

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2026] NZERA 132  
3302180

BETWEEN            YANG (HELEN) FENG  
                                 Applicant  
  
AND                    DONG CONSTRUCTION  
                                 LIMITED  
                                 First Respondent  
  
AND                    DONG WANG  
                                 Second Respondent

Member of Authority:    Rachel Larmer  
  
Representatives:        May Moncur, advocate for the Applicant  
                                 Dong Wang, for the Respondents  
  
Investigation Meeting:    29 September 2025 at Auckland and by AVL  
  
Submissions Received:    12 December 2025 from the Applicant  
                                 12 January 2026 from the Respondent  
  
Date of Determination:    5 March 2026

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]    At the material time, the first respondent, Dong Construction Limited (Dong Construction), was an Accredited Employer under Immigration New Zealand's (INZ's) Accredited Employer Work Visa Scheme. It no longer has Accredited Employer status. The second respondent, Mr Dong Wang, is the sole director and shareholder of Dong Construction.

[2]    During a WeChat video call on 10 October 2023 Mr Wang verbally offered the applicant, Ms Yang (Helen) Feng, employment by Dong Construction as a Construction Worker. No written offer was made. Mr Wang sent Ms Feng's individual employment agreement (IEA) to her nominated agent in China along with a job token for the agent to use

to apply to Immigration New Zealand (INZ) for an Accredited Employer Work Visa (AEWV) for Ms Feng. Mr Wang did not provide any documents directly to Ms Feng.

[3] Ms Feng's China based agent assisted her to obtain an AEWV, which she was granted on 13 November 2023.

[4] Prior to obtaining her AEWV, Ms Feng had worked in China as a make-up artist. She had not previously done construction work. Mr Wang said Dong Construction's ability to dismiss an employee under a 90-day trial period provision without the employee being able to bring a dismissal grievance meant the respondents felt secure employing someone from China who did not have construction experience.

[5] From 29 October 2023 Accredited Employers have been prevented from using trial period provisions in the employment agreements they offer AEWV employees. However, this restriction did not apply to job check or AEWV applications that had been made before that date, or job tokens issued before that date. This meant Ms Feng's employment agreement could legally contain a trial period provision because her application had pre-dated this restriction.

[6] Ms Feng arrived in New Zealand on 2 December 2023. She was not provided with work or wages, and left New Zealand on 12 March 2024. Ms Feng made the following claims against the respondents:

- (a) Breach of s 12A of the Wages Protection Act 1983 (the WPA), because she claimed she had paid RMB 100,000 as a premium for her employment by Dong Construction;
- (b) Recovery of the employment premium from the respondents;
- (c) Penalty claims against each respondent for the breach of the WPA;
- (d) Unjustified disadvantage, breach of good faith and breach of her employment agreement by Dong Construction due to its failure to provide Ms Feng with work or wages after she arrived in New Zealand;
- (e) Penalty claims against Dong Construction for its breach of good faith and of her employment agreement;

- (f) That Mr Wang aided and abetted Dong Construction's breaches of Ms Feng's employment agreement, so should have a penalty imposed on him under s 134(2) of the Employment Relations Act 2000 (the Act);
- (g) Unjustified dismissal claim against Dong Construction;
- (h) Leave to recover from Mr Wang personally any wage arrears or other money that Dong Construction defaults on paying her.

[7] The respondents denied all of the claims against them. They said Ms Feng was the subject of fraud by her China based agent(s). The respondents said they had not sought or received any money or a premium for offering Ms Feng employment. The respondents said Ms Feng needs to recover the premium from the person(s) who requested and received money from her.

[8] The respondents admit that Ms Feng did not perform any work and was not paid any salary between arriving in New Zealand on 2 December 2023 and her leaving New Zealand on 12 March 2024.

[9] The respondents said Ms Feng was not given work after arriving in New Zealand because she did not have a driver licence, which was required by her IEA. The respondent said no employment breaches occurred because Ms Feng never actually commenced her employment because she elected to return to China on 12 March 2024.

[10] The respondents denied that Ms Feng was unjustifiably disadvantaged or unjustifiably dismissed, or that there had been breaches of employment standards, good faith, her employment agreement or of the WPA. The respondents said no penalties should be imposed on them.

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

[11] A one-day in-person investigation meeting was held in Auckland. The Authority was assisted by a Mandarin interpreter.

[12] The Authority also obtained information which was shared with the parties from Immigration New Zealand (INZ) about Ms Feng's AEWV and Dong Construction's Accredited Employer status.

[13] Ms Feng was her only witness. She gave evidence by AVL, as she lives in China and was unable to return to New Zealand. Mr Wang and Jiajie (Nana) Liu gave evidence for the respondents. Nana Liu is based in New Zealand but at the time of the investigation meeting she was in China. Ms Liu gave evidence by telephone and she also provided some documents to the Authority.

[14] Mr Dong initially attended the first part of the investigation meeting (IM) by Teams link, as he said thought he could elect to do so. That was unsatisfactory, so the Authority asked him to travel in to attend the investigation meeting in-person, as that is what had been expected of him. Mr Wang did that during the lunch adjournment, so he attended the IM in-person during the afternoon.

[15] Both parties lodged new documents during the investigation meeting and after it. The parties also lodged written submissions after the investigation meeting.

### **Relevant background**

#### *Ms Feng's relationship with Jie Lu*

[16] Ms Feng is Chinese and she was living in China when she was offered employment by the respondents. In June 2023 Ms Feng was told by a woman named "Lujie", who Ms Feng referred to as "aunty", that she (Ms Feng) could make money in New Zealand without any specific qualifications or experience.

[17] Lujie is also known as "Jie Lu" and as "Yang Yan". The Authority has referred to Lujie as "Jie Lu" in this determination as that is the name that was used for her in another Authority determination *Li v Fancy Fancy Construction Ltd*.<sup>1</sup> The applicant in the *Fancy* case said Jie Lu had requested and received employment premiums from him in breach of s 12A of the Wages Protection Act 1993 (the WPA). which also involved (among other things) premium related claims.

[18] Jie Lu told Ms Feng that if she paid her then Jie Lu could get Ms Feng a five year sponsorship for a work visa in New Zealand. Ms Feng trusted Jie Lu, as Jie Lu had known Ms

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<sup>1</sup> *Li v Fancy Fancy Construction Ltd* [2025] NZERA 791.

Feng's deceased parents and was friendly with Ms Feng's mother's younger sister, who also lived in China.

[19] Jie Lu's influence over Ms Feng is evident from the advice that she gave Ms Feng to report her passport stolen after she had arrived in New Zealand as it would supposedly be easier for Ms Feng to travel if she had a passport that had been issued in New Zealand. Ms Feng did what Jie Lu suggested she do and reported her passport as stolen after arriving in New Zealand, even though it had not been stolen.

[20] Jie Lu has been referred to by a different applicant (Mr Guichen Li) in another Authority case *Li v Fancy Fancy Construction Ltd*, which was substantively determined by the Authority on 8 December 2025.<sup>2</sup> In the *Fancy* case Mr Li alleged Jie Lu had requested and received an employment premium for his employment by the employer Fancy Fancy Construction Ltd (Fancy Ltd).

#### *Ms Feng's relationship with Liu Yan*

[21] Jie Lu introduced Ms Feng to Yan Liu, who was a Chinese national who lived in New Zealand. Yan Liu is apparently Jie Lu's nephew. Yan Liu was also named in the *Fancy* case by that employee/applicant as having introduced them to Jie Lu, who had allegedly asked for a premium.

[22] The Authority notes that Yan Liu was referred to as "Yan Li" in the *Fancy* case. Based on the evidence the Authority heard in both this matter, and the *Fancy* case, Yan Liu and Yan Li are the same person. Yan Liu previously worked under an AEWV for Fancy Ltd, which Nana Liu is the sole director and shareholder of.

[23] In Ms Feng's case it was Yan Liu who asked her to pay him RMB 100,000.00 for employment by Dong Construction while in the *Fancy* case it was Jie Lu who allegedly requested an employment premium from the applicant in those proceedings.

#### *Alleged premium*

[24] At Yan Liu's request, while still in China Ms Feng paid him RMB 100,000.00 into his bank account in China on 15 October 2023.

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<sup>2</sup> *Fancy*, above n1.

[25] Ms Feng said on 25 January 2024 Yan Liu's wife, Qiao Yun, told her via a WeChat message that she (Ms Feng) had to pay him another \$10,000.00 NZD for tax payments or she would not be given legal work. The Authority was not provided with a copy of this message. Ms Feng did not pay this amount and raised issues with this request separately with Yan Liu and also Mr Wang.

*Agent in China*

[26] Ms Feng paid an agent in China named Xitian (Cici) Huang RMB 9,200.00 to help her get an AEWV from INZ. While in China Ms Feng paid Ms Huang into her private bank account in China, not into a business account Ms Huang is not a Licenced Immigration Advisor in New Zealand.

[27] Ms Feng told the Authority she had seen Ms Huang's contact details as an immigration agent in the WeChat group called "Work Visa Communications Group" that Yan Liu had set up. Yan Liu also sent Ms Huang a WeChat message saying Ms Feng needed to apply for a work visa.

[28] Ms Feng reached out to Ms Huang to be her agent to apply for her AEWV herself. She was not referred to Ms Huang by the respondents. Ms Huang worked for Ms Feng, not for the respondents.

[29] Mr Wang passed a copy of Ms Feng's employment agreement and a job token Dong Construction had obtained for a Construction Worker to Ms Huang so she could submit these as part of Ms Feng's AEWV application to INZ. Mr Wang said he did not have any other contact with Ms Huang, whom he viewed as Ms Feng's nominated agent.

*Job offer*

[30] Ms Feng was offered the job verbally during a WeChat video call she had with Mr Wang on 10 October 2023. Mr Wang said this was "like a job interview" but more informal.

[31] Ms Feng said Mr Wang did not ask her if she could drive or whether she had a China driver licence. She also said that Mr Wang did not mention she would have a trial period provision in her employment agreement.

[32] Although Mr Wang disputed Ms Feng's evidence about those matters, the Authority preferred Ms Feng's account on the grounds it was more likely to be correct than Mr Wang's denials. These were important matters to Ms Feng so they were not points she would have forgotten about. The informal nature of the discussion and the lack of supporting documents undermined Mr Wang's account of these matters.

#### *The IEA*

[33] Dong Construction provided the Authority with a copy of an IEA which Mr Wang had signed but which had not been signed by Ms Feng. Ms Feng gave the Authority four pages of the IEA which she had signed.

[34] Ms Feng said she did not see the full IEA until it was provided to her during these proceedings because Ms Haung had only given her four pages of the IEA, which were the four pages Ms Feng had signed. These four pages were the signature page, the employee acknowledgement clause, Schedule A that recorded Tools of Trade, and Schedule One that was the Position Job Description.

[35] The Authority accepted this evidence from Ms Feng because these were the only pages that had her signature on it. The respondents also acknowledged they had not given Ms Feng a copy of her employment agreement directly. Ms Feng was therefore not aware of the trial period provision or the requirement that she hold a valid New Zealand driver licence.

#### *Ms Feng's AEWV*

[36] On 10 November 2023 Ms Feng was granted an AEWV that started on 13 November 2023 and expired 36 months from her arrival in New Zealand. The AEWV therefore expired on 2 December 2026.

[37] Ms Feng's AEWV required her to be employed by Dong Construction as a Construction Worker and she was required to work within the Auckland region. Ms Feng was to be paid not less than \$29.66 per hour.

*Start date*

[38] Ms Feng's employment agreement stated that:

The employee will start working for the employer on 13/11/2023 OR upon obtaining a valid visa and arrival in Auckland and continue until either the employer or the employee ends this relationship.

[39] Ms Feng arrived in New Zealand on 2 December 2023.

[40] Ms Feng stayed with a relative after arriving in New Zealand. Ms Feng met Mr Wang on 3 December 2023 to hand over some items he had asked her to bring him from China. She told him she was unwell and unable to work. Mr Wang said Dong Construction had an annual closedown from 15 December 2023 to 5 January 2024 so she could start work after that, Ms Feng agreed to that proposal. As it turned out, Ms Feng was sick for the first two weeks she was in New Zealand.

*Driver licence requirement*

[41] Mr Wang said the offer of employment to Ms Feng and employment agreement required her to have a New Zealand driver licence. Although the employment agreement included a clause that said she would be provided with a motor vehicle for work purposes only and that she had to have a valid driver licence, Ms Feng denied she had been told that was a requirement.

[42] Ms Feng's evidence was that the requirement to have a driver licence was not discussed during the video interview, her employment was not conditional on her having a driver licence and she did not know she had to drive or have a New Zealand licence was preferred over Mr Wang's evidence about that.

[43] Ms Feng could not drive and had never held a driver licence. It was unlikely she would have agreed to move from China to New Zealand to do a job that she knew required her to drive without raising her inability to drive with the respondents.

[44] The respondents also did not record in writing to Ms Feng before she accepted the offer of employment the requirement that she had to drive for work and therefore had to have a valid New Zealand driver licence. Nor was this requirement discussed with her. Accordingly, her employment was not conditional on her holding a New Zealand driver licence as she did not

know about that until January 2024 when Mr Wang used that as an excuse for not providing her with any work or wages.

*Ms Feng's departure from New Zealand*

[45] There was no dispute that Ms Feng had not done any work and had not been paid by Dong Construction while she was in New Zealand. Ms Feng said she left New Zealand as she could not continue supporting herself without an income.

*Recordings*

[46] During the investigation meeting Ms Feng produced a transcript of what she said were WeChat recordings made by her husband, Zhang Yue, who lives in Australia of exchanges he allegedly had with Yan Liu, who at the material time was apparently using his wife's WeChat account to exchange voicemail messages with Zhang Yue.

[47] Ms Feng said that her husband and Yan Liu exchanged a series of voicemail messages which her husband had recorded and sent to Ms Feng, who had put them together and turned the messages into one transcript which she had transcribed, translated and lodged with the Authority.

[48] It was clear during the Authority's investigation meeting that the transcript provided by Ms Feng contained errors, so an amended transcript was lodged by Ms Feng after the investigation meeting. The transcript was undated and the Authority was not told when these recordings/messages had been exchanged.

[49] The content of these messages suggest they had been exchanged after Ms Feng had messaged Yan Liu in February 2024 holding him responsible for the situation she was in and asking him to fix it. Ms Feng had pointed out that Yan Liu had received the money she had paid, and he had introduced her to Mr Wang so she wanted her money back.

[50] One of Yan Liu's messages to Ms Feng's husband said he had tried to explain the situation to Ms Feng "who did not understand". It was clear Mr Liu wanted to avoid repaying Ms Feng the money she had paid him.

[51] Ms Feng alleged these recordings showed that Yan Liu was acting as a 'middleman' for Mr Wang, who denied that. The Authority considered there was a good chance the

comments Yan Liu allegedly made about Mr Wang were deliberately self-serving because Yan Liu was attempting to avoid responsibility for replaying Ms Feng the money he had taken off her. The transcript implied Yan Liu had experience in obtaining unlawful premiums from Chinese nationals, which is an issue INZ may wish to investigate.

[52] In terms of resolving the conflict between the double or triple hearsay evidence the recordings represented and Mr Wang's direct evidence, the Authority has preferred Mr Wang's direct evidence, on the basis represented the strongest evidence available to the Authority on these disputed matters.

[53] Ms Feng was not personally involved in the alleged voicemail message exchanges she sought to rely on. She was not even in the same country as her husband when he was having the exchanges. Ms Feng has also been represented from the outset. Her statement of problem did not refer to these recordings. Her first witness statement also did not refer to these recordings. Ms Feng was not present for these exchanges between her husband (who was in Australia) and Qiao Yun's WeChat account. The transcript of the recordings was not included in the joint bundle Ms Feng had prepared for the investigation meeting.

[54] Ms Feng referred to the recordings in her second witness statement which referred to Yan Liu's wife, Qiao Yun, sending Ms Feng's husband a demand for NZD \$10,000.00 with advice that Ms Feng would not be taxed if it was not paid and therefore could not work legally.

[55] Mr Wang denied using Yan Liu as a middleman and he reiterated to the Authority that he did not engage Yan Liu or Jie Lu and had not asked for money from them and had not received any payment from them. There was also no direct evidence of the respondents requesting or receiving any money from Yan Liu. The evidence established that Yan Liu had been engaged by Ms Feng and he appeared to have been acting as her agent.

[56] Mr Wang appeared at the investigation meeting and was questioned by the Authority and cross examined by Ms Feng's representative. Ms Feng's husband and Yan Liu and his wife were not called as witnesses by Ms Feng in these proceedings. The double or triple hearsay nature of the recordings was considered to be too remote to be accepted by the Authority over Mr Wang's direct evidence which had been tested under affirmation.

**Issues to be determined**

[57] The following issues are to be determined:

- (a) Did Dong Construction and/or Mr Wang request and/or receive an employment premium from Ms Feng in breach of s 12A of the Wages Protection Act 1983 (the WPA)?
- (b) If so, can Ms Feng recover the premium from the respondents?
- (c) Did Dong Construction unjustifiably disadvantage Ms Feng by requiring her to pay an employment premium in breach of the WPA?
- (d) Should a penalty be imposed on one or both respondents if they breached s 12A of the WPA?
- (e) Did Dong Construction breach Ms Feng's employment agreement by failing to provide her with work after she arrived in New Zealand?
- (f) If so, did Mr Wang aid and/or abet that breach of Ms Feng's employment agreement?
- (g) Did Dong Construction breach its good faith obligations to Ms Feng?
- (h) Should penalties be imposed on Dong Construction for any breaches of the employment agreement and/or good faith that have occurred?
- (i) Has there been a breach of employment standards?
- (j) If so, is Mr Wang 'a person involved in the breach of employment standards'?
- (k) If so, should Ms Feng be granted leave to recover any wage arrears or other money that Dong Construction defaults on paying her from Mr Wang personally?
- (l) Does the Authority have jurisdiction over Ms Feng's unjustified dismissal grievance?
- (m) If so, did Dong Construction constructively dismiss Ms Feng?
- (n) If so, was Ms Feng's dismissal justified?
- (o) If not, what remedies should Ms Feng be awarded?

- (p) Should any remedies that may be awarded be reduced on the grounds of contribution?
- (q) What if any wage arrears is Ms Feng owed?
- (r) What costs and disbursements should be awarded?

**Did Dong Construction and/or Mr Wang request and/or receive an employment premium from Ms Feng in breach of s 12A of the Wages Protection Act 1983 (the WPA)?**

*Relevant law*

[58] Section 12A of the WPA prevents an employer or person engaged on behalf of the employer to seek or receive any premium in respect of the employment of an employee, whether the premium is sought or received from the person employed or from any other person.

*Relevant facts*

[59] Ms Feng's premium claim faced evidential problems. She was unable to prove on the balance of probabilities, meaning it was more likely than not, that one or both respondents had sought and/or received any of the money she paid Liu Yan.

[60] According to Ms Feng's evidence the premium was requested by, and paid to, her contact, Yan Liu who she had connected with via her 'aunty' Jie Lu. Ms Feng made these payments while she was in China into Yan Liu's bank account in China.

[61] Mr Wang denied receiving any money and there was no direct evidence that established he and/or Dong Construction had received any of the money Ms Feng had paid Yan Liu. When Ms Feng told Mr Wang in January/February 2024 that Yan Liu had requested NZ\$10,000 from her as tax, Mr Wang immediately told her she had been the subject of fraud and needed to get the money she had paid back from Yan Liu.

[62] The available evidence fell short of establishing on the balance of probabilities that:

- (a) Dong Construction and/or Mr Wang had sought or received a premium from Ms Feng.
- (b) The respondents were aware of the payments Ms Feng had made to Yan Liu's bank account in China.

- (c) Yan Liu acted as the respondents' agent or on their behalf or instructions. To the contrary, the evidence established that Liu Yan was acting for Ms Feng, on her behalf and at her direction as she had reached out to him to help her via her "aunty" Jie Lu.
- (d) Yan Liu had paid any of the money Ms Feng gave him to one or both respondents.

[63] The alleged premium payments involved individuals Ms Feng was closely associated with, as Jie Lu (who Ms Feng also referred to as "aunty") was Ms Feng's aunt's friend and Liu Yan was Jie Lu's nephew. This contrasted with the evidence from Mr Dong that there was more of an arms' length connection between the respondents and Liu Yan. Their relationship arose because Liu Yan and Jie Lu had cold called him by turning up at his office in person and saying they knew of people in China who could work for Dong Construction if he needed workers.

[64] Ms Feng said Yan Liu told her in September 2023 that the costs of sponsorship and a five-year work visa was RMB 100,000 excluding visa fees and service fees. Ms Feng said Yan Liu told her that she and her husband were guaranteed to be able to work in New Zealand if they paid that amount and that they would have their visas approved in October 2023.

[65] Ms Feng also had another connection with Jie Lu other than via her family members. Ms Feng's husband got a work visa for Australia which Jie Lu helped him secure. Ms Feng obtained her three year work visa for New Zealand via Jie Lu.

#### *Findings on the premium claims*

[66] Ms Feng was unable to establish the necessary facts required to prove that Yan Liu was more likely than not working for one or both of the respondents or that the respondents had sought or received any of the money Ms Feng had paid Yan Liu. Yan Liu and Jie Lu were more likely than not acting as Ms Feng's agents because she had engaged them, not as the respondents' agents who had not engaged or instructed them.

[67] Accordingly, Ms Feng's premium related claims did not succeed.

**Can Ms Feng recover the alleged premium?**

[68] Ms Feng cannot recover the RMB 100,000.00 she said she paid Yan Liu from the respondents but she could pursue Yan Liu for it. Yan Liu is apparently working in Auckland for a car related business under an AEWV.

**Did Dong Construction breach Ms Feng's employment agreement by failing to provide her with construction work after she arrived in New Zealand?**

[69] The employment agreement Dong Construction said applied to Ms Feng's employment recorded two possible start dates:

- (a) The first potential start date was "13/11/23", which did not apply because Ms Feng was still in China on that date.
- (b) The second start date was "upon receipt of a valid visa and arrival in New Zealand."

[70] Ms Feng arrived in New Zealand on Saturday 2 December 2023, so Dong Construction was contractually required to offer her work and wages from 4 December 2023, being the next working day after that. Mr Wang knew Ms Feng was in New Zealand because he met with her on 3 December 2023 to collect some items off her that he had asked her to purchase for him.

[71] However, Ms Feng advised Mr Wang she could not work immediately because she was unwell. That meant Ms Feng was not ready willing or available to start work on the date anticipated in the IEA, so the parties agreed her first day of work would be after the businesses' closedown had ended on 5 January 2024. The next working day after that was Monday 8 January 2024.

[72] The parties therefore agreed in December 2023 that Ms Feng would start work at Dong Construction on 8 January 2024. That was therefore the date on which Dong Construction's legal obligation to provide Ms Feng with work and wages crystallised.

[73] Although Ms Feng was ready willing and available to start work on 8 January 2024 as agreed, she was not provided with any work to do. That was Mr Wang's decision and Ms Feng had not agreed with it. The respondents' excuse for not providing work was that Ms Feng did

not have a valid New Zealand driver licence so she was unable to use a company vehicle to drive herself to and from the construction sites she was required to work at.

[74] That excuse was not accepted by the Authority as valid grounds for not providing Ms Feng with the work she had been employed to do.

[75] Ms Feng was never given a copy of the IEA that had the motor vehicle clause in it, which recorded the need for her to have a valid New Zealand driver licence so it was not a term or condition of employment that she had been aware of or had agreed to before she arrived in New Zealand.

[76] Ms Feng asked Mr Wang for work at least three times Dong Construction should have allocated Ms Feng work and allowed her to arrange how she would get to and from the construction sites she had to work on. However, that did not occur.

[77] Dong Construction breached Ms Feng's employment agreement by not providing her with work and/or wages from 8 January 2024 onwards.

**Did Mr Wang aid and/or abet Dong Construction's breaches of Ms Feng's employment agreement?**

[78] Mr Wang is Dong Construction's sole director, so he was effectively its controlling mind. It was due to Mr Wang's deliberate decisions that Dong Construction failed to provide Ms Feng with work and/or wages from 8 January 2024 onwards.

[79] Mr Wang therefore aided and abetted Dong Construction's breaches of Ms Wang's employment agreement.

**Did Dong Construction breach its good faith obligations to Ms Feng?**

[80] Ms Feng arrived in New Zealand in early December 2023 expecting to start work immediately but she received no work and no wages from Dong Construction.

[81] Dong Construction's failure to provide Ms Feng with work and/or wages from 8 January 2024 onwards breached its duty of good faith, as required by s 4 of the Act.

**Should penalties be imposed for the breaches of the employment agreement and good faith that have occurred?**

[82] At the material time Dong Construction was an Accredited Employer, although it no longer is. The respondents enticed Ms Feng to come to New Zealand with the promise of work and wages but then failed to deliver either. It is necessary and appropriate to impose a penalty on Dong Construction for its breaches of Ms Feng's employment agreement and of good faith in order to punish it, express public disapproval of its actions and to deter such conduct in future.

[83] Section 133A of the Act sets out the factors the Authority must have regard to when assessing penalties. The breach of good faith and of Ms Feng's employment agreement for which a penalty is to be imposed involved the same conduct and are being penalised under the same Act.

[84] It is therefore appropriate to globalise these breaches into one representative breach that will attract one globalised penalty. The potential maximum penalty for a breach by a company such as Dong Construction is \$20,000.00.

[85] Dong Construction's breach was intentional because the respondents knew Ms Feng was in New Zealand and wanted to work. As a new arrival in New Zealand whose employment was subject to an AEWV that was linked to her job with Dong Construction. Ms Feng was a vulnerable employee. The consequences of the breaches that are being penalised were serious, because they resulted in Ms Feng returning to China as she could not afford to stay in New Zealand without receiving any income.

[86] Dong Construction's breaches have not been remedied because Ms Feng has still not been paid anything. Dong Construction did not appear to have had penalties imposed on it by the Authority previously.

[87] Dong Construction is ordered to pay a penalty of \$1,000.00 directly to the Crown bank.

**Should a penalty be imposed on Mr Wang for aiding and abetting Dong Construction's breaches of Ms Feng's employment agreement?**

[88] For the same reasons (punishment and deterrence) that a penalty has been imposed on Dong Construction, it is appropriate to impose a \$500.00 penalty on Mr Wang personally under

s 134(2) of the Act for aiding and abetting Dong Construction's breaches of Ms Feng's employment agreement.

[89] Mr Wang is ordered to pay this \$500.00 penalty directly to the Crown bank account.

**Has there been a breach of employment standards?**

[90] Section 5 of the Act defines "employment standards", which provide minimum code protections for employees. For the purposes of this matter, the breaches of employment standards that occurred involved:

- (a) Section 64 of the Act (failure to retain signed employment agreement),.
- (b) Section 4 of the WPA (failure to pay wages when they became due without deduction).
- (c) Section 23 and 27 of the HA03 (failure to pay holiday pay on termination of employment).
- (d) Sections 44, 46 and 49 of the HA03 (failure to pay public holiday entitlements).

[91] Dong Construction was required by s 64 of the Act to retain a signed copy of Ms Feng's employment agreement. That did not occur because the copy it provided to the Authority had not been signed by her.

[92] Ms Feng's employment agreement required Dong Construction to provide her with four weeks' notice of termination. That did not occur, because she was constructively dismissed without notice, which breached s 4 of the WPA.

[93] From 8 January 2024 onwards Ms Feng should have been paid her contractual wages of \$29.66 per hour for her minimum number of contracted hours of work which were recorded as 30 hours per week. That did not occur, in breach of s 4 of the WPA.

[94] Ms Feng should have been paid eight per cent of her total gross earnings in the pay run after her employment ended. That did not occur. No holiday pay has been paid in breach of sections 23 and 27 of the HA03 and s 4 of the WPA.

[95] Ms Feng should have been paid public holiday entitlements for the two public holidays that fell during the period she was employed, namely Auckland Anniversary Day on 29 January

2024 and Waitangi Day on 6 February 2024. That did not occur in breach of s 4 of the WPA and sections 44, 46, 49 and 55 of the HA03.

[96] Dong Construction's failure to keep a signed employment agreement or to pay Ms Feng her wages and HA03 entitlements breached employment standards.

**Was Mr Wang 'a person involved in the breach of employment standards'?**

[97] As the sole director, Mr Wang was Dong Construction's controlling mind. It was directly due to his decisions that Dong Construction breached employment standards.

[98] Accordingly, Mr Wang 'a person involved in a breach of employment standards' as defined by s 142W of the Act because he directly aided and abetted Dong Construction's breaches of employment standards.

**Should Ms Feng be granted leave to recover any wage arrears or other money that Dong Construction defaults on paying her from Mr Wang personally?**

[99] Ms Feng is granted leave pursuant to s 142Y(2)(a) of the Act to recover from Mr Wang personally any wage arrears and other money that she has been awarded in this determination but which Dong Construction defaults on paying her.

**Does the Authority have jurisdiction over Ms Feng's unjustified dismissal grievance or did the trial period clause in her employment agreement preclude that?**

*Relevant law*

[100] Section 67B of the Act allows an employer to use a trial period provision in an employment agreement which limits the employee's right to bring a personal grievance claim if they are dismissed within the first 90 days of their employment, subject to the requirements of s 67B having been fully met by the employer.

[101] From 29 October 2023 INZ prevented employers from using trial periods for workers from overseas who were working under an AEWVs. However, this ban did not apply to AEWV applications that were based on job checks had had been approved before that date. Ms Feng's employment fell within that exception to the ban on the use of trial period provisions for employees working under an AEWV.

*Relevant facts*

[102] The respondents failed to provide Ms Feng with a copy of her employment agreement. The evidence established her China based agent, Ms Huang, failed to pass the full copy of the employment agreement on to Ms Feng. The four pages she received and signed did not include the trial period provision. Ms Feng only found out about the trial period provision for the first time as a result of these Authority proceedings.

*Finding*

[103] The trial period clause was not valid. It was not drawn to Ms Feng's attention in the job interview on 10 October 2023 or in the verbal offer of employment that Mr Wang made to her that same day. Ms Feng was also never provided with a copy of the employment agreement that contained that clause. The trial period provision was therefore invalid.

[104] The trial period provision in Ms Feng's employment agreement did not prevent her from pursuing a dismissal grievance, because the respondents could not establish that she had received a full copy of the employment agreement which had the trial period in it. Accordingly, the Authority did have jurisdiction over Ms Feng's constructive unjustified dismissal claim.

**Was Ms Feng constructively dismissed?**

[105] Dong Construction unjustifiably constructively dismissed Ms Feng. It failed to provide her with work, it failed to pay her and it failed to support her to obtain a New Zealand driver licence. Dong Construction breached its good faith obligations to Ms Feng and her employment agreement by failing to provide her with work and/or pay her.

**Did Dong Construction dismiss Ms Feng?**

[106] The respondents' submission that there was no employment relationship in existence because Ms Feng had not actually started work was not accepted.

[107] The definition of employee in s 6(1)(b)(ii) of the Act includes "a person intending to work". Ms Feng had been offered and accepted employment by Dong Construction. The protections of minimum code employment legislation therefore applied to her.

[108] Having employed Ms Feng, Dong Construction had a legal obligation to provide her with work once she was ready and available to work. Ms Feng was available to work from 16

December 2023, after she had recovered from two weeks of illness she had experienced after arriving in New Zealand. After discussing a new start date, the parties agreed Ms Feng would start work on 8 January 2024.

[109] Dong Construction was legally obliged to provide Ms Feng with work and wages from that agreed date. The fact Ms Feng did not have a valid New Zealand driver licence did not excuse Dong Construction as her employer from providing her with work and wages. Ms Feng's employment was not made conditional on her having a valid New Zealand driver licence. The four pages of the employment agreement Ms Feng received did not contain the motor vehicle clause or the valid driver licence requirement.

[110] Dong Construction's failure to provide Ms Feng with work or wages fundamentally breached her employment agreement. It was reasonably foreseeable Ms Feng would not continue her employment by Dong Construction when she was not given any work to do and was not paid her contractual wages, even though she was ready willing and available to work and had told Mr Wang she wanted to work.

[111] It was also reasonably foreseeable that Ms Feng would not be able to support herself in New Zealand without a job or income as her AEWV was tied to her job as a Construction Worker for Dong Construction.

[112] Dong Construction constructively dismissed Ms Feng because the initiative for ending her employment came from her employer, not from her.

### **Was Ms Feng's dismissal justified?**

[113] Justification is to be objectively assessed in light of the justification test in s 103A(2) of the Act. A fair and reasonable employer is expected to comply with its contractual and statutory obligations. These include the good faith obligations in s 4 of the Act and each of the procedural fairness tests in s 103A(3) of the Act.

[114] Dong Construction failed to meet any of these minimum requirements. It also did not have a good reason for not providing Ms Feng with work because it did not give Ms Feng the opportunity to arrange her own transport to and from work.

[115] Dong Construction's constructive dismissal of Ms Feng was substantively and procedurally unjustified.

**What remedies should Ms Feng be awarded?***Mitigation of loss and lost remuneration*

[116] Ms Feng obtained a migrant exploitation visa in January 2024 but was unable to find new work due to her AEWV being tied to her job with Dong Construction. She therefore decided to return to China on 12 March 2024.

[117] Ms Feng did not give any evidence about her personal or financial situation after leaving New Zealand on 12 March 2024. It was not known if she obtained work after returning to China and there was no evidence of her attempting to mitigate her loss while in China.

[118] An award of lost remuneration under s 128 of the Act requires the employee to have attempted to mitigate their loss and an award of lost remuneration must be based on evidence of the employee's actual lost remuneration. This evidence was lacking in this matter which fundamentally undermined the Authority's ability to make an award under s 128 of the Act.

[119] Accordingly, no award of lost remuneration has been made.

*Distress compensation*

[120] Ms Feng gave evidence of the distress she suffered as a result of not being given work or wages after arriving in New Zealand. Ms Feng said she had suffered "severe physical and mental harm". Ms Feng said she had suffered insomnia and anxiety and felt utterly betrayed.

[121] Dong Construction is ordered to pay Ms Feng \$18,500.00 distress compensation under s 123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feeling she suffered as a result of her unjustified constructive dismissal.

**Should any remedies that may be awarded be reduced on the grounds Ms Feng had contributed to the situation that gave rise to her personal grievance claim?**

[122] Section 124 of the Act requires the Authority to assess the extent to which an employee contributed to the situation that gave rise to their personal grievance claim, and to reduce remedies accordingly.

[123] Contribution denotes blameworthy conduct that has been proven on the balance of probabilities. Ms Feng did not engage in any such blameworthy conduct, so her remedies are not to be reduced.

### **What wage arrears is Ms Feng owed?**

#### *Notice pay arrears*

[124] Pursuant to Ms Feng's employment agreement she was entitled to four weeks' notice of termination. Dong Construction constructively dismissed her without notice, so she is owed \$3,559.20 gross as four weeks' notice pay arrears, being 30 hours per week x \$29.66 per hour x 4 weeks.

#### *Wage arrears*

[125] Dong Construction failed to pay Ms Feng any wages for the nine weeks' period from Monday 8 January to Friday 8 March 2024 when she was ready, willing and available to work and had been seeking work from the respondents. The fact Ms Feng did not actually do any work was entirely up to the respondents' decisions, which she had not agreed to.

[126] Dong Construction is ordered to pay Ms Feng wage arrears of \$8,008.20 gross, being \$29.66 per hour x 30 hours per week x 9 weeks. That amount included Ms Feng's public holiday entitlements for 29 January and 8 February 2024.

#### *Holiday pay arrears*

[127] Dong Construction is ordered to pay Ms Feng outstanding holiday pay arrears of \$925.39 gross, being \$11,567.40 as her total gross earnings (had she been paid her contractual wages) x 8 per cent in accordance with s 23 of the HA03.

#### *Interest*

[128] The respondents have effectively had the use of money that should have been paid to Ms Feng by 12 March 2024. Accordingly, Dong Construction is ordered to pay Ms Feng interest on the total amount of wage arrears she is owed of \$12,492.79 (consisting of \$8,008.20 wage arrears + \$3,559.20 notice pay arrears + \$925.39 holiday pay arrears).

[129] Interest is to run from 11 March 2024 until Ms Feng has been paid all of the wage arrears and other interest she has been awarded in this determination. Interest is to be calculated using the Civil Debt Interest Calculator on the Ministry of Justice website.

[130] Dong Construction is therefore ordered to pay Ms Feng interest of \$1,306.91 on the amount of \$12,492.79 for the period 11 March 2024 to 5 March 2026, being the date of this determination.

[131] Interest will continue to run on the total amount of wage arrears and interest outstanding of \$13,799.70 (being \$12,492.79 wage arrears + \$1,306.91 interest up to the date of this determination) from 6 March 2026 until the full amount, including all interest awarded in this determination, has been paid to Ms Feng.

### **Summary of findings and orders**

[132] The Authority made the following findings:

- (a) Ms Feng's premium claims against these respondents did not succeed.
- (b) Dong Construction breached Ms Feng's employment agreement by failing to provide her with work and/or wages from 8 January 2024 to 11 March 2024.
- (c) Dong Construction's failure to provide Ms Feng with work and/or wages breached its good faith obligations in s 4 of the Act.
- (d) Dong Construction is ordered to pay a penalty of \$1,000.00 to the Crown bank account for its breaches of Ms Feng's employment agreement and of its good faith obligations.
- (e) Mr Wang aided and abetted Dong Construction's breaches of Ms Feng's employment agreement.
- (f) Mr Wang is ordered to pay a penalty of \$500.00 under s 134(2) of the Act for aiding and abetting Dong Construction's breaches of Ms Feng's employment agreement. This penalty is to be paid directly to the Crown bank account.
- (g) Dong Construction engaged in multiple breaches of employment standards, as defined in s 5 of the Act.

- (h) Mr Wang was ‘a personal involved in breaches of employment standards’, as defined by s 142W of the Act.
- (i) Ms Feng has been given leave to recover from Mr Wang personally any part of the \$13,799.70 wage arrears and interest she has been awarded in this determination, or ongoing interest on any part of that amount which remains outstanding from 6 March 2026 onwards until it has been paid in full, that Dong Construction defaults on paying her.
- (j) The trial period provision in Ms Feng’s employment agreement was invalid as she had not been given a copy of the IEA and the trial period provision had not been raised with her prior to her employment ending.
- (k) Dong Construction constructively dismissed Ms Feng.
- (l) Dong Construction’s dismissal of Ms Feng was procedurally and substantively unjustified.
- (m) Within 28 days of the date of this determination, Dong Construction is ordered to pay Ms Feng \$32,299.70, consisting of:
  - (i) \$8,008.20 gross wage arrears for the 9 weeks from 8 January to 8 March 2024, as per the payment provisions in the employment agreement.
  - (ii) \$3,559.20 gross notice pay arrears, as per the notice requirements in the employment agreement.
  - (iii) \$925.39 gross holiday pay arrears as per ss 23 and 27 of the HA03.
  - (iv) \$1,306.91 interest from 11 March 2024 to the date of this determination.
  - (v) \$18,500.00 without deduction as distress compensation under s 1213(1)(c)(i) of the Act.

### **What costs and disbursements should be awarded?**

[133] Ms Feng as the successful party is entitled to a contribution towards her actual legal costs. The parties should attempt to agree on costs, based on the notional daily tariff of \$4,500.00 for this one day investigation meeting.

[134] If agreement on costs cannot be reached, Ms Feng has 28 days within which to lodge costs submissions. The respondents then have 14 days within which to lodge their costs

submissions. If a costs determination is sought, then proof of the actual legal costs incurred is required, by way of a GST invoice. The parties are invited to identify any factors they say should result in the notional daily tariff of \$4,500.00 being adjusted.

Rachel Larmer  
Member of the Employment Relations Authority