

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2021] NZERA 577
3124634

BETWEEN ZHAOBIN BAN
 Applicant

AND YUEWEI XIE
 Respondent

Member of Authority: Sarah Kennedy

Representatives: May Moncur, advocate for the Applicant
 Yuewei Xie, in person for the Respondent

Investigation Meeting: 12 August 2021 at Whanganui

Submissions received: 18 August and 6 December 2021 from Applicant
 13 August and 17 December 2021 from Respondent

Determination: 22 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Zhaobin Ban claims that during his employment at Noodle Canteen in Whanganui, he was not paid correctly. He says he routinely worked 66 hours per week over six days but was paid wages for 40 hours per week. As a consequence, Mr Ban says he was not paid for all the time he worked and the remuneration he was paid did not meet the applicable statutory minimum wage rate when having regard to the total number of hours worked. Mr Ban also says he worked on 13 public holidays and was not paid correctly because he received his normal pay for those days.

[2] Mr Ban seeks wage and public holiday arrears, penalties, and costs.

[3] Yuewei Xie says Mr Ban's claims are not based on facts and that Mr Ban was paid correctly and in accordance with the terms and conditions of his individual employment agreement (IEA). Mr Xie says Mr Ban never worked more than eight hours a day or five days a week and he was able to enjoy New Zealand public holidays because Mr Ban did not work on any public holidays.

[4] Mr Ban gave oral evidence at the investigation meeting of paying a fee to secure employment in New Zealand. The Authority's investigation was expanded to include whether or not this payment constituted a premium. However, Mr Ban was not able to provide any further information about the alleged financial transaction and Mr Xie says he has no knowledge of this matter because he did not receive any such money from Mr Ban. Based on the evidence available, other than enquiring into it, the Authority is taking no further action in relation to this issue.

The Authority's investigation

[5] For the Authority's investigation, I was informed that Mr Ban speaks Mandarin and "no English" and Mr Xie speaks Cantonese and "not much English". Both Mr Xie and Mr Ban gave oral evidence with the assistance of a translator and answered questions under oath or affirmation from me and from each other. Both provided written submissions and supplementary submissions on penalty.

[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.

Issues

[7] The issues requiring investigation and determination are:

- (a) Whether Mr Ban is owed unpaid wages and statutory holiday pay?
- (b) Is Mr Xie liable for penalties for breaches of minimum standards and, if so, in what amount?
- (c) Is Mr Xie also liable for penalties for breaches of good faith and, if so, in what amount?
- (d) Should either party contribute to the costs of representation of the other party?

Background

[8] Mr Xie employed Mr Ban through an agent in China to work as a Chinese Cuisine Chef at Noodle Canteen in Whanganui from 28 May 2018 to 15 June 2020 when Mr Ban resigned. Mr Ban's New Zealand work visa required him to have full time work under an employer's sponsorship.

[9] Mr Ban's IEA provided that the commencement date was to be "upon receipt of a work visa from Immigration New Zealand." He was to work 40 hours per week at \$21.00 per hour and but it did not specify days or shifts or make reference to a working week of more than 40 hours in total. It provides an entitlement to four weeks leave per year and stated in compliance with the Holidays Act that if the employee was required to work on a public holiday, they received a paid day in lieu plus a payment of time and a half.

[10] The wage and time records for Mr Ban (and five other employees of Noodle Canteen) consistently record all employees working eight hours a day, five days a week, with the occasional week recorded as a 32-hour week when a public holiday fell in that week. Mr Ban's gross pay is recorded as \$840.00 per week and after tax as \$700.18. Mr Ban's signature appears in the last column of his wage and time records against each row. Each row represents a week of work.

[11] The work records show Mr Ban working Tuesday to Saturday when he first started in May 2018 and after a four-week block of leave in July/August 2019 his workdays changed to Monday to Friday until resignation. Mr Ban says regardless of what is recorded in the wage and time record, he actually worked six days a week Tuesday to Sunday initially and then Monday to Saturday.

[12] After resignation, Mr Ban moved to Auckland and transferred his work visa to his new employer. It was then that Mr Ban became aware that he had not been paid correctly considering the hours he had worked at Noodle Canteen. On more than one occasion Mr Ban contacted Mr Xie (and Mr Xie's wife) and raised issues about outstanding wages and statutory holiday pay resulting in his final communications and text message (translation provided at the investigation meeting) as follows:

"Hello boss my visa has been approved so could you finalise my wages and process it. Plus holiday pay in NZ dollars. I worked for you for 2 years at 11

hours per day. That is hard earned money so better to be processed quickly. I'm not saying anymore (or there is no need to say anymore). You are a wise man."

[13] Shortly after there was a brief telephone call between Mr Ban and Mr Xie that did not resolve the issues. They both said they argued and "scolded" each other. Mr Xie hung up and blocked all further messages on his phone from Mr Ban. Mr Ban sent a further text that said, "Boss do not threaten me over the phone." Mr Xie did not receive that message because he had blocked all communications from Mr Ban by then.

[14] Mr Ban instructed May Moncur, advocate, who raised a wage arrears claim in writing with Mr Xie in August 2020.

Mr Ban's evidence

[15] Mr Ban gave evidence that during the recruitment process in China he paid approximately \$30,000 to Mr Xie's agent in order to secure the employment and he took out a loan to make that payment. He said that at the time the agent in China warned him that he must do what his employer told him and that if he did not, his visa would be cancelled.

[16] When Mr Ban started work, he says he was asked to sign more than one blank column on blank pages of the wage and time record and later to sign at the beginning of each week. Mr Ban says the detail of each row was filled in later. In time he was asked to sign two weeks at a time and that is when the signature appears between the lines.

[17] Mr Ban said he knew something was not right when he was asked to sign blank columns beside empty rows, but he felt he had no choice. He said when he first arrived he knew to obey the terms and conditions of his contract and that if people asked him and he said things other than what was in contract then Mr Xie would have to send him home. If his visa was cancelled, he would have to go back to China and pay back the loan. Mr Ban said he and his family could not survive if they had to pay back the loan if he was not working in New Zealand. His evidence was that he was fearful of his employer on the basis that he was on an immigration visa and needed to be sponsored by Mr Xie as his employer and that is why he did what he was told.

[18] Mr Ban's evidence was that he worked at the shop from 11:00am to 10:00pm and sometimes he finished later than 10:00pm after tidying and cleaning. He says he did not get regular breaks and when he did, they were often not until late. His evidence was that he worked for 11 hours with a short meal break with small additional breaks when work allowed. Mr Ban denied that he worked split shifts after Mr Xie gave evidence about split shifts.

[19] Mr Ban seeks \$50,077.44 minimum wage arrears. This is based on Mr Ban working six days per week, 11 hours per day (11am – 10 pm) for 96 weeks, taking into account a half hour unpaid lunch break. It includes holiday pay.

[20] Public holiday arrears are also sought in the sum of \$4,504.50. This is calculated on the basis that Mr Ban worked all 13 public holidays (a total of 143 hours) during his employment but was not paid time and half.

Mr Xie's evidence

[21] Mr Xie did not accept that Mr Ban worked any more than 40 hours over five days each week. Mr Xie says he kept complete wage and time records (handwritten in the book) recording daily and weekly working hours and the wages Mr Ban was entitled to.

[22] Mr Xie's evidence was that Mr Ban did not work on any public holidays and said that Mr Ban was able to enjoy New Zealand's public holidays. Mr Xie kept a separate holiday and leave record which records Mr Ban taking a leave day on all 21 public holidays during his period of employment. Mr Xie also said the shop was not open on every public holiday and if it was, he and sometimes his wife and children worked in the shop.

[23] Mr Xie denied Mr Ban was ever asked to sign any records when the rows or pages were blank but agrees he asked Mr Ban sign weekly and then fortnightly.

[24] Mr Xie says they were in an employment relationship in accordance with the IEA, he has never threatened Mr Ban, and Mr Ban could have said at the time that he had a problem. He also pointed out he has no right to send Mr Ban back to China or to

cancel his visa. Mr Xie's evidence is that Mr Ban was paid according to the IEA and Mr Ban's signature in the wage and time records is evidence of that.

[25] When asked about the detail regarding start and finish times Mr Xie said in evidence that if Mr Ban started at 11:00am, for example, he would work eight hours from 11:00am to 3:00pm, take a break and then work 4:00pm to 7:30 or 8:00 pm. When Mr Xie was asked who carried on until the shop closed, he changed his evidence to say he organised the workers into split shifts to cover the opening hours and provide time for tidying and cleaning. Mr Xie could not confirm start and finish times of the split shifts or the breaks, saying that they all worked "flexibly".

[26] Mr Xie remained adamant throughout his evidence that no roster was required even with split shifts and flexible start and finish times. The wage and time records do not assist because they do not specify start and finish times or provide a record of breaks or split shifts.

[27] Mr Xie told me that he had been in business since 2009 and that he was told by the Department of Labour to keep the wage and time record which he says he has done and maintained in his evidence and submissions that Mr Ban worked 40 hours per week and never worked on a public holiday.

Analysis

Split shifts or 8-hour workdays

[28] After much questioning about opening hours and the number of employees, Mr Xie changed his evidence to say that Mr Ban and others worked split shifts but despite his acceptance the employees worked split shifts, Mr Xie could not confirm the number of hours in the first or second part of the shift, or the length of time of any break in the middle of a workday or the daily or weekly work pattern. He said there was no set start time because that was flexible, and yet maintained there was no written system or roster to co-ordinate and communicate to Mr Ban and others when they were required to work.

[29] Mr Xie's evidence was that he confirmed verbally with the workers each week what he had decided they were working and the hours the shifts were split into.

[30] I note at this point that Mr Ban's evidence that he worked 11-hour days is largely consistent with the shop opening hours. Given the change in Mr Xie's evidence over the course of the investigation meeting, I find Mr Xie's evidence to be lacking in credibility regarding the hours that Mr Ban worked.

Number of employees

[31] On review of the wage and time records, it is unlikely there were sufficient employees to cover the shop opening hours given the number of workers employed at the same time as Mr Xie, if they were completing eight hour shifts five days a week. The work records provided show over the time Mr Ban was employed there were two periods between 28 August 2018 and 17 February 2019 and a week in January 2020 when there were three workers. At all other times there were only two workers (including Mr Ban).

[32] This means that with predominantly two employees, working eight-hour shifts, five days a week, and Mr Ban always having a worker with him, the available worker hours (40 hours) fall well short of covering the total number of opening hours (74.5 hours) if two workers were always required (which was Mr Xie's evidence).

[33] Mr Xie said much later in his evidence that his wife and children filled in on occasions but did not provide this information initially and provided no evidence of this. I do note Mr Xie's evidence that he is also a chef. With three workers potentially there were enough worker hours to cover the opening hours with Mr Xie working but Mr Xie's evidence was that he filled in when needed, not that he worked full-time in the shop and during most of the period of Mr Ban's employment there were only two workers.

Public holidays

[34] Mr Xie said that Mr Ban was able to enjoy New Zealand's public holidays and gave evidence that Mr Ban never worked on a public holiday. He also said he did not always open the shop on every public holiday. Mr Ban is recorded in the holiday and leave record as having taken leave for all 21 public holidays during his period of employment.

[35] I note Mr Ban's claim, that he worked 13 out of 21 public holidays, is consistent with Mr Xie's evidence that the shop was closed on some public holidays. I also note some inconsistencies between Mr Ban's wage and time and holiday and leave record and some anomalies with leave days recorded in the wage and time record.

[36] On five occasions when public holidays fell on a Monday (but Monday was not recorded as a workday for Mr Ban), the wage and time record records him as not working the day after those public holidays. This starts after Queens Birthday on 5 June 2018, when Mr Ban had only been employed for eight days.

[37] This pattern continues for five out of seven public holidays until Mr Ban changed his days of work to Monday to Saturday after taking a four-week block of annual leave from 22 July 2019 to 10 August 2019. At that point the pattern of a day off after a public holiday ends. There are no other single days of leave recorded other than public holidays after Mr Ban started working Mondays. This pattern suggests that these single days of leave were in fact, days off in lieu for Mr Ban after he worked the preceding public holiday. Otherwise, he would have worked seven days in a seven day stretch according to Mr Ban's evidence.

[38] These single days off are also not recorded in the holiday and leave record and the tally at the top of that record shows total leave taken is 20 days which covers the four-week block of leave taken in July 2019 and not the extra single days.

[39] Noting this was Mr Ban's first employment in New Zealand on a temporary work visa, he was unfamiliar with New Zealand Employment Law, and the inherent power imbalance in employment relationships, I accept the evidence of Mr Ban that he worked up to 66 hours a week over six days.

Conclusion

[40] There are direct conflicts in the evidence of the parties, however, with the assistance of a translator, accepting that English was an additional language (for both parties), I still found Mr Xie's evidence to be evasive and inconsistent, particularly about start and finish times.

[41] In relation to statutory holidays, the inconsistencies set out above are sufficient for me to be satisfied on the evidence available that those were likely to be days in lieu after working a statutory holiday. I find that it was the practice of Mr Xie to have Mr Ban work on statutory holidays and as a result, Mr Ban has not been paid correctly for statutory holidays.

[42] In addition, considering the total number of opening hours compared with the number of workers (set out above), Mr Xie's evidence changing and that I do not find it credible that no roster was required to co-ordinate the Chinese chefs (including Mr Xie) working flexible split shifts, I have preferred the evidence of Mr Ban in relation to the number of hours worked.

Result (wage arrears and statutory holiday pay)

[43] I find that Mr Xie owes Mr Ban wage arrears of \$50,077.44 set out above at paragraph [19]. I also find that Mr Xie owes Mr Ban statutory holiday arrears of \$1501.50 which is the half component of the time and half that he was not paid and differs from the amount set out at [20] above. These amounts must be paid to Mr Ban within 28 days of this determination.

Penalties

[44] Penalties were sought by the Applicant but not argued by the parties at the hearing, however, both parties were given an opportunity to provide further written submissions on penalties.

[45] In determining the quantum of penalties to be imposed, if any, s 133A of the Act sets out the relevant matters the Authority is to have regard to as follows:

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including –

- (a) The object stated in section 3; and
- (b) The nature and extent of the breach or involvement in the breach; and

- (c) Whether the breach was intentional, inadvertent, or negligent; and
- (d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or person involved in the breach, because of the breach or involvement in the breach; and
- (e) Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) Whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[46] For the purposes of determining penalties, the Authority must assess the statutory considerations set out in s 133A of the Act and take account of the guidance set out in the relevant case law, including *Borsboom v Preet PVT Ltd*, *A Labour Inspector v Prabh Limited*, and *A Labour Inspector v Daleson Investment Limited*.¹

[47] In *Preet* the Employment Court set out a four-step approach to fixing penalties where there have been multiple breaches of minimum employment standards:

- a. Step 1 – Identify the nature and number of breaches.
- b. Step 2 – Assess the severity of breaches considering both aggravating and mitigating factors.
- c. Step 3 – Consider the means and ability of the respondent to pay.
- d. Step 4 – Ensure that the amount arrived at after the first three steps is proportionate to other cases and the extent of the breaches.

[48] In *A Labour Inspector v Matangi Berry Farm Limited*,² the Court applied an approach to penalty setting which assessed the factors in s 133A of the Act and then

¹ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143; *A Labour Inspector v Daleson Investment Limited* [2018] NZEmpC 110; and *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110.

² *Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

applied those and other considerations identified in *Preet* using the four-step process to quantify the penalty.

[49] In *Preet*, the Employment Court observed it may be appropriate to consider whether multiple but materially identical breaches arising from a particular course of conduct should be treated as a global single breach (noting care should be taken to ensure a global approach does not result in an artificially low penalty).³

Number and nature of breaches

[50] Penalties are sought for:

- Failing to keep wage and time records (s130 of the Act),
- Breach of the IEA namely failing to pay wages for all hours worked (s 134 of the Act),
- Breaches of the requirement to pay minimum wage for all hours worked (s 10 Minimum Wage Act)
- Breaches of the requirement to pay time and half for working on public holidays (s 75 Holidays Act); and
- Breach of good faith (s 4 of the Act).

[51] I consider that penalties for failing to keep wage and time records and to pay minimum wage for all hours worked are appropriate given the nature and extent of the breaches I have found to be made out.

[52] Both the Minimum Wage Act 1983 and the Employment Relations Act 2000 allow for penalties to be imposed.⁴ The maximum penalty for a single breach by an individual, such as Mr Xie, if found liable for a penalty, is \$10,000 per breach.⁵ With two breaches there is potential total liability for penalties amounting to \$20,000 for Mr Xie as a consequence.

[53] Ms Moncur on behalf of Mr Ban submits the breaches were deliberate, repeated and conducted solely for maximising business profit and that Mr Xie has taken advantage of the power imbalance between the parties. Regarding failure to keep (accurate) wage and time records, she submits the employer has obtained significant

³ *Preet* above n1 at 100 and 141.

⁴ Minimum Wage Act 1983, s 10; and Employment Relations Act 2000, ss 130(4) and s 133.

⁵ Employment Relations Act 2000, s 135(2)(a).

financial benefit and unfair market advantage from these breaches and undermined the Authority's investigation.

[54] Ms Moncur submits that Mr Xie failed to take any steps to mitigate the negative effects of the breaches and contrasts that with the "extraordinary efforts" Mr Ban has had to go to pursue his claim.

[55] Mr Xie's submissions on penalty set out his position that Mr Ban was abusive on the phone when he tried to address the concerns about pay, that he had emailed the wage and time records, and that he knows nothing of the payment made to the agent in China. He also says all the workers had the same wage and time records and Mr Ban was unable to explain that at the meeting. He submitted that Mr Ban's claims are all fabricated and therefore no penalties are payable.

[56] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.⁶

Aggravating features

[57] Aggravating features include the vulnerability of migrant workers which was a factor in this case because Mr Ban's work visa was connected to Mr Xie as the employer. The wage and time records do not reflect the number of hours worked or split shifts, which means I consider the failure to keep accurate records to be intentional in this case. I also note the records that do exist were not provided to Mr Ban until the hearing and Mr Xie took no steps to mitigate the breaches and continues to deny any breaches.

[58] Following the approach set out in *Preet*, I have adopted a starting point of 80 per-cent for breaches of the Minimum Wage Act⁷, taking into account the similar aggravating factors. This means that at this point the proposed penalties to be imposed on Mr Ban are \$16,000.

⁶ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁷ *Preet* above n1 at [167].

Financial circumstances of Mr Xie

[59] No submissions were provided that were relevant to consideration of Mr Xie's financial circumstances in the imposition of penalties, but I note that Mr Xie was unrepresented and appears to be running a small business. No mitigating factors were put forward and his submissions were brief and focussed on his view that Mr Ban has fabricated his claims.

Proportionality of outcome

[60] Penalties are to be proportionate to the arrears found to be owing by the Authority which would amount to \$16,000. The breaches were ongoing through the course of the employment period. I note Noodle Canteen is a small business and Mr Xie has not come to the attention of the Authority before. Standing back and considering the overall merits of the case, I consider a penalty of \$10,000 to be appropriate.

Result (penalties)

[61] Noting that the purpose of penalties is both punishment and to deter the conduct, taking all relevant factors into consideration, it is appropriate to impose a significant but proportional penalty of \$10,000 on Mr Xie.

[62] Ms Moncur submitted that a portion of the penalty should be paid to Mr Ban. In the circumstances of this matter, including the aggravating circumstances set out above, I have decided that a portion of the penalties should be paid to Mr Ban. Mr Ban is to receive a \$1,000 penalty for each breach.

Orders

[63] Mr Xie is to pay Mr Ban wage arrears of \$50,077.44 and statutory holiday arrears of \$1,501.50 within 28 days of this determination.

[64] Mr Xie must also pay a total penalty of \$10,000.00 within 28 days of this determination. A portion of this penalty amounting to \$8,000.00 is to be paid to the Employment Relations Authority which is to be paid by the Authority into a Crown bank account. Mr Xie must also pay the balance of \$2000.00 to Mr Ban.

Costs

[65] Costs are reserved.

Sarah Kennedy
Member of the Employment Relations Authority