhang's pay to \$27 per hour in April and ended Mr Zhang's employment.

[21] Given the above, which demonstrates the indefinite nature of the work Mr Zhang performed for Starlight Construction and then Frames Direct, the expectation he would perform the work individually, the significant degree of direction, control and supervision provided by Mr Wang, the agent of those entities, including how performance issues were dealt with and the deficit in bargaining power between Mr Zhang and the employer, the weight of evidence is there was an employment relationship between Mr Zhang and the successive owners of the truss and frame business, Starlight Construction and then Frames Direct.

[22] Frames Direct says it cannot be responsible for Mr Zhang's employment because of the terms of his work visa. Working outside the terms of such a visa does not exclude a matter being brought under the Employment Relation Act 2000.

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<sup>6</sup> *Prasad and Tulai v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150 at [92] – [94].

<sup>7</sup> For completeness Mr Zhang's IRD records show not PAYE return for wages paid by Starlight Construction or Frames Direct.

<sup>8</sup> *Smiths City (Southern) Ltd (In receivership) v Claxton & Ors* [2021] NZEmpC 25 at [47] – [49].

*Was Mr Zhang unjustifiably dismissed?*

[23] Whether a dismissal is justifiable is determined by the Authority inquiring into the employer's actions, both as to whether there were reasonable grounds for the dismissal and whether the process taken to reach that decision was fair (including whether minimum standards of procedural fairness as set out at s 103A(3) of the Act were met). The Authority is required to objectively assess whether those actions were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.<sup>9</sup> The Authority must also assess whether the employer's actions were those of a fair and reasonable employer acting in compliance with the good faith obligations set out in s 4 of the Act.<sup>10</sup>

[24] Mr Zhang was an employee of Frames Direct from 1 April until 27 May 2024. He was entitled to have his employer put its concerns to him, be provided a fair opportunity to respond and have any response fairly considered. In addition, the concerns had to be well founded. The catalyst for concerns being raised appear to be concerns about Mr Zhang's work speed and whether that meant he should receive a lower rate of pay. Mr Zhang gave unchallenged evidence that this was put to him by Mr Wang in a meeting of which he had no notice and that when he did not agree to a pay reduction Mr Wang dismissed him. I accept his evidence which is consistent with the matters narrated when the personal grievance was raised. Mr Zhang was dismissed.

[25] The next issue for consideration is whether the dismissal was justified. Because Frames Direct did not put the concerns fairly to Mr Zhang, it is unable to discharge the obligations under s 103A and s 4 of the Act. Mr Zhang's dismissal was unjustified.

### **Remedies**

[26] Mr Zhang has established a personal grievance for unjustified dismissal. He is entitled to a consideration of the remedies sought.

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<sup>9</sup> Employment Relations Act 2000, section 103A.

<sup>10</sup> Employment Relations Act 2000, section 4.

### *Reimbursement of lost wages*

[27] Mr Zhang seeks an award of 11 weeks lost wages at \$16,038.<sup>11</sup> After reviewing the evidence of loss and Mr Zhang's attempts to mitigate that loss the Authority is satisfied he is entitled to an award of lost wages of 11 weeks at \$15,147 (gross). I am satisfied the minimum weekly hours Mr Zhang was entitled to, based on the pattern of work over his employment with Frames Direct, was his weekly average hours of 51 hours per week.<sup>12</sup>

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

[28] The circumstances of Mr Zhang's personal grievance(s) have caused him to experience uncertainty and stress which has had an ongoing negative impact. He said he has found it difficult to deal with the feelings he has experienced since raising an employment relationship problem with his employer and as a migrant worker being away from his home country and young family through this time has been difficult. Mr Zhang is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$12,000.

### *Contribution*

[29] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded. There is no compelling evidence Mr Zhang's work performance or other action of Mr Zhang contributed to the circumstances of his personal grievance. He has not contributed in a blameworthy way to the circumstances which have given rise to his personal grievance.

### **Arrears**

[30] Mr Zhang claims arrears for public holiday pay, termination annual leave and two weeks' notice period.

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<sup>11</sup> \$27/hour x 51 hours per week.

<sup>12</sup> Refer MMS invoices, Ms Wu's identification of Mr Zhang as 'carpenter 3' and correlation with Mr Zhang's evidence of hours worked.

*Public holiday pay*

[31] I accept Mr Zhang's evidence that he did not work the four public holidays which fell in the period of his employment at the yard - Waitangi Day 2024, Good Friday 29 March 2024, Easter Monday 1 April 2024 and ANZAC Day 2024 – that these were days he would normally have worked and for which he has not been paid. Frames Direct was his employer from 1 April 2024 and is responsible for the public holiday payment for two public holidays which fell within Mr Zhang's period of employment with that entity. Within 21 days of the date of determination Frames Direct is to pay Mr Zhang \$551.48 (gross).<sup>13</sup>

*Annual holiday payment*

[32] As an employee Mr Zhang was entitled to be paid termination holiday pay when his employment ended.<sup>14</sup> He has not been paid termination holiday pay to which he is entitled calculated at eight per cent of total gross earnings. His holiday pay is to be calculated for the period of his employment with Frames Direct from 1 April to 27 May 2024.

[33] Frames Direct is ordered to pay Mr Zhang \$882.36 in holiday pay within 21 days of the date of determination.<sup>15</sup>

*Notice period*

[34] This claim is not established. The evidence is insufficient that the parties agreed a notice period.

*Should interest be ordered on the arrears?*

[35] 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. It is appropriate where a person has been deprived of the use of money to make an award for interest. Mr Zhang is entitled to an award of interest on the public holiday and holiday pay arrears.

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<sup>13</sup> 2 days x \$275.74 (gross) being relevant daily pay at last day of employment based on invoiced hours.

<sup>14</sup> Holidays Act 2003, section 27.

<sup>15</sup> 8% of total gross earnings being \$11,029 per MMS invoices at \$27/per hour.

[36] Frames Direct is ordered to pay interest, using the civil debt interest calculator, within 21 days of this determination, as follows:<sup>16</sup>

- (i) interest on the sum of \$1433.84, being the total of arrears awarded, calculated from 27 May 2024 until the date payment is made in full.

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

### **Person involved**

[38] Under s 142Y(2)(a) and (b) of the Act, an employee seeking to recover money from a person who is not their employer can only do so with prior leave of the Authority (or court) and, to the extent the employer is unable to pay the money owing. Money recoverable under s 142Y is that which involves a breach of employment standards.<sup>17</sup>

[39] There is no evidence before that Authority that Frames Direct will be unable to pay any award made in favour of Mr Zhang including any award involving a breach of employment standards. On the information currently before the Authority the application for leave is not granted.

### **Penalty**

[40] Mr Zhang seeks a penalty for failure to provide wage and time records on request, failure to provide a written employment agreement, failure to pay public holiday pay and failure to pay annual leave entitlements. The statutory obligations are clear and the breaches of those obligations are established.

[41] The maximum penalty against a company is \$20,000.<sup>18</sup> The breaches are sufficiently interrelated to warrant a globalisation. 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>19</sup>

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<sup>16</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator).

<sup>17</sup> Employment Relations Act 2000, s 5.

<sup>18</sup> Employment Relations Act 2000, s 135.

<sup>19</sup> *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

[42] Frame Direct's failure to provide its employee Mr Zhang with a written employment agreement and failure to keep a wages and time record for him have hindered his ability to bring this matter. He has had to establish his terms of employment without a written employment agreement and he has not had the benefit of wages and time records to calculate his arrears claims, though the MMS invoices lodged with the statement in reply have assisted with the calculation of total hours worked. He has had to use his own resources to establish these claims which will likely have caused stress and delay. Likewise with the breaches of holiday pay entitlements. Given Mr Zhang's vulnerable status as a migrant worker was known to Frames Direct its actions must be seen as intentional and its culpability high. There is no relevant previous conduct of Frames Direct to consider. There is no specific evidence before the Authority of any financial difficulty it may have in paying any penalty.

[43] Standing back and including comparison to other cases and the relevant matters listed in s 133A of the Act, a fair penalty is \$2,000. Frames Direct is ordered to pay half the penalty to Mr Zhang to compensate him for the inconvenience and resources expended in pursuing statutory entitlements and the balance to the Crown. The penalty is to be paid within 21 days of the date of this determination.

### **Summary of orders**

[44] Within 21 days of the date of determination Frames Direct NZ Limited is ordered to make the following payments to Yan Zhang:

- a) \$12,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
- b) \$15,147 (gross) pursuant to section 123(1)(b) of the Employment Relations Act 2000;
- c) \$551.48 (gross) in arrears of public holiday pay; and
- d) \$882.36 (gross) in annual holiday pay; and
- e) calculate and pay Yan Zhang interest on total arrears as ordered in paragraph [38] above.

[45] Within 21 days of the date of determination Frames Direct NZ Limited is to pay penalties of \$2,000 half of which is to be paid to the Crown and half to Yan Zhang.

## **Costs**

[46] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Zhang may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum Frames Direct NZ Limited will then have 14 days to lodge any reply memorandum.

[47] On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment.

Marija Urlich  
Member of the Employment Relations Authority