

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2026] NZERA 320
3394844

BETWEEN	JUNCHEN XU Applicant
AND	AURORA DEVELOPMENTS LIMITED First Respondent
AND	WENFENG SU Second Respondent
AND	ZHENGYU ZHANG Third Respondent

Member of Authority: Simon Greening

Representatives: Aimee Cai, advocate for the Applicant
Aimee De-La Cruz, advocate for the Respondents

Investigation Meeting: 10 April 2026 in Auckland

Submissions received: 15 April 2026 from the parties

Determination: 26 May 2026

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Junchen Xu was employed by Aurora Developments Limited (ADL) as a project quantity surveyor.

[2] ADL is a construction company which is in the business of building residential homes. Zhengyu Zhang is the sole director of ADL. Wenfeng Su is a shareholder of ADL and is also engaged by ADL to undertake management related tasks and duties.

[3] Mr Xu says he commenced employment with ADL on 1 March 2021. ADL says Mr Xu commenced employment with ADL on 1 April 2021.

[4] ADL's position is that Mr Xu was learning and observing during the month of March. Further, ADL says Mr Xu did not undertake any billable or project related work for ADL during this period.

[5] Mr Xu says that from 1 March 2021 he was employed on a full-time basis by ADL doing the same kind of work as other quantity surveyors employed by ADL.

[6] Mr Xu says that he is owed the minimum wage for the month of March 2021, because he was employed during this period and he was not paid by ADL.

[7] Mr Xu seeks payment of the minimum wage for the month of March 2021 on the basis that he was an employee of ADL during this period.

[8] Mr Xu's position was made redundant on 6 January 2025. His final day of employment with ADL was 27 January 2025.

[9] Mr Xu says that he was unjustifiably dismissed. He seeks compensation for hurt and humiliation arising from the dismissal and reimbursement of lost remuneration as a result of the personal grievance. ADL's position is that Mr Xu's position was no longer required, and there were genuine commercial business reasons for disestablishing his position.

The Authority's investigation

[10] For the Authority's investigation written witness statements were lodged by Ms Bonnie Li, Mr Jin Li, Mr Feng Dong, Mr Su, Mr Zhang and Mr Xu. The witnesses answered questions from me under oath or affirmation and from the representatives.

[11] 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

[12] The issues requiring investigation and determination are:

- (a) Was Mr Xu an employee of ADL prior to 1 April 2021?
- (b) If Mr Xu was an employee of ADL prior to 1 April 2021, is he entitled to the minimum wage for this period?
- (c) Was Mr Xu unjustifiably dismissed by ADL?
- (d) Is Mr Xu entitled to arrears of wages in respect of unpaid incentives, pursuant to s 131 of the Act?
- (e) Does ADL owe Mr Xu annual holiday pay pursuant to s 28(4) of the Holidays Act 2003 (HA03) and, if so, should a penalty be issued?
- (f) Did ADL breach s 6 of the Minimum Wage Act 1983 (MWA) and, if so, should a penalty be issued?
- (g) Is Mr Xu entitled to arrears of wages for the period 10 September to 30 September 2023?
- (h) Did ADL breach any provision of the employment agreement, and if so, did Mr Su and/or Mr Zhang aid or abet a breach of any provision of the employment agreement?
- (i) If so, should a penalty be issued pursuant to s 134(2) of the Act?
- (j) If Mr Xu establishes his personal grievance, then is he entitled to remedies pursuant to s 123(1)(c)(i) and/or s 128(2) of the Act?
- (k) If Mr Xu is awarded a remedy, should it be reduced pursuant to s 124 of the Act?
- (l) Should there be an order for costs?

Was Mr Xu an employee of ADL prior to 1 April 2021?

[13] In determining whether Mr Xu was employed by ADL, the Authority must determine the real nature of the relationship between the persons who are said to be employer and employee under a contract of service.¹

[14] In deciding the real nature of their relationship, the Authority must consider all relevant matters, including any matters that indicate the intention of the persons, and is not to treat as determinative any statement by the persons that describes the nature of their relationship.²

¹ *Rasier Operations BV v E TU Inc* [2025] NZSC 162 at [71].

² Above n 1 at [71].

[15] Mr Xu interviewed for the role of quantity surveyor with ADL on 19 February 2021. Mr Xu says that he commenced employment on 1 March 2021 as a full-time quantity surveyor.

[16] In his witness statement, Mr Zhang says:

I recall that the company's position was that Mr Xu's formal paid employment would begin on 1 April 2021.

Before that start date, I understood that Mr Xu wished to come in on a learning basis so that he could observe the work and build up his experience.

He was not being brought in to the company as a fully functioning paid quantity surveyor from day one.

The purpose of that early period was practical exposure. From my understanding, he was shown examples of QS work, scenario-based exercises, and completed project material so that he could learn how Aurora approached pricing and measurement work.

I did not understand the pre-start period to involve Aurora assigning Mr Xu independent billable work that the company then used commercially as if he were already an employee.

[17] Mr Xu says the work he undertook for ADL between, 1 March and 1 April 2021, was identical to work performed by other quantity surveyors employed by ADL.

[18] Mr Xu has provided the Authority with evidence in support of his claim that he was employed by ADL from 1 March 2021, in the form of daily work logs, a timesheet, and a text message from his supervisor which read:

Please get some rest early. You have worked very hard over the past few days.
I will arrange to move forward with confirming your permanent employment.

[19] As demonstrated in his daily work logs, the work undertaken by Mr Xu for ADL during this period included: completing purchase orders, working on site instructions, and completing variation orders.

[20] The key submission for ADL, is that during this period Mr Xu's involvement with ADL was limited to learning and observation, and no independent billable work or billable outputs were assigned to Mr Xu in March 2021.

[21] In determining the real nature of the relationship between Mr Xu and ADL, I have considered the following factors:

(a) Mr Xu has provided evidence in the form of daily work logs, and timesheet, which support his contention that he was employed from 1 March 2021.

- (b) ADL has not provided the Authority with learning or training records for Mr Xu.
- (c) ADL believed that Mr Xu could not commence employment immediately, however ADL has not been able to establish on what basis a one-month period of observing and learning would make Mr Xu employable as a quantity surveyor.
- (d) ADL is of the view that Mr Xu was not undertaking any form of work. ADL says that Mr Xu reviewed projects, undertook measurement exercises, and completed scenario-based tasks. However, the daily work logs supplied by Mr Xu support the conclusion that he was undertaking relevant project work for ADL.
- (e) Although ADL did not bill clients for Mr Xu's work in March 2021, it does not follow that ADL did not gain an economic benefit from Mr Xu's activity because he worked on projects that ADL was involved in.³

[22] For these reasons I reach the conclusion that Mr Xu was employed by ADL between 1 March and 1 April 2021.

If Mr Xu was an employee of ADL prior to 1 April 2021, is he entitled to the minimum wage?

[23] Based on Mr Xu's daily work logs, and an example timesheet, I am satisfied that Mr Xu is entitled to payment for 40 hours per week for each week in the month of March 2021 on the basis of the minimum wage rate that applied in March 2021.⁴

[24] Within 28 days of the date of this determination I order ADL to pay Mr Xu the statutory minimum wage rate (gross), which was in force in March 2021, for a 40-hour work week for every week in the month of March 2021 (the Sum Owed).

[25] Within 28 days of the date of this determination I order ADL to pay Mr Xu the sum equivalent to 8% of the Sum Owed.⁵

³ *The Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152 at [27].

⁴ Minimum Wage Act 1983, s 6.

⁵ Holidays Act 2003, s 25(2).

Is Mr Xu entitled to arrears of wages in respect of unpaid incentives, pursuant to s 131 of the Act?

[26] Clause 18 of the individual employment agreement states:

The employer shall be entitled to institute policies and rules in relation to its activities and the conduct expected of employees from time to time and such policies and rules shall be observed by the employee in good faith.

[27] Mr Xu signed a policy document labelled “Incentive Mechanisms”.

[28] Under the policy heading are the words: “Vision 1.1 30.04.21”. I understand the word “vision” is not correct; it should read “version”.

[29] Clause 3(b) of this policy states:

Andy (Mr Xu) and Luca indirectly participate in the calculation work for projects in Aurora assist in placing orders, apply for public services and collect the requested information for CCC applications. They will be rewarded \$100 at the end of each project.

[30] Clause 3(b) of the individual employment agreement states:

At the end of the Financial Year, the employee shall receive a bonus depends on performance, see Appendix A, Incentive Mechanisms.

[31] ADL submits the incentive mechanisms policy was not binding on the parties because it was not signed by ADL and had not yet been operationalised.

[32] I find the incentive mechanisms policy was binding on the parties because it is expressly referred to in Mr Xu’s written employment agreement, Mr Xu signed the policy, and the policy sets out specifically what Mr Xu (Andy) would get paid at the completion of each project.

[33] The incentive mechanism was straight-forward. If Mr Xu participated in the calculation work for a project, assisted in placing orders for a project, applied for public services and collected information for a CCC application for a project, then Mr Xu would receive \$100 following the completion of the project.

[34] Mr Xu submits that during his employment with ADL he worked on 74 projects that were completed. Mr Xu has given specific details of the lot numbers, the number of lots at a particular location and the specific street address for each completed project.

[35] Mr Xu was entitled to receive \$7,400 under the incentive mechanisms policy.

[36] Within 28 days of the date of this determination, I order ADL to pay Mr Xu the sum of \$7,400.⁶

Was Mr Xu unjustifiably dismissed by ADL?

[37] The legal test for determining whether a dismissal is justified, is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.⁷

[38] The Authority must also have regard to the resources available to the employer when considering the employer's action in context.⁸ However, even small-scale employers like ADL, are required to follow a basic redundancy process.⁹

[39] Mr Xu was dismissed on 27 January 2025 on the basis that his position had been made redundant. In *Grace Team Accounting Limited v Brake* the Court of Appeal explained the legal basis for making a position redundant and the process an employer is required to follow.¹⁰

[40] On 6 January 2025, Mr Su asked Mr Xu to attend a meeting. Mr Xu did not know what the meeting was about.

[41] During the meeting, Mr Xu was informed that his position had been made redundant and his final day of employment with ADL would be 27 January 2025.

[42] Applying the legal principles in *Brake*, ADL's decision to dismiss Mr Xu was unjustified because:

- (a) ADL did not consult with Mr Xu before the decision was made to disestablish his position and terminate the employment agreement.
- (b) ADL did not provide any information to Mr Xu or provide a proposal seeking his feedback before the decision was made to make his position redundant.¹¹

⁶ Employment Relations Act 2000, s 131(1).

⁷ Employment Relations Act 2000, s 103A(2).

⁸ *E TU Incorporated v Singh* [2024] NZEmpC 84 at [49].

⁹ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [71].

¹⁰ *Grace Team Accounting Limited v Brake* [2014] NZCA 541 at [85].

¹¹ Employment Relations Act 2000, s 4(1A)(c).

(c) At the time, ADL did not provide Mr Xu with any information in support of its business case for disestablishing his position and therefore ADL did not establish or explain the genuine business reasons for making Mr Xu's position redundant.

Is Mr Xu entitled to arrears of wages for the period 10 September to 30 September 2023?

[43] The issue is whether, instead of taking annual leave between 10 September and 30 September, Mr Xu continued to work while overseas during this period.

[44] Mr Xu says that he put in a request for annual leave for this period and travelled overseas, but when he asked Mr Zhang whether he should take his laptop with him so he could continue to work, while overseas, Mr Zhang advised Mr Xu to take his laptop with him.

[45] Mr Xu provided evidence in the form of WeChat messages between Mr Xu and Ms Hang, during this period, to demonstrate that he continued to work for ADL while he was supposed to be on annual leave.

[46] Mr Zhang says that any correspondence between Ms Hang and Mr Xu during this period were not company authorised directions requiring Mr Xu to undertake work while on annual leave.

[47] I have reviewed the WeChat messages provided by Mr Xu. On the balance of probabilities, I am satisfied that Mr Xu undertook work for ADL while he was overseas, and he was not on annual leave during this period.

[48] Therefore, Mr Xu is entitled to wage arrears for the period 10 to 30 September 2023.

[49] Within 28 days of the date of this determination, I order ADL to pay Mr Xu the sum equivalent to two weeks wages (gross) and the sum equivalent to 8% of this amount.¹²

¹² Holidays Act 2003, s 25(2).

Does ADL owe Mr Xu annual holiday pay pursuant to s 28(4) of the Holidays Act 2003 (HA03) and, if so, should a penalty be issued?

[50] During the term of his employment with the company, ADL paid Mr Xu's annual holiday pay with his ordinary pay for each pay period.

[51] Mr Xu was employed on a permanent full-time basis with ADL. Therefore, ADL was not able to pay Mr Xu's annual holiday pay with his ordinary pay.¹³

[52] ADL has incorrectly paid annual holiday pay with Mr Xu's ordinary pay.

[53] Despite the payments made by ADL, Mr Xu is entitled to annual holiday pay in accordance with s 16 of the HA03.¹⁴

[54] Mr Xu commenced employment with ADL on 1 March 2021.

[55] Within 28 days of the date of this determination, I order ADL to pay Mr Xu the sum equivalent to 4 weeks' paid annual holidays for each period of 12 months continuous employment, and for the final year of his employment ADL is to calculate and pay Mr Xu annual holiday pay in accordance with s 25 of the HA03.

[56] The purpose of the HA03 and the text of s 28B(2) of the HA03, requires an employee's annual holiday entitlement to be restored as if the payment had not been made. However, ADL may decide to bring a new application to the Authority to recover what they perceive to be mistaken annual holiday payments made to Mr Xu.¹⁵

Did ADL breach any provision of the employment agreement, and if so, did Mr Su and/or Mr Zhang aid or abet a breach of any provision of the employment agreement?

[57] There is insufficient evidence to establish this claim. This claim does not succeed.

¹³ Holidays Act 2003, s 28(1).

¹⁴ Holidays Act 2003, s 28(4).

¹⁵ *Smart Sushi Northwest Limited v A Labour Inspector of the Ministry of Business Innovation and Employment* [2025] NZEmpC 236 at [45].

Remedies

Penalty – Minimum Wage Act 1983

[58] Section 133A of the Act sets out a number of factors the Authority must have regard to in determining whether a penalty is appropriate and, if so, the quantum. In addition, the full Court in *Borsboom v Preet PVT Ltd* has set out other factors when determining a penalty application.¹⁶

[59] ADL breached s 6 of the Minimum Wage Act 1983 by not paying Mr Xu during the first month of his employment with the company. Although Mr Zhang believed Mr Xu was not an employee during the first month of his engagement with the company, there was evidence in support of Mr Xu's claim that he was undertaking work for ADL during this period and was not being paid.¹⁷

[60] However, the breach of the Minimum Wage Act 1983 was not committed knowingly. The breach was rectified after the first month of employment with ADL. The Authority is not aware of any history of previous breaches.

[61] ADL had a statutory obligation to comply with the provisions of the Minimum Wage Act 1983. A penalty is justified in the circumstances. A penalty of \$1,000 is appropriate in the circumstances.

[62] Within 28 days of the date of this determination, I order ADL to pay a penalty of \$1,000 to the Crown.

Penalty – Holidays Act 2003

[63] Although there was a technical breach of the HA03, because ADL paid annual holiday pay with Mr Xu's ordinary pay, there is no justification to issue a penalty pursuant to s 75(2) of the Act. This was not a situation where deterrence is required. Mr Xu did not sustain any loss due to ADL's error.

¹⁶ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 at [151].

¹⁷ *Labour Inspector v Southern Taxis Limited* [2021] NZCA 705 at [57].

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

[64] An award of compensation is for the impact on the employee of the personal grievance and is not intended as punitive action to signal disapproval of the employer's conduct.¹⁸

[65] In considering an award of compensation, the assessment required is the nature and extent of harm caused to the employee by the employer's breach.¹⁹

[66] At the investigation meeting I listened carefully to Mr Xu's evidence regarding the impact of the dismissal on. Following the meeting where Mr Xu was told he was being dismissed, he sought advice from his doctor. The dismissal came as a shock to Mr Xu, it affected his emotional and mental health, and in particular caused him to struggle with his sleep.

[67] In the context of a redundancy situation, the purpose of consultation is to allow an employee the opportunity to consider and process an employer's proposal. Mr Xu was not provided with that opportunity.

[68] Taking all of these factors into account, an award of \$14,000 compensation under s 123(1)(c)(i) of the Act is appropriate in this case.

[69] Within 28 days of the date of this determination, I order ADL to pay Mr Xu the sum of \$14,000 pursuant to s 123(1)(c)(i) of the Act.

Reimbursement of lost wages

[70] Mr Xu seeks lost remuneration as a result of the personal grievance for unjustified dismissal, pursuant to s 128(1) of the Act. Mr Xu seeks the sum equivalent to 3 months' ordinary time remuneration.²⁰

[71] The termination letter sent to Mr Xu did not refer to any commercial reasons for making his position redundant. Mr Xu was not provided with any information explaining why his position was no longer required.

¹⁸ *Paykel Ltd v Ahlfield* [1993] 1 ERNZ 344 at [342].

¹⁹ *Pyne v Invacare New Zealand Limited* [2023] NZEmpC 179 at [41].

²⁰ Employment Relations Act 2000, s 128(2).

[72] If ADL did have concerns about its financial position, it did not outline these concerns or explain to Mr Xu the savings it would achieve by disestablishing his position. Therefore, this is not a case where Mr Xu's dismissal was likely inevitable.²¹

[73] I have reviewed the information Mr Xu has provided the Authority. I am satisfied the steps Mr Xu took in the period between the final day of his employment with ADL and securing new employment, were reasonable, therefore he is entitled to recover his losses for that period.²²

[74] Within 28 days of the date of this determination, I order ADL to pay Mr Xu the sum equivalent to 3 months' ordinary time remuneration.

[75] Mr Xu did not contribute to the situation that gave rise to the personal grievance he has established. Accordingly, no reduction in remedies is required under s 124 of the Act

Summary and orders

[76] Within 28 days of the date of this determination ADL is ordered:

- (a) to pay Mr Xu the statutory minimum wage rate (gross), which was in force in March 2021, based on a 40-hour work week for every week in the month of March 2021 (the Sum Owed); and
- (b) to pay Mr Xu the sum equivalent to 8% of the Sum Owed (gross); and²³
- (c) to pay Mr Xu the sum of \$7,400 (gross); and²⁴
- (d) to pay Mr Xu the sum equivalent to two weeks wages (gross) and the sum equivalent to 8% of this amount; and²⁵
- (e) to pay Mr Xu the sum equivalent to 4 weeks' paid annual holidays for each period of 12 months continuous employment, and for the final year of his employment ADL is to calculate and pay Mr Xu annual holiday pay in accordance with s 25 of the HA03; and
- (f) to pay Mr Xu the sum of \$14,000 pursuant to s 123(1)(c)(i) of the Act; and

²¹ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [26]; *Butler v Ohope Chartered Club Inc* [2021] NZEmpC at [16]-[32]; and *Faitala v The Pacific Island Business Development Trust* [2026] NZEmpC 53 at [74].

²² *Maddigan v Director-General of Conservation* [2019] NZEmpC 190 at [164].

²³ Holidays Act 2003, s 25(2).

²⁴ Employment Relations Act 2000, s 131(1).

²⁵ Holidays Act 2003, s 25(2).

- (g) to pay Mr Xu the sum equivalent to 3 months' ordinary time remuneration (gross); and
- (h) to pay a penalty of \$1,000 to the Crown.

Costs

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

[78] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Xu 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, ADL 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.

[79] 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.²⁶

Simon Greening
Member of the Employment Relations Authority

²⁶ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.