

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 769
3308022

BETWEEN DONG CHEN
Applicant

AND TZC LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: The applicant in person
No appearance for the respondent

Investigation Meeting: 19 December 2024 in Auckland

Submissions (and other
information) received: At the investigation meeting and 19 December 2024 for
the applicant
Nothing provided for the respondent

Determination: 20 December 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Having been referred by an acquaintance, in January 2022 Dong Chen began working for TZC Limited (TZC or the company), primarily on construction and decking work. TZC is a building construction company. Mr Chen stopped working for the company in December 2023.

[2] Mr Chen has attempted to get payment for holiday pay since finishing but says TZC has not paid him.

[3] TZC's position appears to be that the rate it paid Mr Chen was higher than the minimum wage and included a component for holiday pay.

Authority's investigation

[4] TZC's sole director and shareholder Donghua (Tony) Zhang communicated with the Authority seeking an extension of time to lodge a statement in reply. Despite an extension being granted, no statement in reply was received.

[5] Then a case management conference was held on 8 October 2024 with Mr Chen and Mr Zhang in attendance. A date of 19 December 2024 was agreed for the investigation meeting which was almost two weeks after Mr Zhang was due back from a trip overseas.

[6] On 19 December 2024 there was no appearance by Mr Zhang or anyone else for TZC. An Authority officer made contact with Mr Zhang who said he had only recently arrived back from overseas and was unable to attend the meeting. Mr Zhang was informed that if he did not attend, the meeting may go ahead without him. The Authority officer called Mr Zhang back and made an offer for him to attend the investigation meeting by telephone. Mr Zhang declined that offer saying he was too busy.

[7] I was satisfied that TZC was aware of the investigation meeting, with Mr Zhang having agreed to the date and TZC being sent a notice of investigation meeting to the email address Mr Zhang had used to communicate with the Authority. I proceeded with the investigation meeting, assisted by an interpreter of the Cantonese language. Evidence was heard from Mr Chen under affirmation. Mr Zhang was then given the opportunity to provide any written comment and informed that his comment at the case management conference would be taken into account.

[8] After the investigation meeting Mr Dong provided the date on which he had surgery.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

Issues

[10] The issues to be determined are whether TZC owes Mr Chen annual leave, including consideration of s 28 of the Holidays Act 2003, and/or sick leave.

Mr Chen works for TZC

[11] Mr Chen started working for TZC from 10 January 2022, without being given an employment agreement. Mr Zhang told the Authority at the case management conference that as Mr Chen was being paid more than the minimum wage, the rate included a percentage for holiday pay. Mr Chen told the Authority there was no discussion between the parties to that effect.

[12] His initial work was on two properties in Hillsborough, Auckland. He was then moved to a project in Flat Bush.

[13] During the January to July 2022 period TZC paid Mr Chen in cash at a rate of \$23 an hour. In that period, he worked over 700 hours for the company.

[14] Mr Chen filed in the Authority a record of the days and hours he worked, based on figures he needed to provide to TZC to be paid wages. This record continued over his period of employment. Mr Chen was not aware of a company system for recording hours. The Authority directed TZC to provide wages and time records but it did not do so.

[15] Mr Chen regarded himself as full time, sometimes working nine or ten hours a day, six days a week. At other points if the weather was bad or the company did not have the requisite supplies, he would be told to go home or not work for a period.

[16] From about August 2022 TZC started paying Mr Chen into his bank account and his pay rate went up to \$30 an hour. Mr Chen has some IRD records of the amounts the company informed IRD it paid Mr Chen, although not covering the whole period of employment. No payslips as such were provided by TZC although occasionally he would receive a message identifying the hours being paid for and the total pay.

[17] From 29 October 2022 Mr Chen was assigned to work at the Commercial Bay site in central Auckland. That project continued until February 2023 when a temporary halt was called. A little work at another central city site followed in April 2023. He later did

some work in East Auckland for TZC although there were periods when no work was offered to him.

[18] From 5 to 19 December 2023 Mr Chen worked for TZC at a Manukau site. He refers to deciding to terminate his employment due to unpaid wages. He informed the Authority he has now been paid for the hours worked.

TZC's position

[19] At the case management conference, Mr Zhang told the Authority that Mr Chen was a casual worker, also referring to him as an apprentice. Mr Zhang said the lowest labourers were paid the minimum wage, around \$23 an hour but as Mr Chen was paid \$27 an hour, that covered for his annual leave and sick pay already.

[20] On that basis TZC does not believe anything is owing.

Mr Chen entitled to holiday pay

[21] Mr Chen did not take any paid annual leave during his employment with TZC and was not paid for holidays when his TZC employment finished. His employer would usually be required to pay out holiday pay on termination.

[22] TZC says Mr Chen was paid for his holidays ongoing as part of his pay. Annual holidays are permitted to be paid with an employee's pay in particular circumstances – s 28 of the Holidays Act 2003.

[23] Those circumstances are:

- (a) If an employee is employed under a fixed term agreement of less than a year, or works on an intermittent or irregular basis that makes it impracticable for the employer to provide 4 weeks' annual holiday - s 28(1)(a)(i) and (ii); and
- (b) The employee agrees in his or her employment agreement - s 28(1)(b); and
- (c) The annual holiday is paid as an identifiable component of pay – s 28(1)(c); and

(d) The annual holiday pay is not less than 8% of gross earnings – s 28(1)(d).¹

[24] All those s 28(1) criteria must be met in order to permit payment that is sometimes called ‘pay as you go’ holiday pay.

[25] TZC cannot meet all of those tests in this case. Even if it is arguable that Mr Chen’s work was intermittent or irregular, particularly in 2023, any arrangement of paying holiday pay with pay was not included in an employment agreement, as there was no agreement and the holiday pay was not an identifiable component of pay.

[26] As TZC does not meet the s 28 requirements, even though it sees itself as already having paid, Mr Chen became entitled to annual holidays.² As holidays were not taken during employment, Mr Chen is entitled to four weeks’ holiday for his first year of service and 8 % of his subsequent gross earnings.³ At the time of termination he was being paid \$30 an hour.

[27] For the completed year of service Mr Chen is entitled to four weeks’ annual leave calculated on the greater of ordinary weekly pay at the end of employment or average weekly earnings during the 12 months before termination.⁴

[28] I have calculated the greater sum as being ordinary weekly pay of \$609 gross, based on total earnings of \$2,436 gross (81.2 hours) in the four weeks before termination.⁵

[29] In addition, Mr Chen is entitled to 8% of his gross earnings from his first anniversary.⁶

[30] So TZC owes Mr Chen:

First year of service - ordinary weekly pay of \$609.00 x 4 weeks	\$2,436.00
Second year of service (partial) - 8% of gross earnings of \$9,913.50	\$793.08
Total	<hr/> \$3,229.08

¹ Emphasis added.

² Holidays Act 2003, s 28(4).

³ Holidays Act, ss 24 and 25.

⁴ Holidays Act, s 24(2)(a) and (b).

⁵ Holidays Act, s 8.

⁶ Holidays Act, s25.

Sick leave

[31] Mr Chen was not given paid sick leave when he worked for TZC. He seeks paid sick leave for time he had off after an operation on 18 January 2023. He showed the Authority a medical letter about the operation.

[32] By January 2023 Mr Chen had been in continuous employment for more than six months and therefore was entitled to paid sick leave.⁷

[33] There is no provision similar to s 28 of the Holidays Act, allowing sick leave to be regularly paid as part of wages during employment. TCZ should have paid Mr Chen sick leave in January 2023 and owes it to him now.

[34] The company provided no holiday and leave records, so these figures cannot be verified in the way they could be if proper records existed. However, I accept Mr Chen's evidence and find that he took two weeks off work.

[35] Sick leave is calculated at the rate of relevant daily pay or average daily pay for what would otherwise be a working day.⁸ As there was variation in Mr Chen's working hours, average daily pay is the appropriate calculation method.⁹ I have calculated his total hours worked for the year before as 1262.55 and the total days worked as 156, giving an average daily hours of 8.09.¹⁰ At the rate of \$30 an hour, this gives an average daily pay of \$247.70. At an average of three days work a week, TZC owes Mr Chen six days at \$247.70 gross, totalling \$1,486.20 sick pay.

Interest

[36] Mr Chen seeks interest on the money outstanding. He should have been paid for holiday pay on termination, which is now a year ago. Mr Chen should have been paid sick leave in early February 2023.

⁷ Holidays Act, s 63(1).

⁸ Holidays Act, s 71(1).

⁹ Holidays Act, ss 9 and 9A.

¹⁰ Recognising Mr Chen's recording of parts of hours worked.

[37] The Authority has the power to order interest under clause 11 of Schedule 2 of the Act. Mr Chen has been deprived of money he was entitled to and should be paid interest as follows, calculated under the Civil Debt Calculator,¹¹ until the date of payment:

- (i) on the sum of \$3,229.08 holiday pay from 22 December 2023 (shortly after his termination); and
- (ii) on the sum of \$1,486.20 sick pay from 7 February 2023.

Costs

[38] Mr Chen has represented himself so there are no costs claimed. He is entitled however to be reimbursed for the Authority's filing fee of \$71.55.

Orders

[39] Within 28 days of the date of this determination TZC Limited is to pay Dong Chen:

- (a) \$3,229.08 as holiday pay, \$1,486.20 as sick pay, and interest on those sums;
and
- (b) \$71.55 for the filing fee.

Nicola Craig
Member of the Employment Relations Authority

¹¹ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>