

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 297  
3074252

BETWEEN	YINTONG GUAN Applicant
AND	JAY.CO LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Applicant in Person Clive Thompson, advocate for Respondent
Investigation Meeting:	1 July 2020 via Zoom
Further information received:	4 July 2020 from Applicant 3 July 2020 from Respondent
Determination:	31 July 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Jay.Co Limited is ordered to pay to Mr Guan the sum of \$4,114 gross as arrears of wages under s 131 of the Act within seven (7) days of the date of this determination comprising:**
- i. Unpaid wages for 17 and 18 August 2019 of \$34;**
  - ii. Notice of four weeks' wages of \$4080**
- B. Jay.Co Limited is ordered to reimburse Mr Guan the filing fee of \$71.56 within seven (7) days of the date of this determination.**

## **Employment relationship problem**

[1] Mr Guan worked for Jay.Co Limited as its Restaurant Manager from 12 July 2019 until 18 August 2019. Jay.Co Limited operates the Joy Inn Restaurant in Rotorua. The terms of Mr Guan's employment were set out in an individual employment agreement.

[2] Mr Guan claims arrears of wages for hours he says he worked but has not been paid, payment of the notice of period in accordance with the terms of the employment agreement and reimbursement of a premium he says he was required to pay to Jay.Co to retain his employment.

## **Issues**

[3] In order to resolve Mr Guan's application I must determine the following questions:

- a) Is Mr Guan owed arrears of wages?
- b) Is Mr Guan owed arrears of wages for unpaid notice?
- c) Did Mr Guan pay a premium?

[4] As permitted by s 174E of 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 as a result. While I have not referred in this determination to all the evidence received I have carefully considered everything.

## **Arrears of wages**

[5] Mr Guan seeks payment for time he says he worked on 20 and 21 May and 17 and 18 August 2019. In addition he claims payment of time he says he worked beyond the contracted 40 hours each week.

### ***20 and 21 May 2019***

[6] Mr Guan says he worked on both of these days and did not receive payment for the time worked. Jay.Co denies Mr Guan worked and says he did not have a valid work visa and so he could not work.

[7] Mr Guan told me that on 19 May 2019 he received a request from Ms Lisha He, a director of Jay.Co, to attend the restaurant the following day at 10 am to start work.

On 20 May Mr Guan received WeChat messages containing contact details of food and other suppliers and says he placed at least one order on behalf of the restaurant. He has provided copies of the WeChat messages to support his evidence.

[8] The difficulty for Mr Guan relying on the WeChat messages is that the WeChat message Mr Guan relies on to show he did work was not a message sent by him. It was instead a message sent to him by Ms He as a template to show him how to place orders if he was successful in being employed in the Manager's role.

[9] As well as her restaurant business Ms He runs a motel business and spends each morning cleaning units. Ms He confirmed she messaged Mr Guan on 19 May asking him to be at the restaurant the following morning at 10 am but when she realised she would not be there because she would be cleaning motel units she rang Mr Guan and asked him to come later in the day. Mr Guan does not recall whether Ms He called him or not.

[10] Evidence from other employees working for Jay.Co at the time of Mr Guan's employment recall seeing Mr Guan at the restaurant on the evening of 20 May but were not able to confirm what time he arrived.

[11] I have preferred the evidence of the respondent as being more plausible. I find on the balance of probabilities it is more likely than not that Mr Guan did not work on 20 or 21 May but rather he attended the restaurant to familiarise himself with the restaurant and Ms He was accommodating by providing him with information about suppliers and a suggested template for messages to go to suppliers when and if he started working at the restaurant. While Mr Guan was introduced to other employees and was invited to join the staff for a meal at the end of their working day I am not satisfied he himself undertook any work.

[12] Mr Guan's application for payment for 20 and 21 May is declined.

### ***17 and 18 August 2019***

[13] Mr Guan's employment was terminated on 18 August 2019. Despite working on 17 and 18 August he says he has not been paid for the hours he worked.

[14] The wages and time record for 17 and 18 August show Mr Guan received payment for four hours worked on each day but not at his ordinary rate of pay. The time

record book for 17 and 18 August records Mr Guan's refusal to sign the record and shows that he worked from 4.30 pm to 8.30 pm on each day.

[15] I am satisfied Mr Guan was not paid at the correct rate of pay for each hour he worked on 17 and 18 August and is owed arrears of wages for the balance which equates to \$34 gross.

[16] Jay.Co Limited is ordered to pay to Mr Guan the sum of \$34 gross as arrears of wages under s 131 within seven (7) days of the date of this determination.

***Payment for hours over 40***

[17] Clause 6.1 of the employment agreement sets as 40 the number of hours to be worked each week on five days of the week. The hours are to be worked by way of split shifts. The first part of the shift to be worked from 11 am to 2.30 pm and the second part of the shift from 5.00 pm to 9.30 pm.

[18] Mr Guan says he consistently worked six days each week and claims payment for the additional day. This is denied by Jay.Co.

[19] Jay.Co has provided the time record book used by the company to record hours worked for each of its employees including Mr Guan, from July to September 2019. During the investigation meeting Mr Guan acknowledged that some of the entries in the time record book are his. The time record book entries show Mr Guan worked five days each week starting and finishing at times consistent with those set out in the employment agreement.

[20] Mr Guan has not established to my satisfaction that he worked more than the five days recorded in the time record book. Accordingly, his application for payment for hours worked over 40 each week is declined.

**Payment of notice**

[21] There is no dispute that Mr Guan's employment was terminated on 18 August 2019. The employment agreement provides for two separate notice requirements. During a trial period the notice required is one week. At all other times notice of four weeks is required.

[22] On 18 August 2019 Mr Guan was given one weeks' notice that Jay.Co was exercising its right under the trial provision in the employment agreement and s 67A of

the Act to terminate his employment. Mr Guan was advised his last day of work would be Sunday 25 August and that all outstanding wages and holiday pay would be paid on that date.

[23] Mr Guan says that despite being told his last day of work would be 25 August, on 19 August he was removed from WeChat groups for staff and suppliers so he was unable to do his job. For this reason he says he notified Jay.Co he would not work the remainder of his notice period.

[24] I am satisfied it is more likely than not that Jay.Co never intended for Mr Guan to work out his notice period. In the email to Mr Guan on 18 August Ms He wishes Mr Guan all the best for his future. This type of sentiment would not be necessary at that time, if it was intended for Mr Guan to continue working for another week.

[25] Mr Guan's employment agreement provided for a trial period of 90 calendar days. Section 67A of the Act requires the employment agreement to specify that the trial will start at the beginning of Mr Guan's employment. It does not. The trial provision is not compliant with the requirements of the Act and accordingly, Jay.Co is unable to rely on any terms relating to it.

[26] For the foregoing reasons the notice period applicable to the ending of Mr Guan's employment is four weeks. Despite advising Mr Guan he would be paid in lieu of notice it is apparent from the wages and time records that Mr Guan has not been paid for any notice period. He is entitled to an order for payment of the full period of four weeks' notice.

[27] Jay.Co Limited is ordered to pay to Mr Guan the sum of \$4,080 gross as arrears of wages under s 131 of the Act within seven (7) days of the date of this determination.

### **Premiums**

[28] Mr Guan claims he was required to repay to Jay.Co a cash sum of \$240 on four separate occasions totalling \$960. Mr Guan claims the payments were a premium which he was required to pay to Jay.Co to guarantee his employment.

[29] Section 12A of the Wages Protection Act 1983 (WPA) prohibits an employer from seeking or receiving any premium in respect of the employment of any person. If

Jay.Co is found to have breached s 12A of the WPA Mr Guan is entitled to recover from Jay.Co Limited the amount paid.

[30] Mr Guan has provided a copy of a document which he says records the payments he made to Ms He during his employment. The record shows payments made on 18 and 25 July and 1 and 8 August 2019. In its statement in reply Jay.Co denies requiring Mr Guan to return \$240 each week to Ms He.

[31] Mr Guan told me Ms He put her name on the document each week when he paid her the money.

[32] I am not satisfied the signature on the document is that of Ms He. The document is set out in Mandarin with English translations written in to assist the Authority. When Ms He signed the employment agreement with Mr Guan she signed in mandarin. Given that the document presented by Mr Guan was largely in mandarin it seems improbable that Ms He would sign the document in English. I am not persuaded the document is authentic and can be relied on to prove Mr Guan's claim that he paid a premium to Ms He. Mr Guan's application is accordingly declined.

### **Costs**

[33] Mr Guan has been successful to a limited extent and is entitled to be reimbursed the filing fee in this matter. Jay.Co Limited is ordered to reimburse Mr Guan the filing fee of \$71.56 within seven (7) days of the date of this determination.

### **Certificate of determination**

[34] Pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 Applicant is to be provided with a Certificate of Determination, sealed with the seal of the Authority recording that within seven (7) days of the date of this determination, Jay.Co Limited is ordered to pay to Mr Guan:

- a) Arrears of wages under s 131 of the Act totalling \$4,114 gross;
- b) Filing fee of \$71.56.

Vicki Campbell  
Member of the Employment Relations Authority