

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 335  
5551797

BETWEEN TAO (EDWIN) GU  
Applicant  
A N D UTEL TELECOM GROUP  
LIMITED  
Respondent

Member of Authority: Rachel Larmer  
Representatives: Matthew McGoldrick, Counsel for the Applicant  
No Appearance for the Respondent  
Investigation Meeting: 28 October 2015 at Auckland  
Written Record of Oral Determination: 29 October 2015

---

**WRITTEN RECORD OF ORAL DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

---

**Employment relationship problem**

[1] Mr Gu is a Chinese citizen. He moved to New Zealand from Australia on 09 January 2009. Mr Gu was employed by UTEL Telecom Group Limited (UTEL) from 28 October 2014 until he was dismissed on 10 April 2015.

[2] Prior to starting work for UTEL Mr Gu was a student. At the time Mr Gu started work for UTEL he held a Student Visa which expired on 31 March 2015. The conditions of his Student Visa enabled Mr Gu to work part-time (up to 20 hours per week) during his studies and full-time during his holidays. Mr Gu was legally entitled to work full time from 17 October 2014 when his last course finished up until 31 March 2015 when his Student Visa ended.

[3] Mr Gu was able to continue working full time from 02 March 2015 until 16 February 2016 as a result of being granted a Partnership Visa due to his long term relationship with his girlfriend.

[4] Mr Gu's Partnership Visa expires on 14 February 2016. The Partnership Visa is a work visa with open conditions and allows Mr Gu to work in any organisation up until the visa expires on 14 February 2016.

[5] Mr Gu says that Mr Philip Ling, who is currently the sole shareholder and director of UTEL, offered him employment on an hourly basis originally.

[6] Mr Gu says the parties agreed he would be employed at the rate of \$100 per day to work around 5-6 hours a day driving Mr Ling and acting as his (Mr Ling's) personal assistant and conducting market research for UTEL.

[7] Mr Gu says that as it turned out he worked a lot more hours than expected but despite that he still got paid \$100 per day. Mr Gu says this was in breach of the Minimum Wage Act 1983 (MWA) because it meant his hourly rate ended up to be less than the applicable minimum wage of \$14.25 per hour.

[8] Mr Gu provided a summary of his days and hours of work and the amounts that he got paid to the Authority. UTEL has provided unsworn information in Mandarin which it claimed was Mr Gu's work schedule. Mr Gu disputes that information which he says is inconsistent with the information he gave UTEL each month about his days and hours of work and which also contradicts his sworn evidence. I accept Mr Gu's evidence over UTEL's.

[9] Mr Gu claims \$1,518.50 in underpaid wages arising from the alleged breach of the Minimum Wage Act 1983 (MWA).

[10] Mr Gu says that on 25 November 2014 he had a meeting with Mr Ling during which they agreed that Mr Gu would be employed on a permanent (ongoing) basis on the following terms and conditions:

- (a) Mr Gu would start with a one year contract with a view to him becoming a permanent employee after that;
- (b) The annual salary was \$35,000 per annum;
- (c) Work hours would be from 10am until 5.30pm Monday to Friday;
- (d) Wages were to be paid monthly;

- (e) Mr Gu was to have a parking space in the Hobson Street carpark for his use;
- (f) Mr Gu was to be provided with a 2degrees mobile phone plan which UTEL would pay for;
- (g) Mr Gu would start working in accordance with these terms and conditions on 02 December 2014 being the day after which Mr Ling left New Zealand.

[11] Mr Gu asked for the agreed terms and conditions to be recorded in writing and was told that he would receive an employment agreement recording this on 08 December 2014.

[12] When Mr Gu received the employment agreement it was not suitable for his position because it appeared to relate to construction workers. Mr Gu raised his concerns with Mr Ling but did not receive any response.

[13] From 02 December 2014 Mr Gu began recording his own work hours because he was aware that UTEL was not doing so and he was concerned because he was often instructed to work outside of his agreed work hours.

[14] At the end of each month Mr Gu emailed his record of work hours and wages to Mr Ling. Mr Gu says his last wages payment was for work he had done up to the end of January 2015 but that after that time he was not paid at all.

[15] Mr Gu says he was dismissed on 10 April 2015. Mr Gu says that on 17 February 2015 Mr Peter Jiang<sup>1</sup> told Mr Gu he had to leave work immediately because his Student Visa expired on 31 March 2015.

[16] Mr Gu tried to explain to Mr Jiang that he had a valid work permit so there was no need for his employment to end but says Mr Jiang did not want to discuss the matter. Mr Gu claims Mr Jiang told him "*your services ended and you can go*".

[17] Mr Gu contacted Mr Ling on the evening of 17 February 2015 to advise that Mr Jiang had told him (Mr Gu) to go. Mr Ling told Mr Gu that he agreed with Mr Jiang who was the shareholder's representative.

---

<sup>1</sup> Mr Jiang is a friend of Mr Ling's. Mr Gu says Mr Ling had advised him (Mr Gu) that Mr Jiang was also a representative of UTEL's shareholders

[18] Mr Gu says that Mr Ling told him that Mr Jiang was very angry with Mr Gu and had advised Mr Ling to “*get rid of him*”. Mr Gu says that Mr Ling told him that he should just leave the company quietly to which Mr Gu responded that he did not want to.

[19] Mr Gu sought advice and then emailed Mr Jiang and Mr Ling requesting a written employment agreement and confirmation of his employment status because he was concerned about the recent discussions he had had with them.

[20] Mr Jiang telephoned Mr Gu on 18 February and advised that Mr Gu was employed on an on-call basis only and that he was not going to be permitted to sign a contract (employment agreement) with UTEL. Mr Jiang said that the verbal agreement that Mr Gu and Mr Ling had reached was not valid and that Mr Gu’s job was to be limited to market research and nothing else.

[21] Mr Jiang told Mr Gu that if he did not do as he was told then UTEL would not pay him anything. Mr Gu asked him to put these instructions in writing but Mr Jiang refused to do so.

[22] Mr Jiang also told Mr Gu that he had to return UTEL’s mobile telephone and SIM cards and the company’s keys. Mr Gu told Mr Jiang to put this in writing and Mr Jiang again refused to and said that if Mr Gu did not comply with his (Mr Jiang’s) instructions then he would call the Police to report Mr Gu for stealing the company’s assets.

[23] Mr Gu took sick leave on 19 and 20 February 2015 as a result of the workplace stress he was suffering. He then received an email from Mr Ling on 20 February purporting to be a first written warning as a result of taking “*unacceptable*” sick leave. Mr Gu claims this first written warning unjustifiably disadvantaged him in his employment.

[24] Mr Ling alleged that Mr Gu had misled UTEL about his Visa status. Mr Gu strongly denies this because he had disclosed his Visa status from the outset and had advised that he would be getting a new Work Visa when his Student Visa expired.

[25] On 22 February Mr Gu emailed Mr Ling objecting to the written warning and providing a medical certificate for his sick leave on 20 February. He also provided receipts totalling \$69 for his parking and for the doctor’s consultation and asked for

UTEL to reimburse him that money into his bank account. That did not occur so Mr Gu now seeks to recover it from UTEL.

[26] Mr Gu provided the Authority with an email from Mr Jiang to UTEL's lawyer, Mr Loo, which advised that "*we wish to get rid of him [Mr Gu] with minimum risk because of his dishonesty*".

[27] On 26 February UTEL's lawyer wrote to Mr Gu enclosing an employment agreement and asking for the return of his swipe card to the company's carpark so it could be used by clients. Mr Gu returned the company keys and mobile telephone although he believed that the carpark and SIM cards with the mobile plans were part of his agreed remuneration.

[28] Mr Gu's solicitor responded on 27 February advising that the draft employment agreement Mr Gu had been given did not accurately reflect the agreed terms of his employment. An unjustified disadvantage grievance was also raised regarding actions taken against Mr Gu on 20 and 22 February regarding the first warning.

[29] UTEL was further advised that Mr Gu had a valid Work Visa and that his Partnership Visa was due to be received within approximately one week, which would allow him to remain and work in New Zealand until 16 February 2016.

[30] Mr Gu's solicitor expressed concern about Mr Jiang's email advising of a desire "*to get rid of*" Mr Gu which had also described Mr Gu as "*our target*". Mr Gu's solicitor indicated that UTEL's actions in terms of making Mr Gu's employment less secure, removing existing benefits from him and purportedly introducing new terms and conditions which had not been agreed between the parties were attempts to pressure Mr Gu to resign. Mr Gu's solicitor advised that if that were to occur it would be considered an unjustified constructive dismissal.

[31] Mr Gu's solicitor also identified that Mr Gu had not been paid in accordance with the minimum wage legislation over the period 28 October to 01 December 2014 because he had been paid \$2,500 when the minimum wage legislation required that he be paid \$4,018.50, so a shortfall of \$1,518.50 was claimed.

[32] Mr Gu's solicitors sought wage arrears and requested copies of Mr Gu's wage and time records under s.130 of the Employment Relations Act 2000 (the Act). These have not been provided.

[33] On 10 March 2015 Mr Gu received an email from Mr Ling stating that he had to follow the company's working hours from 9am to 6pm with an hour for lunch and that if he failed to do so he would be marked as absent for the day. Mr Gu says at this time he had still not been paid for work he had done in February.

[34] On 10 March Mr Gu's solicitor wrote to UTEL's lawyers objecting to Mr Ling purportedly unilaterally changing Mr Gu's previously agreed terms and conditions regarding his hours of work and seeking payment of his wage arrears for the work he had done in February. No response was received.

[35] On 10 March Mr Gu received a further email from Mr Ling advising that a second written warning had been imposed for Mr Gu being late and for not presenting reports to Mr Ling.

[36] Mr Gu says this second warning also amounts to an unjustified disadvantage because his agreed hours of work were 10am until 5.30pm and he had not agreed to the unilateral variation put forward by Mr Ling. The second written warning advised that Mr Gu would be dismissed if he got a further warning as he was considered "*a bad character*" and to be "*cheating management*" about his visa status.

[37] On 16 March Mr Ling sent a text to Mr Gu telling him to go home "*and organise all previous working reports and confirm with the company. Before that the company will not assign new tasks. [sic] If you cannot accomplish above tasks within three days, company will marks as absence of work*". Mr Gu claims this is yet another unjustified disadvantage because he was effectively suspended from his workplace.

[38] Mr Gu said he had no idea what Mr Ling was talking about. He said he had thought Mr Ling required two kinds of reports, a daily working report and a research report. The reports required computer research which Mr Gu needed to use the company's computer for, but was unable to do so because he was not permitted to be at work.

[39] Mr Gu also said that over the preceding months he had not been assigned any jobs because he had been forbidden to do a lot of his old tasks with his responsibilities being passed off to Xiaoyun Wang (known as Sophia) who had arrived from China in January 2015.

[40] On 23 March, Mr Ling commenced a WeChat with Mr Gu (which is like Skype call) during which Mr Ling told Mr Gu that his presence at work was seen as disturbing the company's normal operations and he would be fined if he did not hand over previous reports. When Mr Gu objected, Mr Ling told Mr Gu that if he had a problem with that he should file a written complaint.

[41] Mr Gu says he prepared a report on what he had been doing prior to being suspended and regarding his research which he says was difficult because he had not had access to his computer or work information.

[42] His lawyer sent this report to UTEL and asked that Mr Gu be allowed to return to work as he had done the report. They also advised that Mr Gu had just received his Partnership Visa which meant he was legally entitled to remain and work in New Zealand until 16 February 2016.

[43] Mr Gu then received an email dated 10 April with the title "*Dismissal*". Mr Gu told the Authority there was nothing attached to the email so he had no idea why he was being dismissed. Mr Gu said he did not see the dismissal letter until UTEL filed its Statement in Reply on 20 May 2015.

[44] The dismissal letter was undated but advised that UTEL had decided to terminate Mr Gu's employment with effect from 31 March 2015. The dismissal letter referred to two previous performance warnings (19 February and 12 March) and noted ongoing concerns about Mr Gu's performance and absence from work for two weeks without adequate reason. Mr Gu says he was not at work because he had been unlawfully suspended by UTEL.

[45] Concern was also raised by UTEL in its dismissal letter that:

- (a) Mr Gu had not signed the employment agreement that UTEL's lawyers had given him on 26 February;
- (b) His Work Visa had expired on 31 March 2015;

(c) He had continued to use the company carpark.

[46] Mr Gu completely disagrees with everything in the dismissal letter. He claims his dismissal is unjustified. Mr Gu also seeks that a penalty be imposed on UTEL for breaching MWA, HA03, the Act and the WPA. Mr Gu asks that any penalties be paid to him and not the Crown.

[47] Mr Gu also claims he was not paid holiday pay upon termination and did not take any paid holiday while employed.

[48] UTEL, in its Statement in Reply, says that it discovered on 16 February that Mr Gu's Student Visa was expiring on 31 March 2015 after which time he was not legally entitled to work full-time. UTEL claims that when Mr Gu was advised about this he abandoned his work, resulting in UTEL issuing Mr Gu with written warnings which then led to his dismissal on 01 April 2015.<sup>2</sup>

[49] UTEL was directed by the Authority to provide Mr Gu's wage and time records and holiday and leave records and a copy of the Employer's Monthly Schedule (with information that did not relate to Mr Gu being redacted) but that has not occurred.

[50] UTEL did not file written statements of evidence in accordance with the Authority's timetable directions. UTEL emailed the Authority on 27 October 2015 saying Mr Gu was a casual contractor and never an employee. Mr Gu strongly refutes that and UTEL's claim contradicts the sworn evidence currently before the Authority.

### **Issues**

[51] The following issues are to be determined:

- (a) Was Mr Gu employed by UTEL?
- (b) Was Mr Gu unjustifiably disadvantaged in his employment?
- (c) Was Mr Gu's dismissal justified?
- (d) What if any remedies should Mr Gu be awarded if his grievance claims succeed?

---

<sup>2</sup> The dismissal letter says Mr Gu's employment was terminated on 31 March 2015 but the Statement in Reply says he was dismissed on 01 April.

- (e) Should Mr Gu be reimbursed for his medical expenses?
- (f) Did UTEL pay Mr Gu less than the minimum wage?
- (g) If so, how much is Mr Gu owed?
- (h) Is Mr Gu owed unpaid wages for February, March and April 2015?
- (i) Is Mr Gu owed unpaid holiday pay?
- (j) Should UTEL be ordered to pay interest on any amounts Mr Gu is awarded?
- (k) Did UTEL breach the Act, WPA, MWA or HA03?
- (l) If so should penalties be imposed on UTEL?
- (m) If so, should some or all of the penalties be paid to Mr Gu?
- (n) What if any costs should be awarded?

### **Was Mr Gu employed by UTEL?**

[52] Section 6 of the Act defines the meaning of “*employee*”. When determining whether or not the parties were in an employment relationship, s.6(2) of the Act requires the Authority to determine “*the real nature of the relationship*” between the parties. This includes consideration of all relevant matters, including the intention of the parties, but such intention is not determinative of the matter.

[53] I consider it clear that the parties were in an employment relationship. UTEL had provided Mr Gu with two written employment agreements and it had entered into ongoing communications with Mr Gu’s solicitor without raising the issue that he was not employed. Mr Gu had also been issued with written warnings and suspended from work which could not have occurred if the parties were not in an employment relationship. UTEL also “*dismissed*” Mr Gu rather than terminating a contractual arrangement.

[54] I find that the evidence did not support UTEL’s unsworn suggestion (in its email to the Authority) that Mr Gu was never employed and was merely a casual contractor. I am therefore satisfied that the Authority has jurisdiction to investigate

and determine all of the matters which Mr Gu has identified in his statement of problem.

### **Was Mr Gu unjustifiably disadvantaged in his employment?**

#### *Justification test*

[55] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether how UTEL acted, and its actions, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Gu was disadvantaged and then subsequently dismissed.

[56] A fair and reasonable employer is expected to comply with its statutory obligations which include the s.4(1A) good faith obligations and each of the four procedural fairness tests in s.103A(3) of the Act. Failure to do so is likely to fundamentally undermine an employer's ability to justify its actions and how it acted.

#### *Was Mr Gu disadvantaged?*

[57] Mr Gu left work sick at 12.30pm on 19 February. On 20 February UTEL issued him with a warning for unacceptable sick leave supposedly because Mr Gu had not supplied a medical certificate. That claim is factually incorrect because I am satisfied that Mr Gu did in fact supply UTEL with a medical certificate, a copy of which he provided to the Authority.

[58] Mr Gu received a second warning via email on 12 March for being late to work and for not providing reports to UTEL. He was advised a third warning would result in his dismissal. On 16 March Mr Gu was sent home and not permitted to return to work.

[59] I find that Mr Gu was indeed disadvantaged by the two written warnings and by his suspension from work.

#### *Was the disadvantage to Mr Gu justified?*

[60] UTEL did not provide any sworn evidence to justify taking the various actions which I have held disadvantaged Mr Gu in his employment. It seems clear that UTEL breached all of the minimum procedural fairness requirements so cannot establish

compliance with any of the four tests in s.103A(3) of the Act. I further find that the action taken by UTEL was not substantively justified.

[61] I therefore find that UTEL has been unable to justify the disadvantage it caused Mr Gu in accordance with the justification test in s.103A(2) of the Act. UTEL's actions and how it acted were clearly not what a fair and reasonable employer could do in all the circumstances. I find Mr Gu's unjustifiable disadvantage claims all succeed.

### **Was Mr Gu's dismissal justified?**

[62] UTEL is also unable to establish that its dismissal of Mr Gu was justified in accordance with the requirements of the s.103A(2) justification test.

[63] UTEL failed to comply with its s.4(1A) good faith obligations in the Act because it did not provide Mr Gu with the relevant information or an opportunity to comment on it before he was dismissed.

[64] UTEL also failed to comply with any of the minimum procedural fairness requirements set out in s.103A(3) of the Act. UTEL just sent Mr Gu an email headed "*Dismissal*" which is obviously not what a fair and reasonable employer could do.

[65] I also find that Mr Gu's dismissal was not substantively justified. UTEL appears to have dismissed Mr Gu over visa concerns when he did in fact hold the required visa and had provided a copy of it to UTEL before it dismissed him. There does not appear to have been any good reason for UTEL to have dismissed Mr Gu.

[66] I find that UTEL's dismissal of Mr Gu is procedurally and substantively unjustified so Mr Gu's dismissal grievance succeeds.

### **What remedies should Mr Gu be awarded for his successful personal grievance claims?**

#### *Mitigation*

[67] Mr Gu says he applied for a large number of jobs but did not obtain employment until August 2015. Mr Gu provided copies of his job applications. I am satisfied he adequately mitigated his loss.

*Lost remuneration*

[68] Mr Gu started a new job on 03 August 2015. He is seeking lost wages of \$10,769.23 for the three months and three weeks he was without work. I consider it appropriate to compensate Mr Gu for his actual loss. UTEL is ordered to pay Mr Gu that amount under s.128(3) of the Act.

*Distress compensation*

[69] Mr Gu told the Authority that he could not believe the whole situation was happening to him. Mr Gu says he had worked hard for UTEL and had put in extra hours and overtime. Mr Gu said he was very shocked and felt devastated to be accused of misleading the company which was totally wrong. Mr Gu maintains that he has been completely honest with UTEL at all times. Mr Gu says the accusations of dishonesty made him feel like he was seen as dishonourable which hurt him deeply.

[70] Mr Gu says he tried to do the right thing by asking for mediation and by requesting an employment agreement and confirmation of his employment status. Mr Gu says he was put under even more stress and worry by his dismissal because it compounded the financial problems UTEL had already caused him by its failure to pay his wages.

[71] Mr Gu says his unjustified dismissal made his financial situation even worse which put a lot of stress and strain on him and his girlfriend. Mr Gu says he had to ask for help from his parents which caused him great embarrassment and he had to rely on his girlfriend for financial assistance which also was distressing to him.

[72] Mr Gu says that he lost all of the friends he had met during the time he worked for UTEL. Mr Gu says that he encountered a former colleague at a Chinese restaurant in June and she told him that Mr Jiang had announced to everyone that he had reported Mr Gu to immigration to have him deported back to China because his visa had expired and could not be renewed. Mr Gu was surprised and speechless and considered this to be an attempt by UTEL to damage his personal reputation.

[73] In terms of his successful disadvantage claims Mr Gu also gave evidence about the distress and confusion he felt by receiving the first written warning and then shortly thereafter the second written warning without any disciplinary process having been undertaken.

[74] Mr Gu was also confused because he was directed not to come into the office but at the same time told he had to file reports when he did not have any real ability to do so because the information he required to compile the reports was in the office. Mr Gu says that although he did his best to provide the reports that had been requested, UTEL still did not let him back to work.

[75] I have approached the award of distress compensation on a global basis so the amount awarded accounts for all of the distress Mr Gu suffered in respect of each of his disadvantage grievances and in connection with his dismissal grievance.

[76] UTEL is ordered to pay Mr Gu \$8,000 under s.123(1)(c)(i) of the Act to compensate him for the hurt, humiliation and injury to feelings he suffered as a result of his successful personal grievance claims.

**Should Mr Gu be reimbursed for his medical expenses?**

[77] Mr Gu was not statutorily required to provide a medical certificate for his sick leave on 19 and 20 February. However, the warning he received from UTEL caused Mr Gu to see his doctor on 20 February. I find that Mr Gu incurred medical fees solely because UTEL disputed his sick leave so it is appropriate that he be reimbursed for that.

[78] UTEL is ordered to reimburse Mr Gu \$69 being the \$65 fee for the doctor's visit plus \$4 for parking charges.

**Did UTEL pay Mr Gu less than the minimum wage?**

[79] The minimum wage rate applicable at the material time was \$14.25 per hour. In the absence of UTEL producing Mr Gu's wage and time records as it was directed to do so, in accordance with s.132(2) of the Act, I accept Mr Gu's evidence about the wages he was paid and the hours, days and time worked by him.

[80] I therefore find UTEL breached the MWA by paying Mr Gu less than \$14.25 for each hour he worked over the period 28 October to 01 December 2014.

### **What if anything is Mr Gu owed?**

#### *Underpaid salary*

[81] UTEL is ordered to pay Mr Gu underpaid salary of \$1,518.50 being the difference between what he would have received had he been paid the minimum hourly wage rate (\$4,018.50) and what he actually received (\$2,500).

#### *Non-payment of salary for February, March and April 2015*

[82] Mr Gu claims unpaid wages of \$6,805.55 because he was not paid for work he did in February, March or April 2015. UTEL is ordered to pay Mr Gu \$6,805.55 being \$2,916.67 for February and March and \$972.22 for 10 days in April.

#### *Unpaid holiday pay*

[83] Mr Gu says he did not take any paid annual leave while employed nor was he paid holiday pay upon termination. Mr Gu is owed 8% of his total gross earnings with UTEL. Mr Gu's total gross earnings include the wage arrears he has been awarded in this determination.

### **Should UTEL be ordered to pay Mr Gu interest?**

[84] UTEL has had the benefit of the use of money which Mr Gu should have been paid by at the latest by 10 April 2015. I therefore consider it appropriate to exercise the Authority's discretion to impose interest at the current prescribed rate of 5% per annum.

### **Did UTEL breach the Act, WPA, MWA and/or HA03?**

#### *Wages Protection Act 1983*

[85] I find that UTEL breached the WPA by unlawfully deducting \$605 from Mr Gu's pay without his written consent.

#### *Minimum Wage Act 1983*

[86] I find that UTEL breached the MWA by paying Mr Gu less than the minimum wage rate of \$14.25 per hour for the 272 hours he worked over the period 28 October to 01 December 2014.

### *Employment Relations Act 2003*

[87] I find that UTEL breached s.65 of the Act by failing to provide Mr Gu with a written employment agreement before he started work. It also breached s.130 of the Act and by failing to keep and to produce upon request wage and time records for Mr Gu.

### *Holidays Act 2003*

[88] I find that UTEL breached s.23 of the HA03 by failing to pay Mr Gu his holiday pay upon termination. It also breached s.81 HA03 by failing to keep holiday and leave records for Mr Gu and by failing to produce such records upon request.

### **Should penalties be imposed on UTEL?**

[89] Mr Gu pointed out to UTEL on a number of occasions that it was required to provide him with an employment agreement but it failed to do so. The agreement provided was not suitable for his position nor did it reflect the terms the parties had agreed. I find that UTEL's failed to meet its obligations under s.65 of the Act.

[90] The failure to keep wage and time records and produce them on request and the failure to keep holiday and leave records and to produce those upon request are serious ongoing breaches. Likewise, the failure to pay Mr Gu the minimum wage for the hours he worked is another serious matter.

[91] I also consider that UTEL attempted to exploit Mr Gu's perceived vulnerability because Mr Ling and Mr Jiang both threatened to report him to Immigration to have his visa status revoked, to have him deported and generally attempted to make him very concerned about all matters in connection with his visa when Mr Gu raised legitimate concerns about his employment situation.

[92] I consider this to be high handed and reprehensible conduct by UTEL which needs to attract a significant penalty.

[93] Although UTEL appears before the Authority as a 'first offender' it has not demonstrated any remorse. Its deficiencies were drawn to UTEL's attention by Mr Gu's solicitor but instead of addressing those defects, it escalated its unlawful actions towards Mr Gu by imposing unjustified warnings, an unjustified suspension and then unilaterally dismissing him.

[94] I therefore consider UTEL's breaches of minimum employment legislation to be deliberate breaches of its obligations as an employer.

[95] I consider it necessary to impose penalties to punish UTEL for its unlawful actions, to signal strong disapproval of employers who chose not to comply with employment legislation and to act as a deterrent against UTEL and any other employers deciding to engage in such unlawful activities going forward.

[96] I adopt a totality approach to penalties so order UTEL to pay total penalties of \$20,000 for its multiple breaches of the WPA, MWA, HA03 and of the Act.

**Should some or all of the penalties imposed be paid to Mr Gu?**

[97] Mr Gu seeks that he be paid some or all of the penalties imposed. I decline that application on the basis that penalties are to punish wrongdoing and should not be used to compensate a successful applicant. There must be no element of 'double dipping' by a successful applicant associated with the Authority's imposition of penalties.

[98] Mr Gu has been compensated for the effect of these breaches on him so I decline to award him some or all of the penalties imposed on UTEL. Accordingly UTEL is ordered to pay the penalty of \$20,000 directly to the Crown bank account.

**What if any costs should be awarded?**

[99] Mr Gu as the successful party is entitled to a contribution towards his actual costs. The Authority adopts its usual notional daily tariff based approach which is currently \$3,500 per day. On a pro rata basis the notional starting point for assessing costs in this matter is therefore \$750.

[100] I am not aware of any factors which warrant reducing the notional starting tariff. Mr McGoldrick invited the Authority to increase the notional tariff to reflect the cost Mr Gu had incurred due to UTEL's breaches of its legal obligations.

[101] Mr Goldrick submits that the inadequacy and inaccuracy of the limited (unsworn) information UTEL provided had to be addressed by Mr Gu in advance of the Authority's investigation in order to ensure the investigation meeting could be conducted in the most efficient way.

[102] Mr Gu was also put to the unnecessary expense of responding to UTEL's inaccurate and misleading information. Mr Gu has filed two witness statements, he has borne the costs associated with prepared a joint bundle of documents for the investigation meeting, he has prepared helpful succinct submissions which have greatly assisted with the preparation of an oral determination and he has addressed costs.

[103] Mr Gu's case was thoroughly and clearly prepared which I find substantially decreased the investigation time required. This sort of conduct by a party is to be encouraged by the Authority because it is of great assistance in terms of focusing the conflicts in the evidence and any legal issues which in term reduce investigation time and resources.

[104] I consider that this matter in effect involved a one day investigation so it is appropriate to increase the notional starting tariff for an award of costs in this case to reflect that.

[105] I consider justice is best done between the parties by ordering UTEL to contribute \$3,500 towards Mr Gu's actual legal costs. UTEL is also ordered to reimburse Mr Gu \$71.56 for his filing fee.

### **Compliance order**

[106] In closing submissions Mr McGoldrick asked the Authority to impose a compliance order on UTEL off its (the Authority's own) motion. I decline to do so on the basis that UTEL has not had advance notification of a such a claim so has therefore had no opportunity to address it should it wish to do so.

### **Orders**

[107] I find that UTEL unjustifiably disadvantaged and unjustifiably dismissed Mr Gu.

[108] Within 28 days of the date of this determination, UTEL is ordered to pay Mr Gu:

- (a) Lost remuneration of \$10,769.23 under s.128(3) of the Act;
- (b) Distress compensation of \$8,000 under s.123(1)(c)(i) of the Act;

- (c) \$69 being reimbursement of his medical visit and associated parking charges;
- (d) \$1,518.50 salary arrears for failure to pay him the minimum wage rate from 28 October to 01 December 2014;
- (e) Wage arrears of \$6,805.55 for failure to pay his salary in February, March and April 2015;
- (f) \$605 to reimburse him for UTEL's unlawful deduction from his wages;
- (g) Unpaid holiday pay of \$1,575.86<sup>3</sup>;
- (h) Interest to run from 11 April 2015 until these amounts have been paid in full at the current prescribed interest rate of 5% on Mr Gu's;
  - a. lost remuneration [96](a);
  - b. underpaid salary [96](d),
  - c. wage arrears [96](e);
  - d. unlawful deduction from his wages [96](f);
  - e. unpaid holiday pay [96](g);
- (i) \$3,500 towards Mr Gu's actual legal costs; and
- (j) \$71.56 to reimburse Mr Gu's filing fee.

**Rachel Larmer**  
**Member of the Employment Relations Authority**

---

<sup>3</sup> Consisting of lost remuneration of \$10,769.23 plus underpaid salary of \$1,518.50 plus wage arrears of \$6,805.55 plus unlawful deduction from wages of \$605 plus wages received of \$4,500 = \$24,198.25 x 8% holiday pay entitlement under HA03.