

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 312
3161981

BETWEEN YIWEI GU
 Applicant

AND HUNGRY PANDA (NZ)
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: David Kim, advocate for the Applicant
 Kylie Dunn and Juliet Berg, counsel for the Respondent

Investigation Meeting: 6 October and 1 November 2022

Determination: 14 June 2023

DETERMINATION OF THE AUTHORITY

A. Hungry Panda (NZ) Limited unjustifiably disadvantaged Yiwei Gu. The company must pay Mr Gu \$5,000 as compensation for the distress caused by the disadvantage. It must pay him this sum no later than 28 days from the date of issue of this determination.

B. Costs are reserved.

Employment relationship problem

[1] Hungry Panda (NZ) Limited (HungryPanda) dismissed Yiwei Gu from his role as a marketing specialist in the company’s Auckland office on 17 November 2021. He was dismissed because of his conduct during “a verbal and physical conflict” with a staff member of a Dagu Rice Noodle (DRN) restaurant and for speaking rudely to a HungryPanda manager making inquiries about that incident. The letter of dismissal given to him also said Mr Gu had referred to himself as a manager of HungryPanda during that conflict and “threatened to damage” the restaurant’s interests. It said he

“caused damage to [the] company’s brand and reputation and may potentially cause the loss of an important business partner”.

[2] HungryPanda’s food delivery business operates through a web-based computer application. Customers use the application to place orders for meals at restaurants which HungryPanda drivers or motorcycle riders then collect and deliver to them. HungryPanda describes the restaurants from which it collects and delivers meals as its business partners.

[3] Mr Gu’s mother, Xuemei Ye, worked as a delivery driver for HungryPanda. On 17 October 2021, during a day off from his usual office-based role with the company, Mr Gu helped his mother with her deliveries. While doing so, he wore a bright blue jacket with the Hungry Panda logo, part of a uniform provided by the company to its delivery workers.

[4] At the time Auckland was under Covid-19 Alert Level 3 restrictions and orders for delivery were collected from tables outside the restaurant door. While waiting outside a restaurant to pick up what Mr Gu anticipated would be the last delivery of the day, he got into an argument with a restaurant worker.

[5] The HungryPanda app showed the order was marked as ready for collection by the delivery driver but it was not ready. The soundtrack on the restaurant’s CCTV system recorded him asking the restaurant worker, in Mandarin: “Then why did you f**king click it?” Mr Gu said the worker responded by asking him “are you going to die by waiting for a little while?” He then swore at her. She responded with similar strong language. Both Mr Gu and the worker were aged in their mid-twenties.

[6] The CCTV video and audio recording showed they continued to loudly exchange insults while the worker stood inside the front door of the restaurant. She then walked to the back of the restaurant and returned to the front door holding a broom. She walked out the door to where Mr Gu was standing on the footpath and struck him with the broom. The next part of their encounter was not visible to the CCTV cameras.

[7] Mr Gu claimed the worker struck him more than once and he had pulled the broom out of her hands. A written account given by the restaurant worker two days later said there had been “a short struggle” in which Mr Gu had taken the broom off her and held the collar of her shirt.

[8] The CCTV recording showed the worker, and another restaurant worker who had followed her out of the store, returning to the restaurant and locking its door. The footage and a video taken on a mobile phone by a passer-by showed Mr Gu throwing the broom at the door.

[9] About an hour after that incident HungryPanda's Auckland City manager Rui Zhang received a WeChat message from a representative of DRN. The message attached the passer-by's video clip. The clip was being circulated on some social media along with messages referring to a "HungryPanda man" swearing outside a DRN restaurant and "smashing the door with [a] broom".

[10] Mr Zhang identified Mr Gu as the person in the video clip. He contacted Mr Gu by telephone and asked what had happened. Mr Zhang said Mr Gu responded by swearing at him, saying "they beat me first" and then making some critical comments about Mr Zhang's role in the HungryPanda business. Mr Gu denied he swore at Mr Zhang during that phone call.

[11] The following day Chendi Ma, HungryPanda's Australian-based human resources manager for New Zealand, contacted Mr Gu by telephone to ask him about the incident. Following their conversation Ms Ma told Mr Gu that he was to be suspended from work on full pay while the company conducted a disciplinary investigation. In a subsequent letter, confirming the suspension, Mr Gu was told HungryPanda had received "a serious complaint" from the DRN restaurant along with the CCTV recording of the incident and a photo showing injuries to the restaurant worker. Mr Gu was also told the company was investigating allegations he had represented himself as a manager of HungryPanda, had threatened to damage the restaurant's connection with HungryPanda and had been "abusive and aggressive" to Mr Zhang.

[12] On 1 November Bocheng Du, HungryPanda's country manager for New Zealand, and Ms Ma met by Zoom with Mr Gu. According to a note of the meeting Mr Gu told Ms Ma and Mr Du there had been "an unpleasant quarrel" where he and the restaurant worker had "used inappropriate words against each other". He said he took the broom off the worker in self-defence. He denied making any threat to the restaurant's business by referring to his role with HungryPanda.

[13] Mr Gu was not provided with copies of all the information available to the HungryPanda managers at that time, either before the meeting or during it. This information included the CCTV recording which DRN managers had provided to HungryPanda at its request; an online report made to Police by the restaurant worker 48 hours after the event; email correspondence from DRN asking HungryPanda to take action over Mr Gu's conduct; and a written statement Mr Zhang had made about their conversation on the evening of 17 October.

[14] It was not until 9 November that Mr Gu, at his request, was shown the CCTV recording in a further Zoom meeting with Ms Ma. Ms Ma did not then ask Mr Gu if he had anything more to say about what the recording showed had happened.

[15] On 17 November he was sent a letter of dismissal. Ms Ma signed the letter on HungryPanda's behalf but her evidence was that the decision to dismiss Mr Gu was made by Mr Du, a human resources advisor and a legal advisor.

[16] In his application to the Authority Mr Gu sought findings he was unjustifiably dismissed and HungryPanda should pay him lost wages and \$20,000 as distress compensation. In reply HungryPanda said its dismissal decision was justified and carried out fairly.

The Authority's investigation

[17] Mr Gu, Ms Ye, Ms Ma, Mr Du, Mr Zhang and Wenjia Zhang gave written and oral evidence, under affirmation, in the Authority's investigation. Ms Zhang, no relation to Mr Zhang, is a HungryPanda office worker. Ms Zhang said she heard the telephone conversation between Mr Gu and Mr Zhang on the evening of 17 October.

[18] The Authority's investigation meeting was held over two days. Mr Gu attended both days by Zoom connection from Shanghai. He was raised in Shanghai and had returned to live there shortly after he was dismissed.

[19] Also attending by Zoom, on the first day, were Mr Zhang (from Canada), Mr Du (from the United States) and Ms Ma (from South Korea). On the second day of the meeting Mr Du attended in person. Ms Ma again attended by Zoom. Other witnesses attended in person on one or both days.

[20] In addition to asking questions of witnesses during the investigation meeting, the representatives gave closing submissions about the facts and legal issues.

[21] 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. This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed for the delay.¹

The issues

[22] The issues requiring investigation and determination were:

- (a) Was HungryPanda's decision to dismiss Mr Gu for serious misconduct, and what it did to reach that decision, what a fair and reasonable employer could have done in all the circumstances at the time?
- (b) If HungryPanda was found to have acted unjustifiably, what remedies should be awarded to him, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
 - Compensation under s123(1)(c)(i) of the Act?
- (c) If any remedies were awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Gu that contributed to the situation giving rise to his grievance?
- (d) Should either party contribute to the costs of representation of the other party?

Reasonable conclusion of serious misconduct

[23] Hungry Panda's letter of dismissal set out three grounds for its finding that Mr Gu had committed serious misconduct on 17 October 2021:

- (i) The verbal and physical conflict with the restaurant worker had damaged the company's brand and reputation;
- (ii) He had used abusive and aggressive language in communication with the restaurant worker and Mr Zhang; and

¹ Employment Relations Act 2000, s 174C(4).

- (iii) His actions, including a reference to being a manager of HungryPanda and threatening to damage DRN's connection with the company, had damaged its relationship with DRN.

[24] There was no real contest in the evidence and submissions over whether a fair and reasonable employer could have found Mr Gu's actions in swearing at the restaurant worker about the delayed order, and the escalating verbal exchanges that followed, were serious misconduct. Mr Gu's impatience about the delayed order may have been understandable. As he explained in his oral evidence, a customer waiting for the delivery could check on HungryPanda's app and see the meal was marked as ready for collection but would not understand that the meal had not, in fact, been handed over for delivery. As Mr Du confirmed in his oral evidence, customer dissatisfaction about delays in deliveries could affect a driver's ratings on the company app and the driver's subsequent work assignments and income.

[25] While Mr Gu may have had valid concerns about the delay while helping his mother with her work as a delivery driver on that particular day, he was clearly identified by his bright blue company-branded jacket as a representative of HungryPanda. In that role, and as an employee of the company, HungryPanda reasonably expected he should be civil and courteous in expressing any such concerns rather than swearing at and insulting the restaurant worker.

[26] However the evidence, considered overall, did not establish HungryPanda had acted reasonably in concluding Mr Gu was responsible for the physical violence that then occurred. Assessed objectively, as HungryPanda's managers could have done at the time, the CCTV recording clearly showed the restaurant worker had initiated that part of the events that day. In the online report she made to the Police two days later, the restaurant worker said she got the broom for her protection because she feared Mr Gu was going to climb over the table and assault her. The CCTV recording, however, showed she had walked calmly to the back of the store, after shouting abuse at Mr Gu, picked up a broom and walked purposefully out of the restaurant door, around the table and on to the footpath to hit him with the broom. It was not an action consistent with anyone in any real fear. Rather it showed someone assertively expressing strong displeasure at being sworn at and deciding to mete out her own remedy for it.

[27] Similarly, HungryPanda's conclusion that Mr Gu had, during those events, claimed to be a manager who could affect DRN's business through HungryPanda's app, lacked a sufficiently reliable foundation. Mr Zhang's evidence on that point was based on what he said he was told by two DRN managers, neither of whom were present during the incident. The restaurant worker's account, written two days later, did not refer to it. One of the DRN managers had, in a text message to Mr Zhang on 17 October written that she had been told Mr Gu "said he is not a normal delivery, he is operate (sic) manager something". There was no other evidence about what else Mr Gu may have said. Rather, the evidence from Mr Zhang and Mr Du established no more than what Mr Du described as "an implication" that Mr Gu had referred to holding some senior position so staff or managers of the restaurant may have thought he had some greater sway in the company and could affect DRN's business with HungryPanda.

[28] Mr Zhang's evidence that Mr Gu had reacted angrily during their telephone conversation on 21 October was, on balance, more likely than not to be correct. Mr Zhang's account of what was said described language that was consistent with what Mr Gu had said during his angry exchange with the restaurant worker, including by responding to Mr Zhang's questions: "F**k you, you are a loser, it's none of your business".

[29] Accordingly, while not all the allegations that HungryPanda had made were established as soundly based, the evidence about what Mr Gu did say to the restaurant worker and to Mr Zhang was sufficient for a fair and reasonable employer to conclude he had committed serious misconduct.

Failures to follow a fair process

[30] The evidence of Ms Ma and Mr Du showed there were, however, some significant flaws in how HungryPanda went about making its decision and providing opportunities for Mr Gu to respond to the company's concerns.² Defects in its process were more than minor and resulted in Mr Gu being treated unfairly.

[31] A fair employer, acting reasonably, could not have interviewed Mr Gu about what was happening without showing him the CCTV recording and providing him an opportunity to comment on it. Ms Ma said Mr Gu was told about the recording but had

² Employment Relations Act 2000, s 103A.

questioned whether it may have been edited and had asked for confirmation that it was not. This was not a sufficient reason to then not show him the recording and not to give him the opportunity to comment about it. It was powerful, if not entirely complete, evidence about what had happened. What it showed also contrasted strongly with the content of the restaurant worker's online account of events. It showed she acted calmly and deliberately in walking back into the store to get a broom and choosing to then step outside the restaurant and hit Mr Gu with it. It was also important context for two photographs, provided to HungryPanda by DRN, of what were said to be bruises on the restaurant worker's hand and the question of whether this resulted from Mr Gu's actions or her action in hitting him with the broom.

[32] While Mr Gu did see the CCTV at a later stage, he was not interviewed again for comments in light of it.

[33] Neither was he shown email messages from DRN representatives which were relevant to the assessments Hungry Panda was making. One message expressed concern that the incident had been reported to their head office offshore. Another urged HungryPanda to "deal with the relevant personnel properly" in order to "minimise the negative impact" on business between the two companies.

[34] This meant Mr Gu did not get a reasonable opportunity to comment on evidence relevant to the allegation about how the physical conflict arose or about the pressure, for business reasons, placed on HungryPanda over what disciplinary decision it might make. Both aspects affected the scope of the findings Hungry Panda made about the physical conflict and the prospect of some lasting damage to its business relationship with DRN. This, in turn, affected the attention Ms Ma and Mr Du gave to alternatives to dismissing Mr Gu. It was apparent from their evidence that alternatives were not really considered because of what they saw as the extent of Mr Gu's misconduct. This may have been limited if he was given a fairer opportunity to fully address the information on which they had relied.

[35] As a result of those defects Mr Gu was unjustifiably disadvantaged during HungryPanda's disciplinary process and in the decision it reached.³ While HungryPanda may, nevertheless, have still justifiably reached a decision to dismiss him on the basis of what he had said to the restaurant worker and Mr Zhang, he was entitled

³ Employment Relations Act 2000, s 122.

to an assessment of remedies for the disadvantage which occurred during the disciplinary process.

Remedies

Lost wages

[36] There were two hurdles to Mr Gu's claim for reimbursement of wages lost as a result of his dismissal. The first was that, for the reasons already given, HungryPanda could still justifiably have come to its decision to dismiss him for serious misconduct over what he said to the restaurant worker and Mr Zhang. On that basis he would still have lost wages and no loss occurred primarily because of the disadvantage he suffered during the disciplinary process.

[37] If the first reason was wrong however, there was a second reason that no lost wages could be awarded. Soon after his dismissal Mr Gu returned to Shanghai at his mother's suggestion. He was unable to find work there for some months, largely because a region-wide lockdown was imposed soon after his arrival due to the Covid-19 pandemic. However, if he had stayed in New Zealand, it was more likely he would have been able to find paying work even during the Covid-19 emergency restrictions as food delivery-related work continued for many during that time. Mr Gu was entitled to work in New Zealand. There was no visa-related reason to leave. As a result of Mr Gu's decision to return to Shanghai, he had failed to make reasonable endeavours to mitigate his loss.

Compensation for humiliation, loss of dignity and injury to feelings

[38] Mr Gu's evidence established he was upset by failures in the fairness of the disciplinary process followed by HungryPanda. It remained a source of distress to him and had undermined his confidence in his subsequent efforts to seek work.

[39] Weighing the particular circumstances of his case, and the general range of awards in similar cases, the sum of \$7,500 was an appropriate award of compensation for his distress under s 123(1)(c)(i) of the Act.

Reduction of remedy for blameworthy conduct

[40] If the Authority finds a worker has a personal grievance, it must consider whether there were any blameworthy actions of the worker that contributed to the

situation giving rise to the grievance to such an extent that any remedy awarded should be reduced.⁴

[41] Mr Gu's own evidence established his actions in swearing at the restaurant worker and, later, Mr Zhang was blameworthy conduct. While he was helping his mother with her deliveries that day, he was wearing the colours of the company, the bright blue HungryPanda jacket, and was an employee who had obligations to act properly when out and about on company business. While he was frustrated by the delay in providing an order, other means of addressing those concerns were available. He accepted, in his oral evidence, that he had not acted appropriately on that day.

[42] Those actions are suitably marked by a one third reduction of the remedy that would otherwise have been awarded, that is from \$7,500 to \$5,000. This is the amount that Hungry Panda must pay Mr Gu as compensation for the distress caused to him by failures in the fairness of its disciplinary process. It must pay this amount to him within 28 days of the date of issue of this determination.

Costs

[43] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Gu may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum HungryPanda would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[44] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Robin Arthur
Member of the Employment Relations Authority

⁴ Employment Relations Act 2000, s 124.

⁵ See www.era.govt.nz/determinations/awarding-costs-remedies.