

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 461

3124159

BETWEEN

SHAN JAN (ALLEN) CHEN  
Applicant

A N D

TOWER SCAFFOLDING GROUP  
LIMITED  
Respondent

Member of Authority: David G Beck

Representatives: Rebecca White, counsel for the Applicant  
No appearance by the Respondent

Investigation Meeting: 10 August 2021 in Christchurch

Submissions Received: 10 August 2021 from the Applicant  
No submissions from the Respondent

Date of Determination: 19 October 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Shan Jan (Allen) Chen says that when he left the employment of Tower Scaffolding Group Limited (Tower) on 11 June 2020 as a result of being made redundant (a process not contested), his accrued holiday payment was not correct and during the March 2020 Covid-19 lockdown period his salary was unilaterally reduced. Mr Chen also claimed Tower did not provide him with an employment agreement.

[2] Mr Chen claimed: wage arrears; outstanding holiday pay and interest and various penalties for identified statutory breaches.

[3] Mr Chen's counsel filed the matter with the Authority on 6 November 2020 and Tower's then counsel, provided a response on 20 November 2020 (statement in reply). The response indicated Tower does not accept they owe Mr Chen wage arrears. That Tower has been in the process of reviewing the payslip records to determine whether any genuine holiday pay due remains unpaid. The amount of holiday pay Mr Chen claims is outstanding was incorrect due to a suggestion that Mr Chen entered data into Tower's payroll system without their knowledge, agreement or consent.

[4] Further that any breach of the Holidays Act by Tower was outside its control and a result of actions of Mr Chen. The Respondent did not fail to provide Mr Chen with a written employment agreement, as an updated employment agreement was sent to Mr Chen on or about April 2019. However, the signed copy may have been lost when it was posted from Christchurch to Auckland.

[5] As a result of the Covid-19 level 4 lockdown, Tower's business was adversely affected. Tower obtained Wage Subsidies from the Government. Pursuant to the guidelines of the Government, Tower applied the wage subsidies to all of its employees, including Mr Chen. Mr Chen did not oppose or object to this. Tower does not owe any salary or wage arrears. The issues between the parties are largely business dispute related rather than employment.

[6] The parties were directed to mediation but the matter remained unresolved.

[7] As the matter progressed to the setting down of a directions conference to timetable an investigation meeting, Tower's then counsel indicated on 28 April 2021 that they were no longer acting for Tower. From this point onwards Tower has not participated in the Authority proceedings, including failing to file evidential briefs as directed and no one from Tower attended the investigation meeting. I am satisfied that Tower were aware of the directions teleconference, as a call to a director of Tower to join the teleconference was attempted but he hung up. Further to this, the notice of the investigation meeting was served upon the directors

of Tower and they have been provided with Mr Chen's and his supporting witness's statements.

### **The Authority Investigation**

[8] At the investigation meeting I considered written and heard evidence from Mr Chen; Wei (Vivian) Cheng a former Tower employee (payroll administrator); Kenneth Hai Feng a Tower shareholder and Xiaolin (Maggie) Wen a former Tower accounts administrator. I was ably assisted by Charlene Voon, an independent interpreter.

[9] Pursuant to s 174E of the Employment Relations Act 2000 I make findings of fact and law and outline conclusions on matters to resolve the disputed issue and make orders, but I do not record all evidence and submissions received.

[10] The issues to be decided are:

- i. Is Mr Chen owed holiday pay and if so, how much?
- ii. Did Tower comply with relevant statutory provisions in reducing Mr Chen's remuneration during the initial 2020 Covid-19 lockdown period?
- iii. If Mr Chen's claims are established, what remedies should be awarded, including consideration of whether Tower should be the subject of any penalty actions.
- iv. An assessment of the level of costs to be awarded to the successful party.

### **What Caused the Employment Relationship Problem?**

[11] Mr Chen says he has worked in the construction/scaffolding industry for 16 years and commenced employment with Tower in April 2015 as an Operations Manager overseeing their Christchurch branch. Tower also operates within and is based in Auckland.

[12] As context prior to April 2015, Mr Chen was employed by Kwikserve (South Island) Scaffolding limited, a company he was also a director and shareholder of. Kwikserve was a company established by Kenneth Hai Feng's father (Shu Pan Fung) who also started Tower in 2005 and Mr Fung worked alongside Mr Chen. Kwikserve merged with Tower and then

Tower later, pursuant to a Joint Venture Agreement in July 2018, entered a relationship with two other scaffolding companies. Kwikserve was removed from the Companies Register on 20 May 2019.

[13] When Mr Chen started working for Tower he was not provided with an employment agreement but says his employment was transferred from Kwikserve to Tower and it was agreed this would be a 'seamless' transfer with continuity of salary and terms and conditions including accumulated holidays.

[14] Tower's statement in reply to the Authority conceded that Tower employed Mr Chen from around April 2015 and claimed that a written employment agreement was provided "in or about April 2019" but the signed copy was lost in the post. An unsigned copy was provided.

[15] As a result of the emergence of Covid-19 in March 2020, Tower was forced to close from 25 March and they obtained the initial wage subsidy for 48 employees (covering the period 27 March 2020 – 9 June 2020). By way of an email of 23 March 2020 to all employee's from Tower's HR advisor Tower indicated "at the current stage company is only able to pay each worker NZ\$585.80 before tax deduction per week to cover your basic living expenses until further financial plans announced by the government". Tower's statement in reply suggested Mr Chen "did not object to this reduction and given the circumstances, this was reasonably taken as consent".

[16] At the time of being placed on the wage subsidy rate Mr Chen's salary was \$90,000 per annum (\$1,730.77 per week). The wage records I was provided with however, show during the lockdown period Mr Chen's salary fluctuated - he was paid the subsidy amount of \$587.80 for two weeks from 29 March and then \$931.92 for two weeks, one payment of \$1,278.08 before being restored to \$1,730.77 for two weeks, then back down to \$1,384.62 up until 12 June 2020. Mr Chen claims wage arrears for this period in the amount of \$4,340.39.

[17] In June 2020 Tower decided to close the Christchurch branch and 36 roles were disestablished, including Mr Chen's, with his last day of employment being 11 July 2020.

[18] At the time of Mr Chen's employment ending he says the accumulated leave balance owed was 1590.30 hours, amounting to \$65,339.72. This is the amount in dispute as Tower did not pay this to Mr Chen in his final pay. Email exchanges of 14 July 2020, provided to the Authority from Tower's HR advisor to Vivien Cheng (then Christchurch payroll administrator) detail that a hold was deliberately placed upon paying out Mr Chen's holiday pay in his final pay when he was made redundant "until further notice given by management".

[19] Mr Chen says the amount of accumulated leave "made sense to me because I hardly ever took leave" and that he knew his leave balance had been transferred from Kwiksave to Tower. Mr Chen says attempts to obtain his final holiday pay foundered including an attempt by Tower directors to sell the company to him with the holiday pay amount due being discounted from the purchase price. Mr Chen produced a draft credit note dated 8 September 2020 evidencing this discount that referenced the amount of holiday pay balance outstanding as \$92,306 (a figure that included without a breakdown an unspecified "other reimbursement").

[20] Mr Chen then instructed counsel who wrote to Tower's directors Ming Xian Feng and Normand Liang on 25 September 2020, challenging the restructuring process, seeking the accrued holiday pay owing, requesting holiday and leave records and Mr Chen's individual employment agreement.

[21] Tower's then counsel responded by way of a letter of 30 September 2020 on behalf of "Tower Scaffolding Group Limited" indicating:

1. Our client is aware of its obligations to its employees.
2. The holiday pay in question has been or will be made as soon as practicable and relevant records will be provided.
3. We are taking instructions about the requirement in paragraph 6 of your letter (i.e. copy of individual employment agreement and documentation about restructuring process).

[22] After a further email exchange Tower's counsel on 12 October 2020 wrote they were instructed to:

1. Enclose record of your client's leave balances, leave history report and employee pay summary report;
2. Enclose copies of letters of 23 June 2020 and 6 July 2020 in relation to "restructuring process";
3. Note that about 'unpaid holiday pay', it is due to incorrect entries of record, and our client has been trying to correct the record with your client.

[23] I observe in the enclosed document headed "Leave Balances for Shan Jan Chen" his leave balance not taken shows 1590.30 hours and \$65,339.72 owing. An accompanying "Leave History Report" commences in the pay period ending 29 March 2015 and has an opening balance of 1,077.31 hours cited as "Earned Adj". Mr Chen says this represents the agreed accumulated leave carried over from Kwikserve. No further correspondence was entered into.

#### **Evidence given at investigation meeting**

[24] Vivian Cheng indicated that she commenced with Tower in February 2017 as a payroll administrator overseeing Tower's operation in Christchurch and Timaru. Ms Cheng indicated Tower used payroll software that automatically calculated leave and was of the opinion that any adjustments or alterations would have to be made with the assistance of the software company.

[25] Ms Cheng confirmed Mr Chen always followed the leave application process set up and would submit an application form whenever he took leave. Ms Cheng could not recall Mr Chen approaching her about any holiday pay concerns.

[26] Ms Cheng confirmed that when Mr Chen was made redundant Tower's Auckland based HR advisor instructed her to pay the final pay owed, but to hold onto Mr Chen's holiday pay, "she said it would be sorted out between Allen and TSGL's shareholders".

[27] Ms Cheng recalled receiving individual employment agreements for waged staff distribution only around March/April 2019, as none were in place. Ms Cheng recalled some remained unsigned but there was no follow up on these.

[28] Ms Cheng could not recall Mr Chen being provided with an employment agreement or Peter Tanner the then general manager in Christchurch receiving one, but she signed her own employment agreement with her employer being named as Tower Scaffolding Holdings Limited.

[29] Ms Cheng recalled being paid her normal full salary during the 2020 Covid-19 lockdown period as she worked from home.

[30] Xiaolin (Maggie) Wen indicated she commenced with a Tower entity (Tower Scaffolding Limited) in June 2012 as an accounts administrator responsible for payroll. In April 2013 as three scaffolding companies (including Kwikserve) merged, Ms Wen had her employment transferred to Tower Scaffolding Holdings Limited but she was not provided with an employment agreement. Ms Wen recalled having her accumulated leave balance transferred to the new entity.

[31] At the time of the merger, Ms Wen, working out of Auckland, says she was responsible for setting up a new company-wide payroll system using a specialist software provider. Prior to this, Ms Wen had used MYOB for payroll. Ms Wen says after the merger “the agreement was that all employees of merged companies, as well as their leave balances, would transfer to TSGL” rather than be paid out. Ms Wen recalled manually transferring all leave balances into the new payroll system. Ms Wen indicated that she had sole authority over payroll information and believed it was secure from anyone altering such.

[32] Kenneth Hai Feng who had been a group director of Tower up to 2017 (and remains a shareholder), affirmed that he knew Mr Chen through him having run Kwikserve with Mr Feng’s father. Mr Feng recalled that when the companies merged it was agreed that all assets and liabilities would be transferred including, accumulated staff holiday pay balances.

[33] Mr Feng's experience of Mr Chen was positive describing him as a "humble and honest man". It was Mr Feng's view that Tower knew that the holiday pay was legitimately owing but perceived the sum to be too much.

[34] I found all witnesses who gave evidence to be credible and convincing.

**Assessment - is Mr Chen owed holiday pay and how much?**

[35] Given that the existence of an accumulation of holiday pay owed was not contested and such is an entitlement under s24 Holidays Act 2003 where holidays are unused, the only issue to decide is how much is owed. I am persuaded in the absence of any evidence or documentation to the contrary of what was disclosed, that Mr Chen's accrued leave owed of 1590.30 hours is accurate, as it was based upon information provided by Tower and affirmed by the then payroll administrator.

[36] I find Mr Chen is owed \$65,339.72 c arrears of holiday pay.

**Was the reduction in Mr Chen's salary during lockdown a legitimate act?**

[37] In the absence of any employment agreement it is still evident that Tower had to obtain permission to unilaterally alter Mr Chen's salary and did not do so. CJ Inglis has pointed to the "widely understood common law rule" in *Gate Gourmet v Sandu* that:

.... where there are agreed hours of work cancelled by the employer, wages remain "payable" provided that the employee was ready and willing to work those hours.<sup>1</sup>

[38] I received no submissions from Tower apart from the suggestion made that a lack of protest from Mr Chen was implied consent to the changes in his salary rate. I find this contention unconvincing and evidence that Tower made no attempt to engage with Mr Chen.

[39] I find the fluctuating reductions of Mr Chen's salary were also a breach of s 4 Wages Protection Act 1983 and that he is entitled to recover wages owed as a remedy for this breach.

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<sup>1</sup> *Gate Gourmet v Sandu* [2020] ERNZ 561 at [57] and [60].

A finding Member Urlich also made in *Raggett v Eastern Bays Hospice Trust* was that: “Any short pays outstanding at the applicants’ final pay remain due and owing”.<sup>2</sup>

[40] I find Mr Chen is owed wage arrears in the sum of \$4,340.39.

### **Penalties?**

[41] I am not persuaded that penalties sought for the various breaches including non-provision of an employment agreement, are appropriate in the circumstances. In my view the transgressions Mr Chen’s counsel has identified though not minor or condoned, can be adequately remedied by my finding that Ms Chen has successfully established that arrears are due for payment. In making this assessment I rely generally upon s 160 (3) of the Act.

### **Interest**

[42] Section 123(1)(b) of the Act allows the Authority to consider reimbursing “other money lost” by the employee flowing from a grievance and interest plainly falls under this category of remedy. I find that interest as claimed should be paid on the unpaid holiday pay and lost wages awarded and I fix the period of such up to the day of the investigation meeting 10 August 2021.

### **Outcome**

[43] Overall I have found that Tower Scaffolding Group Limited must pay Shan Jan (Allen) Chen the sums of:

- i. \$65,339.72 (gross) to cover holiday pay owed;

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<sup>2</sup> *Raggett v Eastern Bays Hospice Trust* [2020] NZERA 266 at [37].

- ii. \$4,340.39 (gross) wage arrears to cover the shortfall that was not paid during the 2020 Covid-19 lockdown between 27 March 2020 – 9 June 2020; and
- iii. Interest is to be paid on both the above amounts in accordance with Schedule 2 of the Interest on Money Claims Act 2016 for the period 11 July 2020 until 10 August 2021.

### **Costs**

[44] Costs are at the discretion of the Authority and here Mr Chen was successful in his claims for arrears of wages and unpaid holiday pay owed in an investigation meeting that took half a day at which he was represented by counsel.

[45] I have taken into account that Mr Chen was pursuing minimum entitlements and that he was forced to issue proceedings. In such circumstances, I consider it is appropriate to order a significant uplift on the normal daily tariff as counsel has rightly suggested it would be inequitable not to grant such as Mr Chen will ultimately receive less than his statutory entitlement by virtue of having needed to engage counsel.

[46] In the circumstances I award Mr Chen a contribution to legal costs in the amount of \$8,000 to be paid by Tower Scaffolding Group Limited.

David G Beck  
Member of the Employment Relations Authority