

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 767
3338280

BETWEEN	YUANXIANG YANG First Applicant
AND	WENJUAN YANG Second Applicant
AND	KIPPERS EAST LIMITED First Respondent
AND	WEIWEN RAYMOND SU Second Respondent

Member of Authority:	Claire English
Representatives:	Athena Wu, advocate for the Applicants Weiwen Raymond Su and Nicole Peng for the Respondent
Investigation Meeting:	7 and 8 August 2025 in Napier
Submissions received:	22 August and 8 September 2025 from Applicant 22 August and 5 September 2025 from Respondent
Determination:	27 November 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Yuanxian Yang and Mrs Wenjuan Yang were employed by the first respondent Kippers East Limited (KEL), to work in its restaurant. The second respondent, Mr Weiwen Raymond Su is the sole director and 50% shareholder of KEL. Mr Su worked in the restaurant with the assistance of his wife, Ms Peng.

[2] Mr and Mrs Yang resigned from their employment on 17 April 2024. They raise claims of unjustified dismissal, that they were underpaid compared to actual hours worked, and that they are owed various Holidays Act entitlements including payment for public holidays, sick leave, and annual leave. They seek recovery of these monies from KEL, and they also seek that Mr Su be found to be a person involved in a breach, and that he is personally ordered to pay any outstanding monies which are not paid by KEL. In addition, penalties and costs are sought against KEL.

[3] KEL, through Mr Su and Ms Peng, resists these claims. It says that Mr and Mrs Yang were paid for all hours worked, and there were times when they were in the restaurant which were not working hours, and for which they are not entitled to payment. They say that payslips, timesheets, and tax records all demonstrate that Mr and Mrs Yang were paid appropriately for actual hours worked, and they were paid for public holidays at the correct time-and-half rate, paid for alternative holidays, and have received payment for all their annual leave entitlements at the correct rate. In relation to Mr and Mrs Yang's claim for a week's sick leave, they said that sick leave was never requested at the time, which was when the restaurant was closed for a week so that everyone could take a summer holiday, and the applicants did in fact take that time off and engaged in personal travel.

[4] In addition, KEL says that no personal grievance claims were raised within 90 days, and should not be allowed to proceed now.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Mr Yang, Mrs Yang, Mr Su, and Ms Peng. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination were:

Issues in respect of Mr Yang:

- (a) Whether Mr Yang is owed wage arrears of:
- \$40,596.60 for being underpaid
 - \$2, 273.88 for not being paid time and a half on public holidays
 - \$4,547.76 for not being paid for alternative leave days
 - \$2,040.36 for not being paid his sick leave between 9 January 2024 to 15 January 2024
 - \$4,209.08 for not being paid his annual holiday pay
 - \$8,834.76 for not being paid for his contractual notice period.
- (b) Whether Mr Yang was unjustifiably disadvantaged by KEL's failure to pay him his entitlements.
- (c) Whether Mr Yang was unjustifiably (constructively) dismissed.
- (d) If Mr Yang is found to have a personal grievance, whether he should be awarded compensation of \$15,000 under s 123(1)(c)(i) (subject to contribution) and reimbursement of lost wages of \$18,363.24 under s 123(1)(b) (subject to mitigation and contribution).
- (e) Whether penalties should be imposed for breaches of statutory entitlements and good faith (with part or all of the penalty to be paid to Mr Yang).
- (f) Whether Mr Yang should be granted leave to recover money from Mr Su personally if the company is unable to pay.

Issues in respect of Mrs Yang:

- (g) Whether Mrs Yang is owed wage arrears of:
- \$24,380.03 for being underpaid
 - \$955.76 for not being paid time and a half on public holidays
 - \$1,911.53 for not being paid for alternative leave days
 - \$1,668.45 for not being paid her sick leave between 9 January 2024 to 15 January 2024
 - \$1,902.73 for not being paid her annual holiday pay

- \$3,403.05 for not being paid for her contractual notice period
- (h) Whether Mrs Yang was unjustifiably disadvantaged by KEL's failure to pay her entitlements.
 - (i) Whether Mrs Yang was unjustifiably (constructively) dismissed.
 - (j) If Mrs Yang is found to have a personal grievance, whether she should be awarded compensation of \$15,000 under s 123(1)(c)(i) (subject to contribution) and reimbursement of lost wages of \$18,716.78 under s 123(1)(b) (subject to mitigation and contribution).
 - (k) Whether penalties should be imposed for breaches of statutory entitlements and good faith (with part or all of the penalty to be paid to Mrs Yang).
 - (l) Whether Mrs Yang should be granted leave to recover money from Mr Su personally if the company is unable to pay.
 - (m) Should either party contribute to the costs of representation of the other party?

Preliminary Issue – was a personal grievance claim raised in time?

[8] KEL signalled at an early stage that it believed Mr and Mrs Yang had not raised a personal grievance claim in time. As a result, Mr and Mrs Yang were directed to provide evidence as part of their witness statements addressing the question of when and how they had raised a personal grievance claim with KEL.

[9] Mr and Mrs Yang said that their advocate had sent a letter raising their personal grievance claim to KEL's business address, that is the restaurant, but that this was never responded to. The parties then attended mediation by agreement and a statement of problem was filed with the Authority on 14 November 2024. KEL says that it was not until the mediation that it found out what the applicants were claiming.

[10] In respect of the letter, Mr Su and Ms Peng note that it appears that it was sent to the restaurant, however, there are four other businesses in the block at the address on the letter. There is a delivery receipt showing a delivery time of 9.22 am, but no signature, so it is not possible to say where the letter was left, which business it was left at, or that it was left with a person at all. They both say they did not receive the letter, and that it might have been left in a generic mail slot as it was apparently delivered

before the restaurant opened at 11.00 am, but this would not necessarily have reached them. They also say that they have continual problems with mail delivery including because local teenagers take unattended mail from them and the other businesses in the block.

[11] The difficulty that KEL faces is that the personal grievance letter was sent to the company's registered office address, which is the same as its address for service, as recorded with the Companies Register. Having warranted that this the correct address where the company can be contacted, KEL and Mr Su as its director are obligated to maintain and check that address for correspondence. The applicants have correctly used KEL's registered address. It is KEL who has failed to either choose a suitable and secure address, or to check it in a proper and timely manner. I find that service was effected on KEL as required by the Companies Act 1993.

[12] Accordingly, my view is the personal grievances were raised within time, and should be allowed to proceed. This means that the claims of both Mr Yang and Mrs Yang for unjustified disadvantage, unjustified constructive dismissal, compensation for hurt and humiliation, and reimbursement of lost wages will be considered in this determination.

Background

[13] Mr Yang and Mrs Yang both gave evidence as to their usual pattern of work with KEL.

[14] Mr Yang arrived in New Zealand first in December 2022. His evidence was that he would arrive at the restaurant at 10.30 am, and from an early stage he had a key and was given the responsibility of opening the restaurant. He would start by turning on the electricity, lights, and gas, and similar prep work. He said these start-up tasks would not take very long, maybe 5 or 10 minutes. Then he would go to the kitchen and begin prep work. It was his job to cook the 19 dishes that made up the smorgasboard. He would cook the 19 dishes, which took 20 or 25 minutes and have them ready to be put into the specialised serving dishes at front of house about 11.10 am. The restaurant opened for customers at 11.00 am. Mr Yang was clear that he had to arrive at the restaurant before 11.00 am to make sure it was open and ready to serve customers.

[15] Lunch was a busy time. Mr Yang would continue to cook as needed, as more might be needed of some of the more popular dishes, especially sweet and sour pork, lemon chicken, and wontons. In addition, the restaurant offered further menu items which were cooked to order, including fish and chips, burgers, and toasted sandwiches.

[16] Mr Su would work in the kitchen together with Mr Yang, as Mr Su was also a chef by training. Mr Su would then serve customers, as Mr Yang's English language skills were limited.

[17] The lunch rush ended between 1.30 pm and 2.00 pm. Mr Yang would then be able to have lunch, which he said was for about 20 minutes. He then completed further prep work before the dinner service, including chopping and prepping vegetables, chopping, marinating and otherwise preparing meat, and making wontons by hand. The dinner rush was from 5.00 pm to around 7.30 pm depending on the day. Mr Yang would continue to make smorgasbord dishes, and cook menu items to order. When he had dinner, it was usually after 8.00 pm and he had to remain available if needed to serve customers. At about 9.00 pm or 9.10 pm depending on how busy it was, the kitchen closed. Mr Yang would begin cleaning, including cleaning the floors, smorgasbord, kitchen, deep fryer, and washing dishes. He would then make sure sufficient meat was set aside to defrost for the following morning before locking up and leaving.

[18] This was the typical routine for most days, although some days were busier than others. Mr Su assisted Mr Yang as stated, and was also responsible for ordering, deliveries, and picking up some supplies especially eggs.

[19] Ms Peng would also sometimes work in the restaurant. She was responsible for timesheets, payslips, and payroll. She would serve customers. She would also fry fish, chips, and chicken, and make other menu items like burgers and toasted sandwiches. Ms Peng only worked in the restaurant part time because of childcare responsibilities.

[20] Mrs Yang arrived in New Zealand in May, and started working at KEL on 27 May 2023. She was an experienced kitchenhand. She was able to assist with prep work, cleaning, and had a particular responsibility for preparing two of the most popular dishes that required some prior preparation, the sweet and sour pork and the lemon chicken. She also cooked certain deep fried menu items similarly to Ms Peng. Her evidence was that she arrived at the restaurant with Mr Yang at 10.30 am every day,

and would work through until 9.30 pm at night. Once she was trained, Mr Su was able to work a little less.

[21] Mr Su's evidence was somewhat different. He said that the restaurant would open at 11.00 am, but that this was also the time that he and Mr Yang (and later, Mrs Yang) would arrive for work. He said there were very few customers at 11.00 am, and the aim was for the smorgasbord to be fully stocked and ready by 11.30 am. He emphasised that the food would only be held for a maximum of 2 hours, so it was in his opinion better if the smorgasbord was ready at 11.30 am, not 11.00 am, because there would be more customers over the lunch period resulting in less food waste. Customers who arrived before the smorgasbord was ready were told they could order from the fixed menu.

[22] Mr Su said that there were few customers between about 2.00 pm and 5.00 pm, and these hours were not work hours for Mr and Mrs Yang. He said that during this time, they could relax, and use their phones.

[23] Mr and Mrs Yang would also on occasion cook for themselves, particularly noodles, dumplings, and steamed buns in their home style. On quiet afternoons, they would make these items for themselves and for Mr Su, Ms Peng, and their children. Mr Yang pointed out that he was a very experienced dumpling chef, so it took very little time for him to make dumplings (and the wontons sold in the restaurant). He also had an electric noodle maker to assist him, so again this did not occupy much time. Mr Su on the other hand said that this was an example of time when Mr and Mrs Yang were not working.

[24] Mr Su said that the kitchen would close around 8.30 pm, not at 9.00 pm, and that cleaning and other tasks would begin around 8.30 pm and when the restaurant shut its doors at 9.00 pm, this was when the work ended.

Claim for Unpaid Wages

[25] Mr and Mrs Yang say they worked from 10.30 am to 9.30 pm, which in their submission amounted to 10.5 hours per day once a small allowance for two meal breaks of 20 minutes each was taken into account.

[26] Mr Su and Ms Peng say they worked from 11.00 am to 9.00 pm or 9.30 pm on some days. They say that when two 1-hour meal breaks were allowed for, this amounted to either an 8 hour day or an 8.5 hour day depending on how busy the restaurant was. Timesheets prepared by Ms Peng show Mr and Mrs Yang detail all this, and accord with the payslips which show payment for either 8 or 8.5 hour days.

[27] The difference in position between the parties is a matter of 2 hours each day, caused by the difference in start and finish times, and the greater time allowed for meal breaks by Mr Su and Ms Peng. Mr and Mrs Yang say they did not and could not take such long meal breaks (eg the full 2 hours deducted) as they always had to be available to serve the customers. Mr and Mrs Yang point out that they were not allowed to leave the restaurant during the working day as they had to be available to serve and cook, or alternatively complete prep work.

[28] Mr Su and Ms Peng say that Mr Yang went to the bank during the afternoon on at least one occasion. They also say that if Mr and Mrs Yang arrived earlier than 11.00 am or left later than 9.00 pm, this was their own choice, and that they preferred to be at the workplace as it was quieter and the Wi-Fi connection was better.

[29] When considering how the pay for Mr and Mrs Yang was calculated, I find that the automatic deduction of 2 hours per day for meals is too high. Section 69ZD(5), (6), and (7)(a) of the Act provides that only one 30 minute unpaid meal break can be deducted for a work period of up to 12 hours long, which was the case here. Shorter rest breaks are required to be paid. For this reason, I take the view that the hours paid by KEL are too short, as it automatically deducted 2 hours per day for unpaid meal breaks, as opposed to the half hour allowed in the Act. I find that this means that both Mr Yang and Mrs Yang are entitled to be paid for a further 1.5 hours for each working day.

[30] Insofar as Mr Su suggested in his evidence that there was agreement that 2 hours of each day would be considered an unpaid meal break, I am not persuaded by this. Section 69ZG of the Act provides that no employment agreement can “exclude, restrict, or reduce” an employees entitlements to rest and meal breaks. Any employment agreement that appears to do so will have no effect. In addition, I am of the view that Mr and Mrs Yang were working during the time they were at the restaurant, even if they may not have been working at the same pace throughout the entire day. The tasks

they undertook, including being available in the restaurant to serve customers, were work. They were not relaxing or for Mr and Mrs Yang's personal benefit. They benefited the business by helping ensure timely food preparation and smooth running. It is also important that Mr and Mrs Yang were not truly free to leave the restaurant during this time, and all parties acknowledged the need to prioritise customers.

[31] In saying this, I do not accept in full the submissions for Mr and Mrs Yang that they always worked a 10.5 hour day, and that wage arrears should be calculated on this basis. In this respect, I prefer the evidence of Ms Peng and the timesheets, which I accept were contemporaneous. Those timesheets showed that the hours worked by Mr and Mrs Yang varied somewhat from day to day and week to week. Given the evidence of all parties that business demand and the opening hours of the restaurant also varied, my view is that the timesheets are more likely to be an accurate reflection of overall hours, once the automatic deduction of 2 hours per day for meal breaks is taken into account. I note the timesheets also recorded any additional hours worked in each week, other events such as public holidays, and rostered days off. Once this is taken into account, the timesheets indicate that Mr and Mrs Yang would work either a 10 hour day, or a 10.5 hour day depending on business requirements. I consider this to be more accurate than a flat 10.5 hour day as claimed by the applicants.

[32] Accordingly, orders need to be made for the reimbursement to both Mr and Mrs Yang of 1.5 hours per day pay, to account for the improperly deducted meal breaks, as provided for at s 60ZD(6) and (7) of the Act. However, no other adjustments need be made.

[33] There was some discussion in the statement of problem and a brief mention in submissions filed after the investigation meeting about cash payments. It was accepted by all that some cash payments for wages and for rent were made by the employer, but these were acknowledged by both parties and all cash wages were properly reported to IRD as wages by KEL. My view is that no issues arise here, and that no further orders need be made in this respect.

Number of Hours Outstanding

[34] Mr and Mrs Yang provided an overview of their patterns and hours of work throughout their employment for the purposes of calculating wages. The patterns set

out (although not the sums claimed) were accepted as an accurate reflection by KEL. Accordingly, I adopt the hours of work put forward by Mr and Mrs Yang as follows:

Mr Yang's Work Patterns

- a. Mr Yang was employed for a total of 70 weeks, from 15 December 2022 to 17 April 2024.
- b. He worked 7 days per week for a total of 56 weeks.
- c. He worked 6 days per week for a total of 13 weeks.
- d. He was on unpaid leave for 1 week, from 9 January 2024 to 15 January 2024.

Mrs Yang's Work Patterns

- e. Mrs Yang was employed for a total of 48 weeks, from 24 May 2023 to 17 April 2024.
- f. She worked 7 days per week for a total of 34 weeks.
- g. She worked 6 days per week for a total of 13 weeks.
- h. She was on unpaid leave for 1 week, from 9 January 2024 to 15 January 2024.

[35] For the reasons set out above, I have found that Mr and Mrs Yang were underpaid by 1.5 hours per day of work. I have not accepted any other or wider wage claims as having been made out. Accordingly, I will calculate the underpaid wages owing to them by reference to their hours of work in a week as set out above:

Mr Yang's Underpaid Hours

- a. For the 56 weeks that Mr Yang worked 7 days per week, he was underpaid by 10.5 hours per week.
- b. For the 13 weeks that Mr Yang worked 6 days per week, he was underpaid by 9 hours per week.
- c. I will consider the claim made for sick leave during the closedown period separately.

Mrs Yang's Underpaid Hours

- d. For the 34 weeks that Mrs Yang worked 7 days per week, she was underpaid by 10.5 hours per week.
- e. For the 13 weeks that Mrs Yang worked 6 days per week, she was underpaid by 9 hours per week.
- f. I will consider the claim made for sick leave during the closedown period separately.

What is the Correct Hourly Rate?

[36] Having worked out the hours that Mr and Mrs Yang were underpaid, I must now consider what the correct hourly rate is.

[37] The payslips show that Mrs Yang was first employed at the rate of \$22.70 per hour, and then her hourly rate was increased to \$23.15 as of 3 April 2024. This accords with Mrs Yang's own pleadings. This means that for the first 46 weeks of her employment, the agreed hourly rate was \$22.70, and for the last 2 weeks, it was \$23.15.

[38] Mr Yang says that he had two contractual hourly rates, the first being \$25/hour, and the second being \$27.76 per hour. The payslips support this, showing that Mr Yang was paid \$25/hour until 25 January 2023, and was paid \$27.76 from 26 January 2023 onwards. This means that for the first 6 weeks of his employment, the agreed hourly rate was \$25.00 per hour, and was \$27.76 from there onwards.

[39] Taking the hourly rates into account, Mr Yang's unpaid hours are calculated as follows:

Mr Yang's Underpaid Hours

- a. For the 56 weeks that Mr Yang worked 7 days per week, he was underpaid by 10.5 hours per week.
 - i. For the first 6 weeks of his employment, this amounts to 10.5 hours/week at \$25.00/hour, or \$262.50 gross per week.
 - ii. For the next 50 weeks, this amounts to 10.5 hours/week at \$291.48 gross per week.
- b. Over a 56 week period, this amounts to the following:
 - i. 6 weeks at \$262.50/week equals \$1,575.00 gross.
 - ii. 50 weeks at \$291.48/week equals \$14,574.00 gross.

- c. For the 13 weeks that Mr Yang worked 6 days per week, he was underpaid by 9 hours per week.
 - i. This amounts to 9 hours/week at \$27.76/hour, or \$249.84 gross per week.
- d. Over a 13 week period, this amounts to the following:
 - i. 13 weeks at \$249.84/week equals \$3,247.92.

[40] The total amount owing to Mr Yang is therefore \$19,396.92 gross. Orders are made accordingly.

[41] Taking her hourly rates into account, Mrs Yang's unpaid hours are calculated as follows:

Mrs Yang's Underpaid Hours

- a. For the 34 weeks that Mrs Yang worked 7 days per week, she was underpaid by 10.5 hours per week.
 - i. For the first 34 weeks of her employment, this amounts to 10.5 hours per week at \$22.70 gross, or \$238.35 gross per week.
- b. Over the 34 week period at \$238.35/week, this equals \$8,103.90 gross.
- c. For the 13 weeks that Mrs Yang worked 6 days per week, she was underpaid by 9 hours per week.
 - i. For the first 11 weeks of this period, this amounts to 9 hours per week at \$22.70 gross, or \$204.30 gross.
 - ii. For the last 2 weeks of her employment, this amounts to 9 hours per week at \$23.15 gross, or \$208.35 gross.
- d. Over a 13 week period, this amounts to the following:
 - i. 11 weeks at \$204.30/week equals \$2,247.30 gross.
 - ii. 2 weeks at \$208.35/week equals \$416.70 gross.

[42] The total amount owing to Mrs Yang is therefore \$10,767.90 gross. Orders are made accordingly.

Claim for Unpaid Sick Leave

[43] Mr and Mrs Yang claim for a week's work of sick leave. This is in relation to a particular period of time when the restaurant was closed for 1 week from 9 January 2024 to 15 January 2024. This was a scheduled closure to allow everyone to take a

week's summer holiday, but was timed to occur after the public holidays over Christmas and New Year which could often be a busy time for the business.

[44] Mr and Mrs Yang did not work during this week and were not paid for this week. Mr Su and Ms Peng say that they had understood this was an allowable business closedown. Mr Yang had already received the full payment of his annual leave entitlement for the immediately preceding year. Mrs Yang had not yet worked a full 12 months, and was not entitled to receive annual leave yet, but no deductions were made from her annual leave balance which remained intact for her to use in the future.

[45] The leave and payment records provided by KEL support this explanation. Mr Yang was paid out in full for his first year's leave entitlement just after his anniversary of employment at the end of December 2023. This money was available to him to use, and although he was not paid for the week of 9 January 2024, no deductions were made from his leave balance and his leave for the year 2024 was again paid out to him in full on his termination. In hindsight, it may have been better for sufficient leave to have been "carried over" to enable Mr Yang to have received pay for the week of 9 January 2024, but this was not discussed or agreed between the parties at the time. Mr Yang was correctly paid his annual leave in full at the end of December, meaning he suffered no monetary loss. I am not persuaded there was significant inconvenience to him in receiving his full annual leave payment some two weeks in advance of his holiday rather than a lesser sum in the usual pay run, and I note that this was not the thrust of Mr and Mrs Yang's complaint in any case.

[46] Mr and Mrs Yang's evidence was that they were told in advance that the business would be closed for this one week, and they had no choice in that which they took exception to. They say that they took a short period of 3 or maybe 4 days to drive to Auckland and back to see the country, and that they spent the remainder of the week resting as they found the work tiring. They claim that they should have been able to take this week in full as paid sick leave because they spent some of that time resting. They both accept that they never asked KEL for sick leave for that week at the time.

[47] I do not accept that I should award paid sick leave in circumstances when both Mr Yang and Mrs Yang gave evidence that they were not sick, had not requested or even mentioned sick leave to their employer at the time, and had in fact taken time away from work for the purposes of travel, rest and relaxation during a short and pre-planned

annual closedown. Had paid sick leave been requested, which it was not, the evidence is that Mr and Mrs Yang would not have been entitled to it as they were not sick and did not suggest that they were.

[48] The claim for unpaid sick leave is not made out. No orders are made.

Claims for Payment of Time-and-a-Half for Work Done on Public Holidays and Payment for Alternative Days

[49] Mr and Mrs Yang say that they routinely worked on public holidays, as the business was open on public holidays. They say that they received only their usual pay during the weeks when public holidays fell, and are therefore due the additional “half” payment in relation to work done on public holidays, and payment for alternative holidays as well. Mr and Mrs Yang rely on their payslips which they say show payment of only standard wages and hours regardless of when public holidays fell.

[50] Ms Peng spoke to the approach taken by KEL in relation to payment for public holidays. She explained that the system was set up to pay a standard number of hours, and therefore a standard amount of pay each week. Every 4 weeks, she would review the timesheets to ascertain if more hours had been worked than expected, or for other matters affecting pay particularly any public holidays. She would then make a “top up” pay in addition to the usual pay runs. These additional payments were recorded on sequentially numbered and dated payslips, which detailed the amount of hours paid for and any additional payments including public holidays that payment was made in respect of. This meant that Mr and Mrs Yang would receive 5 payments and 5 payslips in most if not all 4 week periods.

[51] Ms Peng provided copies of timesheets and payslips for both Mr Yang and Mrs Yang. They demonstrated that additional payments had been made as she had explained, and the relevant public holidays and the payments made for each were set out and recorded. Mr and Mrs Yang had no particular response to this, although it was clear from their in-person evidence that they relied on the payslips setting out their standard weekly pay to support their claim that no additional pay had been received for work done on public holidays, and they were inviting me to ignore the evidence of the additional “top up” payslips.

[52] Having considered all the evidence, I find that Mr and Mrs Yang were paid correctly for work done on public holidays. Their hours and days of work were recorded, payment was calculated and made at the statutory rate of time-and-a-half, and payment was also made for alternative holidays and recorded. This is set out clearly in the timesheets and payslips. In the face of this evidence, no arrears in relation to work done on public holidays are owing, and no orders for additional payment need be made.

[53] Having said this, I note that KEL's practice of paying the additional statutory rate for working on a public holiday as part of a wash-up or top-up payment made every 4 weeks suggests that on at least some occasions, payment was made later than is required by section 55 of the Holidays Act 2003, which requires that payment for a public holiday must be made in the pay that relates to the pay period in which the holiday occurs. Likewise, it suggests that payment for alternative holidays was likely made too early, as section 60 of the Holidays Act 2003 refers to payment being made for such holidays in the pay that relates to the employee's final period of employment, or after 12 months have passed. I will return to this when considering the applicants' penalty claims, as I take the view that the underlying problem is not a lack of payment, but payment made at improper times.

[54] I am not persuaded by general claims made by the applicants that the payslips were fabricated. Ms Peng described her process in making up the payslips. She used a template document in Word, and performed the calculations herself before manually inputting the details into each payslip. Many of the payslips were handwritten, clearly, and following a standard template. In addition, the payslips correspond to the timesheets. I am not persuaded that the occasional presence of the year "2024" on some payslips represents anything more than a printing error when the payslips were printed out in preparation for these proceedings, rather than being evidence of falsification as claimed by the applicants.

Claims for Unpaid Annual Holiday Pay

[55] Mr and Mrs Yang have both claimed for unpaid annual holiday pay. Mr Yang states that he was paid the sum of \$4,663.68 on 20 December 2023 representing annual leave for the first 12 months of his employment, and a further \$1,678.82 on 18 April 2024 when his employment ended. He states that he should have been paid \$10,843.06 as annual holiday pay, based on his calculations for wages for the hours he says he

actually worked, plus an additional 8%. In other words, Mr Yang is claiming that he should be paid annual holiday pay at the rate of 8% on the arrears he is also claiming.

[56] Mrs Yang also claims annual holiday pay. She says that she received the sum of \$4,127.67 for annual leave at the end of her employment, but that she should have received a total of \$10,928.00 calculated on her actual hours of work. Mrs Yang is also claiming annual leave at the rate of 8% should be paid on any arrears of wages ordered.

[57] The Holidays Act 2003 makes it clear that annual leave payments must be calculated on the basis of gross earnings. See for example in the case of Mr Yang, the requirements of s 25 of that Act, and for Mrs Yang, the requirements of s 23 of that Act.

[58] Accordingly, I find that the Holidays Act requires that additional annual leave at the rate of 8% is calculated and paid on any arrears ordered. I note that as my calculations of arrears to be paid is different from the arrears claimed by the applicants, there will also be a difference in the amount of annual leave resulting.

[59] I have found that the amount of arrears is as follows: \$19,396.92 gross to be paid to Mr Yang, and \$10,767.90 gross to be paid to Mrs Yang. At the rate of 8%, the additional amount of annual leave to be paid to each is as follows: an additional \$1,551.75 gross to Mr Yang; and an additional \$861.43 gross to Mrs Yang. Orders are made accordingly.

Claim for an Unpaid Contractual Notice Period

[60] Both Mr and Mrs Yang raise a claim that KEL has failed to pay them for their contractual notice period. The statement of problem stated that they resigned on 17 April 2024, and were told by Mr Su that 17 April was their last day of employment, but were never paid for any notice period. Mr Yang claims the sum of \$8,834.76, which he says is his expected pay for 1 month's notice. Mrs Yang claims the sum of \$3,403.05, which she says is her expected pay for 2 weeks' notice.

[61] Mr Su disputes this claim. He refers to the resignation letters provided by both Mr and Mrs Yang which are dated 17 April 2024, and which state "I hereby resign from my position for personal reasons". Mr Su says that Mr and Mrs Yang returned the restaurant keys on that same day and did not attend work after 17 April, as they left to travel to Auckland meaning that they did not give any notice to him or KEL. They were

paid up to 17 April, that is, they were paid up to the last day they worked. This accords with the in-person evidence of Mr and Mrs Yang.

[62] The difficulty with the claim made by Mr and Mrs Yang is that they are seeking to be paid their contractual notice period in circumstances where they did not provide the notice period required by the contract. They did not dispute that they provided written notice of their resignation on 17 April and then left the workplace of their own volition that same day. Although their statement of problem claimed that Mr Su prevented them or directed them not to work during their notice period, this claim is not supported by their resignation letter or by their in-person evidence that they did not make themselves available for work after 17 April as they had decided to move to Auckland and left for Auckland that day. In these circumstances, I find this claim is not made out. No orders are made.

Personal Greivance Claims – Unjustified Dismissal, Unjustified Disadvantage, and Remedies

[63] Mr and Mrs Yang raise a claim that they were unjustifiably constructively dismissed or unjustifiably disadvantaged by KEL's failure to pay them correctly, and they are entitled to remedies of reimbursement for lost wages, and compensation for hurt and humiliation.

[64] Mr Yang gave evidence in particular that Mr Su had promised to pay him the sum of \$800 per week, and did not. In his in-person evidence, Mr Yang was very insistent that he should have been paid \$800 per week, and was not, and this was the reason why he resigned.

[65] Mr Su said he had contracted to pay Mr Yang at the rate of \$25 per hour, rising to \$27.76 per hour, and when this was multiplied over a 6 or 7 day week, Mr Yang was entitled to be paid considerably more than \$800 per week, and was in fact paid more than this.

[66] The terms of the employment agreement and the payslips support this, even using the lower and incorrect number of hours attributed to Mr and Mrs Yang by KEL. I find that Mr Yang was not entitled to be paid a flat rate of \$800 per week, but was instead entitled to be paid an hourly wage, which gave him an entitlement to more than \$800 per week. He was in fact paid more than \$800 per week, even though his pay was

calculated incorrectly. Accordingly, this cannot have led to a constructive dismissal as argued by Mr Yang.

[67] In addition, Mr and Mrs Yang left their employment at KEL immediately without providing any notice, and moved to Auckland that same day in pursuit of what they considered to be better employment opportunities. There is no evidence that they ever raised any concerns about payment with KEL at any point prior to their resignation, or even on their resignation, as their notices of resignation do not mention any concerns.

[68] Standing back and considering the matter, I am unable to be satisfied on the evidence before me that Mr and Mrs Yang's resignation was at the instigation of the employer. Mr Yang's evidence in particular as to the alleged breach he says led to a constructive dismissal situation does not support a claim of constructive dismissal, as I have found he has not properly represented the terms of his employment he claims were breached. Having said this, I have no doubt that the failure to pay wages correctly for all hours worked is an unjustified breach of Mr and Mrs Yang's conditions of employment, that caused disadvantage to them by denying them use of their wages in a timely way.

[69] I find that both Mr and Mrs Yang suffered an unjustified disadvantage in their employment by the failure to pay wages in full when due, and are entitled to remedies accordingly.

Remedies for Unjustified Disadvantage

[70] Mr Yang has claimed the following remedies in respect of his personal grievance claims: lost wages for a nine-week period, which he says amounts to \$18,363.24, being 73.5 hours per week at \$27.72 per hour, over 9 weeks, and compensation for humiliation, loss of dignity, and injury to feelings of \$15,000.

[71] He says that as a result of being overworked, he felt tired and suffered from back pain. He also says that his attempts to raise his concerns about a wish to work 40 hours per week were ignored, although this is disputed by KEL.

[72] Mrs Yang has claimed the following remedies in respect of her personal grievance claims: lost wages for an 11-week period, which she says amounts to

\$18,716.78, being 73.5 hours per week at \$23.15 per hour, over 11 weeks; and compensation for humiliation, loss of dignity, and injury to feelings of \$15,000.

[73] Ms Yang's in-person evidence was that she felt tired because she was working long hours, and she wanted to work 40 hours per week, but KEL ignored her request (that a request to work fewer hours was made was denied by KEL). She says that her employment caused her emotional hurt.

[74] Section 123(1)(b) of the Act provides that where I have determined that an employee has a personal grievance, I may award as a remedy "reimbursement...of a sum equal to the whole or any part of the wages or other money lost...as a result of the grievance". I have found that both Mr and Mrs Yang have a personal grievance for unjustified disadvantage stemming from a failure to pay wages in full when due. I have awarded remedies for this, by way of reimbursing both Mr and Mrs Yang for the amounts I have found they were underpaid.

[75] In those circumstances, I decline to award an additional sum for lost wages, which appears to be a claim for wages between the Yang's summary resignation on 17 April 2024 and their obtaining new employment. I do not accept that this is a loss that properly flows from the unjustified disadvantage grievance that I have found is made out.

[76] The claims for compensation for hurt and humiliation are however, properly raised. Although KEL disputes that Mr and Mrs Yang raised concerns about being underpaid or requests to work fewer hours during their employment, I accept that the failure to pay wages when due persisted over Mr and Mrs Yang's employment and coloured their experience of it in a negative way.

[77] Accordingly, I find that an award to recognise the hurt and humiliation experienced by Mr and Mrs Yang is proper, and that the sum of \$10,000 is appropriate weighing the usual compensatory awards for a disadvantage claim, the lack of specificity in both Mr and Mrs Yang's evidence on this point, and the ongoing nature of the disadvantage itself. Orders for compensation of \$10,000 without deduction in favour of both Mr and Mrs Yang are made accordingly.

Penalties including whether any penalties should be paid to applicants

[78] Having considered and made findings on the various claims made by the applicants, I must now consider their claims that penalties be awarded against KEL for the following breaches:

- a. Failure to pay wages in breach of the Wages Protection Act 1983 and the employment agreement;
- b. Failure to pay minimum wages in breach of the Minimum Wage Act 1983;
- c. Failure to pay for public holidays in breach of the Holidays Act 2003;
- d. Failure to pay annual holiday pay in breach of the Holidays Act 2003;
- e. Failure to pay sick leave in breach of the Holidays Act 2003;
- f. Failure to provide a written employment agreement in breach of the Act;
- g. A breach of good faith (unspecified).

[79] First, I must consider whether KEL has breached the statutes claimed, such that it may be rendered liable for a penalty.

[80] I have found that KEL failed to pay for some wages, on the basis that KEL deducted more time for meal breaks than is permitted by the Act. This is a breach of the Wages Protection Act 1983, which requires wages to be paid in full when due.

[81] I do not accept that KEL failed to pay minimum wages. KEL paid Mr and Mrs Yang at or above the minimum wage at all times. The dispute between the parties did not arise from any disagreement about the correct hourly rate (there was no such disagreement), but about a standardised deduction for meal times.

[82] I do not accept that it is correct to state that KEL has failed to pay for public holidays, or alternative holidays at all. However, as I have said earlier, I take the view that the timing of these payments breaches relevant sections of the Holidays Act 2003.

[83] For similar reasons, I do not accept that KEL failed to pay annual leave entitlements. KEL calculated and paid for annual leave in accordance with the wages it paid to Mr and Mrs Yang at the time. No payments were withheld. Mr and Mrs Yang have claimed that they should have been paid more wages than they were, and that additional annual leave entitlements should flow from this. I agree that the provisions

of the Holidays Act require this, and I have made orders for remedies accordingly. However, the annual leave payments were calculated correctly at the time they were made, leaving aside the dispute between the parties as to the correct amount of gross earnings on which to base the calculations. A dispute as to the correct amount of earnings on which annual leave is payable is not a breach of the statutory requirement to pay which would require a penalty to be awarded.

[84] I have found that Mr and Mrs Yang had no entitlement to sick leave, so it follows that no penalty need be considered for failure to provide sick leave.

[85] I have considered carefully whether there was a failure to provide a written employment agreement in breach of the Act. I have concluded that this is not made out on the facts. Two employment agreements were in evidence for both Mr Yang and Mrs Yang, an agreement at the start of their employment, and a variation later on during their employment referred to as the “supplementary agreement”. The agreements appeared to be signed and initialled on each page by all parties, and Mr and Mrs Yang acknowledged their signatures. Nevertheless, they said that they had been shown the agreements and allowed and encouraged to take pictures of it for their records, but the agreements were fraudulent. I did not find this persuasive, especially in circumstances where Mr Yang in particular relied on the hourly rates in those agreements when making his wages claims. Overall, I am not persuaded that there were no written employment agreements in breach of the Act.

[86] The claim that KEL acted in breach of good faith is not specific as to what actions or obligations the applicants allege KEL breached or failed to do. On that basis alone, I decline to take this claim any further. I also note that s 4A of the Act which provides for a penalty for “certain breaches” of good faith sets out that penalties are only to be awarded if the breaches were “deliberate, serious, and sustained” or were intended to undermine bargaining, employment agreements and employment relationships. This is a high threshold. It is not reached in circumstances such as these where the parties had a disagreement about the correct way to calculate and pay for meal breaks. For this reason also, I decline to progress any penalty claim on this basis.

[87] Having considered the breaches for which the applicants seek penalties, I find that there are two globalised breaches of statute that might properly lead to penalty claims. The first is a failure to pay wages when due in breach of the Wages Protection

Act. The second is a failure to pay for public holiday entitlements and alternative holidays when required by s 55 and 60 of the Holidays Act 2003.

[88] The considerations in regard to penalties¹ are as follows:

- a. The object of the Act – the entitlement to be paid in full in relation to both wages and holiday pay is a minimum entitlement. By KEL’s default, the applicants have been denied the benefit of their entitlements to both leave (in the form of being able to take an alternative day as a paid holiday) and money;
- b. The nature and extent of the breach – the breaches arise from a consistent failure by Mr Su and Ms Peng to fully appreciate their obligations to make certain payments for meal breaks, and to make payments in respect of public holidays in a timely way;
- c. Whether the breach was intentional, inadvertent, or negligent – the breach was more than inadvertent, in that the employer did not take the necessary care to ensure compliance over a period of time. However, I find that the failures stem more from ignorance than a deliberate attempt to withhold payment;
- d. The nature and extent of any loss or damage – the applicants suffered loss of money which should have been paid to them in a timely way;
- e. Compensation or other steps in mitigation – the problems identified in this determination are capable of being rectified, both specifically and by updating systems and processes going forwards;
- f. The circumstances of the breach, including the applicant’s vulnerability – the applicants are vulnerable as they are migrant employees with limited language skills. KEL is a small business run by its owner and his wife;
- g. Any similar conduct – there is no issue of past similar conduct;

¹ *Nicholson v Ford*, [2018] NZEmpC 132.

- h. Deterrence – there is a need for deterrence on a general basis, as it cannot be enough for an employer to implement systems without checking if these comply with established laws;
- i. Degree of culpability – it is relevant that KEL, through Mr Su and Ms Peng, has not attempted to avoid responsibility and has kept and provided compliant records which allow identification of the problem;
- j. Consistency – the present case is at the lower end of the range of previous awards;
- k. Ability to pay – the respondent is a small business with family as staff, although I note it continues to operate;
- l. Proportionality – the total amounts involved are more than minor, especially from the perspective of the applicants.

[89] Taking all the above matters into account, a penalty of \$5,000 is awarded in relation to Mr Yang; of which, \$4,000 is to be paid to him and \$1,000 is to be paid to the Crown account. A penalty of \$4,000 is awarded in relation to Mrs Yang, of which \$3,000 is to be paid to her, and \$1,000 is to be paid to the Crown account. Orders are made accordingly.

Whether Mr Su should be made liable as a Person Involved in a Breach for any unpaid monies

[90] The applicants have asked that Mr Su be named as a person involved in a breach of employment standards as defined in s 142W of the Act, and that they both be granted leave under s 142Y of the Act to recover personally from Mr Su any money payable to them that KEL is unable to pay.

[91] Section 142W of the Act defines who is a person involved in a breach. The breach must be a breach of employment standards. Employment standards are defined in s 5 of the Act. They include the minimum entitlements under the Holidays Act 2003, the provision of the Wages Protection Act 1983, and the entitlements to rest and meal breaks in the Act. I am satisfied that the breaches in this matter are breaches of employment standards.

[92] Where the employer is an entity such as a company, a person involved in a breach must be an officer of the entity. In the case of a company, an officer is a director of the company. Mr Su is the sole director of KEL, and thus satisfies this requirement of s 142W.

[93] Finally, I must be satisfied that Mr Su has aided, abetted, counselled, or procured, the breach/es, or has been in any way, directly or indirectly, knowingly concerned in or party to the breach. I find that Mr Su was knowingly concerned in the breaches. By virtue of his position in the company and the work he performed in the business on a day-to-day basis, he had direct knowledge of the applicants' terms and conditions, their hours of work, and the arrangements for their pay. He had the requisite level of knowledge and control to be considered a person involved in a breach.

[94] Having found that Mr Su is a person involved in a breach, I also find it is appropriate for leave to be granted under s 142Y of the Act for both Mr Yang and Mrs Yang to recover from Mr Su personally any wages or other monies payable to them as employees to the extent that KEL is unable to pay. Orders are made accordingly.

Request for a Non-publication Order

[95] KEL has applied for a non-publication order, on the basis of "sensitive operational and financial information" about its business, as well as "unjustified reputational damage". It submits that non-publication orders should be made to protect:

- a. The name "Kippers East Limited", which it submits should be redact[ed] or omit[ed]...to protect commercial confidentiality";
- b. The names of the individual parties;
- c. Any financial terms, settlement amounts, or commercially sensitive information disclosed; and
- d. Any other sensitive information (unspecified).

[96] The applicants oppose this. They say the starting point is the principle of open justice, and no specific adverse consequences have been identified. Therefore they submit no non-publication orders should be made.

[97] It is not uncommon for the Authority to make targeted or partial non-publication orders to protect information which is either sensitive, or which has elements of

commercial confidentiality. KEL has not identified any particular information which it says is sufficiently sensitive that requires a non-publication order. Such information is often deeply personal information about an individual's mental or physical health. No such information was before the Authority in this case.

[98] I have considered whether “commercially confidential” information might need to be protected, including “financial terms, settlement amounts, or commercially sensitive information”. I am not aware that any information about settlement amounts was put before the Authority. KEL has not stated what “financial terms” or “commercially sensitive information” it believes need to be protected. In short, I cannot identify any such information. The “financial terms” specific to KEL that were before the Authority were wage rates for the two applicants, but nothing more. I have referred to KEL's opening hours, some information about its menu, and that it had a close-down period in one particular year, but this information is freely available to the public including on KEL's website. Accordingly, non-publication orders are not justified as this information is already in the public domain. Accordingly, I find that no non-publication orders should be made on this ground.

[99] KEL and Mr Su have asked that the names of individual parties are not published. Two of the four parties, Mr and Mrs Yang, reject this contention. This means that KEL is effectively submitting that its name and the name of Mr Su should not be published. There is also the reference to “unjustified reputational damage”, although it is not stated what this is or why it would arise.

[100] The starting point is that KEL and Mr Su do not have any particular right to have their identities as respondents to an Authority proceeding withheld from publication. The starting point, as the applicants contend, is that of open justice. As they have not been able to identify any particular reason why non-publication might be necessary in the interests of justice, the request for a non-publication order is declined. No orders are made.

Orders

[101] Kippers East Limited is ordered to pay to Mr Yuanxiang Yang within 28 days of the date of this determination:

- a. The sum of \$19,396.92 gross in unpaid wages, being calculated at the rate of an additional 1.5 hours per day as set out above;
- b. The sum of \$1,551.75 gross in holiday pay, calculated at the rate of 8% on the unpaid wages awarded above.
- c. The sum of \$10,000 without deduction as compensation for hurt, humiliation, and injury to feelings in accordance with s 123(1)(c)(i) of the Act.

[102] Kippers East Limited is ordered to pay to Mrs Wenjuan Yang within 28 days of the date of this determination:

- a. The sum of \$10,767.90 gross in unpaid wages, being calculated at the rate of an additional 1.5 hours per day as set out above;
- b. The sum of \$861.43 gross in holiday pay, calculated at the rate of 8% on the unpaid wages awarded;
- c. The sum of \$10,000 without deduction as compensation for hurt, humiliation, and injury to feelings in accordance with s 123(1)(c)(i) of the Act.

[103] Kippers East Limited is ordered to pay penalties as follows within 28 days of the date of this determination:

- a. The sum of \$4,000.00 without deduction to Mr Yuanxiang Yang;
- b. The sum of \$3,000.00 without deduction to Mrs Wenjuan Yang; and
- c. The sum of \$2,000.00 without deduction to the Crown Account.

[104] Mr Su is a person involved in a breach, and Mr Yuanxiang Yang and Mrs Wenjuan Yang (as the case may require) are granted leave to recover from him any monies payable to them to the extent that Kippers East Limited is unable to pay.

Costs

[105] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves bearing in mind my initial view that tariff costs would apply in this case.

[106] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicants 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 the respondents will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[107] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.²

Claire English
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1