

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 202  
3208079

BETWEEN

WEI HU  
Applicant

AND

BESTBASE  
CONSTRUCTION GROUP  
LIMITED  
Respondent

Member of Authority: Nicola Craig

Representatives: The applicant in person  
Aimee Yang, counsel for the respondent

Investigation Meeting: 14 and 15 December 2023 in Auckland

Submissions and further information received: At the investigation meeting, 15 December 2023 and 25 March 2024 from the applicant  
At the investigation meeting, 15 December 2023 and 3 January 2024 from the respondent

Date of Determination: 8 April 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Wei Hu worked for a short period on a Tauranga construction project for Bestbase Construction Group Limited (Bestbase or the company). He had a non-work accident and did not work for almost two months. Mr Hu then continued for Bestbase on another project, this time in the Waikato. Bestbase supplies workers to the construction industry.

[2] Mr Hu raises a wide range of concerns about Bestbase including that he was unjustifiably dismissed by the company. Bestbase accepts some of the concerns but not others.

### **The Authority's investigation**

[3] An investigation meeting was held in Auckland on 14 and 15 December 2023. The Authority was assisted by an interpreter of the Mandarin language.

[4] Mr Hu provided written documents outlining his evidence and gave oral evidence under oath, including answering questions from the Authority and Bestbase's representative.

[5] It was originally envisaged that Bestbase's director Xigou Hou and the company's accountant would give evidence. However, only Mr Hou's (unsworn) witness statement was provided. Bestbase's representative then advised Mr Hou was in China seeking treatment as he was unwell and the company was willing to proceed without his or the accountant's evidence. Mr Hu expressed doubt about Mr Hou's situation. The possibility of Mr Hou's wife giving evidence was explored but her evidence would have focused on her husband's health rather than on Bestbase, so it was concluded her evidence was not needed.

[6] Mr Hu provided a witness statement from a co-worker but given how the meeting was proceeding, after discussion with the Authority and Bestbase's representative, he decided not to arrange for the co-worker to attend to give evidence. The co-worker's written statement was set aside.

[7] Submissions were heard from both parties at the close of the investigation meeting. After the meeting Bestbase emailed the Authority saying that in good faith to assist with resolution Bestbase offered to pay Mr Hu for a disputed pay rate reduction and a public holiday, plus reimburse a wage deduction made for rent. In the New Year written confirmation of the payment having been made was received.

[8] 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 and conclusions and specified orders made as a result.

## **The issues**

[9] The issues for investigation are:

- (a) Was Mr Hu disadvantaged by unjustified action of Bestbase regarding:
  - (i) Recruitment information on hours of work (suggesting he was entitled to longer hours);
  - (ii) Failure to ensure he could obtain weekly compensation from ACC: and
  - (iii) Failure to deal with workplace bullying.
- (b) Did Bestbase breach its obligation to provide Mr Hu with an employment agreement, including a compliant agreement?
- (c) Did Bestbase breach its duty of good faith under s 4 of the Act?
- (d) Did Bestbase bargain unfairly with Mr Hu, breaching s 68 of the Act?
- (e) Did Bestbase breach the employment agreement and/or Wages Protection Act 1983 and if so, does it owe Mr Hu for:
  - (i) Late payment of wages; and
  - (ii) Underpayment of wages; and
  - (iii) Deduction from wages?
- (f) Did Bestbase breach s 130 of the Act by failing to provide wages and time records for Mr Hu?
- (g) Did Bestbase breach the Holidays Act 2003 by failing to pay for public holidays and annual leave pay and if so, how much does it owe Mr Hu?
- (h) Was Mr Hu unjustifiably dismissed by Bestbase?
- (i) If grievances are established, what remedies (if any) should he receive?
- (j) If Bestbase breached the employment agreement and/or any of the statutes referred to above should it have to pay a penalty?
- (k) Should either party have to contribute to the other's costs?

[10] When he lodged his case, Mr Hu mentioned interim reinstatement but confirmed at a case management conference that he no longer sought that remedy.

[11] At the investigation meeting Mr Hu made mention of Mr Hou's potential liability. I confirmed to him that Bestbase was currently the only respondent party with Mr Hu indicating he understood.

[12] The money paid by Bestbase after the investigation meeting deals with arrears issues but potential penalties remain live.

[13] Some of Mr Hu's claims seemed punitive and not within the Authority's powers. For example, as well as seeking payment to him of taxes which he says Bestbase did not pay, he sought to receive a 50% compensation payment on top of that.

### **The parties make contact**

[14] Mr Hu was referred by a friend to a post on a food-related WeChat group. He had just come back to Auckland from China and was looking for work. The post was relatively brief. A carpenter was wanted for a Tauranga commercial construction site. The unnamed employer was said to be paying the rent (for accommodation) but not food, with an hourly pay rate from \$36. Reference was made to "[a]t least 60 working hours every week".

[15] Mr Hu contacted the person who posted, whom he assumes was a representative for Mr Hou or Bestbase. There was little evidence about the actual connection with Bestbase denying it was responsible for the post. In any event through the person who posted, Mr Hu obtained Mr Hou's mobile number.

[16] In late April 2022 Mr Hou contacted Mr Hu and added him on WeChat. The two chatted by phone, agreeing that Mr Hu would be employed at \$36 an hour by Bestbase. The company's material filed in the Authority refers to a two week notice period being agreed. Mr Hu does not dispute this.

[17] Further Mr Hou says that Mr Hu agreed to pay whatever was due to the Inland Revenue Department (IRD), as Mr Hu's visa situation was not finalised. Mr Hu disputes any agreement that he pay the tax. In the absence of evidence in person from Mr Hou, I find there was no such agreement.

[18] I conclude that there was an agreement between Bestbase and Mr Hu that he would work full time for the company at \$36 an hour, with a two week notice period.

[19] At that point, Mr Hu's understanding was that he needed a new work visa linked to a new employer. The two discussed that. As a result no start date for the work was set, with Mr Hu awaiting visa arrangements and the company having available work.

[20] No written offer or employment agreement was completed at this time. Bestbase puts the absence of written documentation down to a lack of English proficiency by both Mr Hou and Mr Hu, along with a cultural tradition of a person's word being their bond. Mr Hu does not agree as he later requested an employment agreement.

[21] There is a message in early May 2022 from Mr Hou that he had started the paperwork to prepare "the contract". It is not evident this was a reference to an employment contract. Mr Hou goes on to note the "important point is to provide everyone with commercial insurance, ACC is only part of it, renting a house". The Authority received a certificate of insurance from 6 May 2022 confirming cover for Bestbase for public, statutory and employer's liability.

[22] Mr Hu refers to becoming entitled to another work visa on around 9 May, through a Covid related automatic renewal process. This was an open visa, not tied to Bestbase. There was a delay with provision of the actual visa, reportedly due to Mr Hu's passport being about to expire and him sending it off to the Chinese Embassy for renewal, with the connection between the new visa and the passport not being completed until 27 June 2022.

### **Tauranga work**

[23] Mr Hu and another worker travelled to Tauranga together to start work for Bestbase. On 17 or 18 May 2022 Mr Hu began at the construction site.

[24] It was not a smooth start. A couple of days' work were available then it was raining and Mr Hu and his colleague were told by the client's supervisor to go home for the day. Mr Hu became concerned that working hours would not be guaranteed with the rainy season coming up.

[25] On 19 May Mr Hu messaged Mr Hou seeking "clear instructions" on whether to go back to the worksite. The sequence of events around this time could not be precisely established.

[26] Bestbase material suggests that the supervisor had complained about the quality of Mr Hu's work. Mr Hu denies this.

[27] There is however, text evidence of a co-worker raising dissatisfaction with Mr Hou about Mr Hu, to the extent that it was one of the reasons the worker identified for leaving the job. Mr Hu texted the worker, apologising if he minded Mr Hu's 'joking around' behaviour. It appears the co-worker disliked Mr Hu's language.

[28] Mr Hu indicated he was leaving Tauranga. During his trip, Mr Hou phoned and asked Mr Hu to return to the city, saying he would sort out the working hours. Mr Hu returned.

[29] At the investigation meeting Mr Hu accepted he had given notice (of resignation) to Mr Hou for a second time on 20 May 2022 after a group of workers were sent home early as the supervisor had something else to do. Mr Hou again persuaded him to stay.

[30] There was some suggestion for Bestbase that the employment relationship ceased on 20 May 2022 and resumed when Mr Hu started work later on 18 July 2022. I do not accept that. On 20 May Mr Hou had for the second time persuaded Mr Hu to stay working for the company and there was no other action by Mr Hou which brought the relationship to an end. The employment relationship continued.

#### **Disadvantage grievance - 'false advertising'**

[31] Mr Hu raises a disadvantage grievance about Bestbase's misleading information. The WeChat post referred to "at least 60 working hours every week" whereas the Tauranga work looked like it might be more patchy.

[32] There is a difficulty with whether misleading information provided pre-employment can be properly dealt with under a personal grievance which on the face of it only applies when an employment relationship exists. In this case the parties did not discuss the hours of work when employment was agreed.

[33] There is another difficulty in that, although the hours were not looking promising on Mr Hu's first few days, he was actually only at the worksite for a short period before having an accident.

[34] When I asked Mr Hu what he was seeking for the ‘false advertising’ he said he was not claiming anything for it, it was just an example of bad behaviour on behalf of Bestbase. I take this no further.

### **Mr Hu’s accident**

[35] On 21 May 2022 Mr Hu injured himself when assisting his landlord to cut down a tree. He needed stitches on his hand and bandaging. A medical certificate records him as unfit to work until 24 July 2022.

[36] On 31 May Mr Hu messaged Mr Hou about his ACC weekly compensation application:

...I need you to provide me with an employment contract. The requirement is the date of signing the contract must be before the date of my injury (May 21).  
(*emphasis added*)

[37] Five minutes later Mr Hu messaged that ACC says they will pay from week two, “the benefits of ACC have been a surprise to me”.

[38] Having not received a contract, Mr Hu followed up on 4 June 2022 asking how the preparation of his employment agreement was going. He indicated he needed it in the next few days to submit to ACC.

[39] It is not evident that Mr Hou provided any response to these messages. On 6 June 2022 Mr Hu messaged Mr Hou again, asking about his employment contract.

[40] On the evidence before me Mr Hu never received any ACC weekly compensation, with ACC being unable to satisfactorily establish his employment arrangements.

### **Disadvantage grievance - ACC**

[41] Mr Hu claims he was disadvantaged in terms of ACC payment by Bestbase’s unlawful failure to provide him with an employment agreement. I have concluded that his employment with Bestbase continued after 20 May 2022, with the company taking no steps to dismiss him.

[42] ACC sought IRD information about Mr Hu’s work but as he had not at this stage been paid at all for his three days of work with no tax forwarded to IRD, ACC sought a

copy of his employment agreement. The fact Mr Hu had no tax record in New Zealand for the previous two years, having been stuck in China due to the pandemic, did not assist.

[43] Bestbase says Mr Hu asked for a copy of his contract shortly after he had the accident but there was not one to provide (as the parties had not concluded a written employment agreement).

[44] Mr Hou may have been reluctant to backdate the signing of an employment agreement, which Mr Hu's message indicated was needed. However, Bestbase failed to take any steps to provide information to ACC confirming Mr Hu was in its employment at the time of the accident and what the hours and pay arrangements were. From what is before the Authority, the company took no steps to find out what was needed or assist Mr Hu in obtaining weekly compensation.

[45] Bestbase relies on Mr Hu's message that the benefits of ACC have been a surprise to him. That message was however, minutes after he had asked for the contract so I do not accept there was a solid basis for Bestbase to think everything was okay with payment for Mr Hu.

[46] I accept that Mr Hu was disadvantaged by Bestbase's unjustified lack of action regarding ACC. A grievance is established.

[47] Mr Hu sought an order that Bestbase pay him the compensation he should have received from ACC.

[48] ACC has the primary obligation to pay weekly compensation for situations covered by the scheme. Mr Hu should approach ACC about weekly compensation with this determination.

[49] The remaining disadvantage grievance regarding bullying is dealt with later in this determination.

### **Late pay**

[50] Bestbase had not made any payment for Mr Hu's Tauranga work. On 6 June 2022 he messaged Mr Hou asking for salary to be put into his account.

[51] Payment was eventually made around seven weeks after the work occurred.

[52] Although there was no written employment agreement, wages should be paid within a reasonable time and seven weeks later is outside that period. This late payment will be considered below with other late payments.

### **Move to the Waikato**

[53] On around 7 June 2022 Mr Hu contacted Mr Hou about further work. Mr Hou's written statement refers to him offering Mr Hu another trial, this time working on a project at Waikeria Prison near Hamilton. Reference is made to a two week notice period with Bestbase committed to pay the tax (PAYE). Mr Hu raises no concerns about the two week notice period but does not accept there was a trial. In the absence of direct evidence from Mr Hou, I accept Mr Hu's evidence.

[54] Mr Hou's witness statement refers to the agreement being that Bestbase would pay Mr Hu's rent but recover it from his wages "in due course". Mr Hu does not accept that was agreed. In light of the absence of sworn evidence from Mr Hou and the advertisement on WeChat, I accept Mr Hu's evidence.

[55] Even if there was a verbal agreement to have a trial, that would not satisfy the requirements of s 67A(2) of the Act - a trial period preventing the bringing of a personal grievance must be in writing.

[56] From 17 July 2022 Mr Hu moved into accommodation in Hamilton arranged by Bestbase.

### **The next work project**

[57] Mr Hu and some Bestbase co-workers worked at a construction project at Waikeria Prison. Mr Hu started work there on 18 July 2022.

[58] It was somewhat challenging to gain a clear narrative of events during the Waikeria work. Mr Hu describes on site relations as positive and friendly. Relations with Mr Hou were less so. Mr Hou was only occasionally at Waikeria as he was based in Auckland.

[59] Mr Hu's first wages from the Waikeria project were late. On 9 August 2022 he messaged Mr Hou at length about the late payment, including pleas relating to other workers with family obligations.

[60] Mr Hou replied that there was no delay - “[w]e all understand the usual time”. It appears the understanding was that workers would be paid for weeks 1 and 2 of work in week 3 but sometimes payment was not received until week 4.

[61] Further, Mr Hou messaged:

... The price of the Prison project is low, and the payment cycle is long, and it is difficult to maintain a balance. I beg your opinion: you can leave your job or transfer to another construction site.

[62] Mr Hu saw this as a message to leave or shut up. In actuality he did neither.

[63] Mr Hu was concerned that Mr Hou was attempting to rely on a client’s non-payment to delay payment to Bestbase workers. In addition Mr Hu found Mr Hou’s indication about how long Bestbase had not been paid for, to be misleading.

[64] When the wages payment was received, Mr Hu asked for a payslip but none was provided.

### **Tensions increase between the parties**

[65] On 24 August 2022 Mr Hu sent a very lengthy WeChat message to Mr Hou which included offering to reduce his hourly rate. His evidence is this was after Mr Hou came three times to the worksite seeking a reduction due to purported non-payment by the client. Mr Hu initially refused because he thought the client had paid and even if it had not, Bestbase’s was obliged to pay regardless. Mr Hu was still pushing to have an employment agreement signed on the basis of the actual employment arrangement, not at a reduced rate.

[66] Mr Hu told the Authority Mr Hou finally said they could sign an agreement based on the current hourly rate (\$36) but Mr Hu could then voluntarily sign a variation that he would agree to take a pay cut. Mr Hu reports this as being what he had been waiting for Mr Hou to say. Thus he agreed.

[67] Mr Hu describes himself as being voluntarily agreeable to support the business by taking a pay cut now that Mr Hou had got to the point of being honest and keeping his promise to document their original arrangement. The agreed reduced rate was \$33 gross an hour.

[68] In my words, Mr Hu agreed to a reduction in pay conditional on an appropriate employment agreement being provided which captured the actual agreed terms. There was also some discussion about Mr Hu possibly agreeing to pay some of the rent.

[69] Bestbase failed to provide an agreement within the next 10 days so Mr Hu sent Mr Hou a notice saying that Mr Hou's words were empty and if there was no contract provided by Sunday, Mr Hu would return to \$36 an hour.

[70] On 3 September 2022 Mr Hu withdrew his offer, by way of another message lasting a page. Included were a number of references to parts of a play (such as "... actors in Act 1 enter to the theme of 'Ask for a Pay Cut'"), seemingly describing the interactions between Mr Hu and Mr Hou.

[71] On 5 September Mr Hou blocked his WeChat channel with Mr Hu.

[72] On 6 September Mr Hou messaged that a contract would be sent that night or the next day. He said he had not the time and interest to read "a colourful long masterpiece" or future "unkind" messages. Mr Hou referred to ringing Mr Hu the day before but getting no answer. Mr Hou records he had temporarily shut down their WeChat connection "as a reward for your repeated failure to answer the phone... Wait until you get back to normal.". He asks Mr Hu to phone him.

### **Draft agreement provided**

[73] On 7 September 2022 Mr Hu received an email from an unfamiliar email address but which appears to be from Mr Hou. Attached is a proposed employment agreement, with Mr Hu being asked to call if he had any suggestions. Mr Hou noted discussions about money previously and that he had left out the hourly rate in the agreement with Mr Hu to fill it in as he pleases. And "[n]o matter what happened in the past, I hope there will be no misunderstanding in the future". Mr Hou hoped to receive Mr Hu's "telephone guidance soon". Mr Hu provided some initial written response the same day.

[74] For reasons which are not entirely obvious, Mr Hu then became so troubled by the use of what appears to be Mr Hou's personal email address that a few days later he emailed the Bestbase company email address seeking a reply:

...within three working days to confirm that Mr Hou is authorised to act on behalf of the company in sending me this agreement. If there is no response before 16

September 2022 I will assume that the agreement is approved by Bestbase Construction Group Ltd.

I will formally respond to the agreement by 17 September 2022.

[75] There was no prior indication of anyone other than Mr Hou being in charge, or involved in the management, of Bestbase.

[76] Aside from that, Mr Hu was dissatisfied with the agreement document itself - having no party names, no pay rate, a probationary period included and ordinary hours of 30 or more a week. There are also inapplicable references – for example, implying the employer had borne the employee’s work visa costs and a job description relating to a warehousing role.

[77] Mr Hu was angry - the agreement did not include what he saw as the current agreed conditions and was not relevant to his job. It also does not comply with s 65(2)(a) of the Act in terms of some elements which must be in an employment agreement. Mr Hu expressed to the Authority that he did not consider it to be an employment agreement at all, rather seeing it as an illustration of Mr Hou not being able to keep his word.

[78] On 12 September 2022 Mr Hu sent a text message asking Mr Hou not to call him, only email or message.

### **Events in October 2022**

[79] A short hiatus followed, then on 1 October Mr Hu messaged Mr Hou enquiring about payment for himself and others for public holidays. There had been a one-off public holiday on 26 September 2022 to mark the death of Queen Elizabeth II.

[80] On 14 October, Mr Hu perceived a message from Mr Hou on the work group chat as commending a worker, for what Mr Hu interpreted as, giving up rights.

[81] On 15 and 16 October Mr Hu and Mr Hou had substantial antagonistic exchanges on the group chat. Mr Hu described Mr Hou as portraying “the act of depriving employees of their rights and legally stealing from others and the public as ethical”. He stated proverbially “the trees want to calm down, but the wind does not stop” followed by “I’m officially in the game!”.

[82] Mr Hou commented that he is stunned, noting that Mr Hu sees himself as the embodiment or champion of justice. The group chat is noted to be for feedback of work hours (timesheets), not for “forums and bloggers”.

[83] On 16 October Mr Hu “publicly issued a notice” on the group chat that he would protect his rights through legal means, including pointing out that (in his view) almost all of the terms in the draft employment agreement were unlawful and he would lodge a personal grievance.

[84] Around the same time Mr Hou mentioned in the group chat that it is not easy for enterprises to pay money and taxes on time - “[w]hat is the problem if they miss payment?”. He goes on to describe Mr Hu as “too sensitive, paranoid and ask[ing] too many stupid questions”.

### **Dismissal**

[85] There were signs on 16 October 2022 that Mr Hu was on the way out. He was shut out of the group chat that day with Mr Hou setting up another group chat for the remaining workers.

[86] On the same day Bestbase told Mr Hu’s landlord that it was stopping rent payment on Mr Hu’s accommodation.

[87] On 17 October 2022 Mr Hou sent Mr Hu an email message notifying him that:

Due to various reasons, you did not pass the trial of our company and all relevant expenses are settled as scheduled. Please leave our company before 30<sup>th</sup> of this month and return the entry key...

[88] Mr Hu did not work for the period from around 20 October until the end of October 2022. He complained to MBIE and was researching employment law. His daughter suggested he got a lawyer.

[89] Texts support Mr Hu taking the 24 to 28 October 2022 week off, notifying both the on site supervisor of the Chinese workers and Bestbase’s client, although not directly seeking leave from Mr Hou. Mr Hu met with doctors and lawyers in Auckland during that period, related to work events. Mr Hu reports being in an emotional state and having sleepless nights.

[90] By 30 October 2022 Mr Hu was back in Hamilton and returned his security card to the project manager. He did no further work for Bestbase.

### **No employment agreement provided initially**

[91] Now back to Mr Hu's further claims. Under s 62(2)(a) of the Act employers must provide a copy of the intended employment agreement under discussion.

[92] No agreement was provided before Mr Hu began work for Bestbase in Tauranga. His need became urgent after the accident, with Mr Hu making requests for an agreement, without receipt. Mr Hou may have been concerned with the concept of backdating an agreement but Mr Hu was still entitled to a written agreement, albeit with a later date.

[93] After he started at Waikeria, Mr Hu messaged Mr Hou on 11 August 2022 that he wanted an employment agreement as required by New Zealand law.

[94] In conclusion Bestbase failed to provide Mr Hu with an employment agreement before he started work, as it was required to, thus breaching s 63A(2)(a) of the Act. The company is liable to a penalty.

### **Agreement once provided was inadequate**

[95] When the draft agreement was provided on 7 September 2022 it had a number of the sections not filled in.

[96] It did not comply with all the requirements for agreements under s 65(2)(a) of the Act – it did not specify the name of the employee and employer nor include a description of the place or type of work nor the pay rate.<sup>1</sup> Bestbase therefore breached s 65(2)(a).

### **Good faith**

[97] Mr Hu identifies Bestbase's repeated promises and failure to provide an employment agreement and provision of the inadequate draft as breaches of good faith. That may well be the case but for the purposes of determining penalties, such breaches would be globalised with the breaches of ss 63A and 65 of the Act so nothing further is added.

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<sup>1</sup> The Act, s 65(2)(a)(i), (ii)(iii) and (v).

## **No penalty regarding unfair bargaining**

[98] Mr Hu's claims include unfair bargaining, although his arguments overlap somewhat with the issues above about lack of provision of a (compliant) employment agreement.

[99] Under s 68 of the Act bargaining for an employment agreement can be categorised as unfair in identified circumstances. These include where a party is unable to understand the provisions of the employment agreement due to diminished capacity, such as sickness. Other reasons include where the person reasonably relies on the person they are negotiating with or is induced to enter the agreement by some improper means.<sup>2</sup>

[100] Mr Hu argues that he was bullied in contract negotiations and treated in bad faith, essentially because the proposed agreement did not include terms and conditions which were already agreed.

[101] The agreement Bestbase provided was in English without translation. This could have been problematic but as it turned out Mr Hu had the resources to discover the agreement did not include the terms which had been agreed and did not meet the elements required in s 65 of the Act.

[102] In any event the draft employment agreement was not signed by Mr Hu. He did not accept the proposal. There is no provision under ss 68 or 69 of the Act for the penalty for unfair bargaining Mr Hu seeks.

## **Pay problems**

[103] Mr Hu asserts that Bestbase failed to pay wages on time and underpaid wages.

### *Late payment*

[104] There was no written agreement in place specifying when pay was due. Mr Hu's position is that wages should have been paid in the third week for the previous two weeks of work but that did not always occur. This was in keeping with the message from Mr Hou.

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<sup>2</sup> The Act, s 68(2).

[105] Bestbase accepts there were times when the pay was late due to the company not receiving payment on time. In some instances Mr Hu was not paid until almost two weeks after the pay period had finished. That does not comply with s 4 of the Wages Protection Act that wages shall be paid to the worker when they become payable. Bestbase is liable for a penalty.

#### *Underpayment*

[106] From 29 August 2022 onwards Bestbase reduced the hourly rate it paid to Mr Hu from \$36 to \$33. Mr Hu had agreed to a reduction but conditional on getting the appropriate employment agreement, which did not happen. The company should not have reduced the pay rate. The difference was repaid after the Authority's investigation meeting.

[107] Also, Mr Hu seeks \$396 gross of the period from 24 to 29 October 2022 for which he was not paid. However, during this period he did not work and so is not entitled to payment, given he had no sick leave entitlement and any annual leave payable is accounted for elsewhere.

#### *Deduction*

[108] Bestbase acknowledges it made a deduction from Mr Hu's final pay for rent, thinking this was agreed. I am not satisfied that there was any such agreement which went unconditional and in any event there was no written agreement or consent to deduct.<sup>3</sup>

[109] The deducted amount of \$1,820 has now properly been paid to Mr Hu by Bestbase. But in making the deduction the company breached s 4 of the Wages Protection Act.

[110] Mr Hu also argues that Bestbase should reimburse him for the rent he paid until the end of his notice period. Had he remained at work in Hamilton, using the accommodation, such a claim would be justified. However, Mr Hu chose to effectively take unpaid leave and return to Auckland from when he was notified of his dismissal until his notice period ceased. No order is made.

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<sup>3</sup> Wages Protection Act 1983, s 5(1)(a) and (b).

## *Conclusion*

[111] There are no arrears now owing on any of these wage matters but Bestbase is liable to a penalty for its breaches.

### **Failure to provide wages and time records**

[112] In August 2022 Mr Hu messaged seeking wages and time records from the company. There was no response on that point from Mr Hou.

[113] Mr Hu did keep his own time records at the company's request, with the workers sending their weekly hours to Mr Hou through the group chat. Mr Hu provided these to the Authority.

[114] Mr Hu formally sought his wages and time records on 18 November 2022.

[115] On 9 January 2023 Mr Hou emailed what is described as a payslip to Mr Hu, apologising for the delay and referring to attempts to contact Mr Hu many times regarding payment but failing. The attachment is essentially a wages and time record setting out, for Mr Hu's Waikeria time, total fortnightly hours worked, gross and net pay amounts and tax. Payment of holiday pay on 9 January 2023 is also recorded.

[116] Although the records were eventually provided, Bestbase failed to provide them within a reasonable time after request, breaching s 130 of the Act. The company is liable to a penalty.

### **Holidays Act**

#### *Public holidays*

[117] There was some uncertainty about which public holiday/s Mr Hu was seeking payment for. He also sought to have Bestbase penalised - s 55 of the Holidays Act requires payment for public holidays in the pay that relates to the pay period in which the holiday occurs.

[118] Mr Hu should have been paid for 26 September (the one-off public holiday) and 24 October (Labour Day) 2022.

[119] From the records Mr Hu was paid for 26 September 2022, at the latest in a 16 November payment.

[120] There was a delay in payment for 26 September but given this was a one-off holiday called at short notice I would not consider imposing a penalty for this.

[121] Labour Day occurred after Mr Hu's last actual day of work. At that point he was in a period of leave, although it was not clear at the time whether it was paid. He was paid for Labour Day after the investigation meeting. That was clearly well outside the pay period relating to that day. Given the uncertainty about whether he is owed it I do not consider a penalty to be appropriate here.

#### *Annual leave*

[122] On about 9 January 2023 Bestbase paid Mr Hu holiday pay, being 8% on top of his gross earnings. After the investigation meeting Bestbase has paid for the deduction it made for rent. Nothing further is owing.

### **Unjustifiable dismissal**

#### *Trial period*

[123] Bestbase gave Mr Hu notice of his employment finishing by way of a trial period. The company does not have a solid basis to rely on a trial period even if it was found one had been verbally agreed between the parties. As mentioned above, a trial period must be in writing.

[124] Even if the draft agreement is taken as binding it contains a probation period rather than a trial period, which runs from first appointment. That would not assist Bestbase. It would have run from around April or May 2022 when the Tauranga work was discussed and started. Three months expired in July or August 2022, well before Mr Hu was dismissed.

#### *Dismissal*

[125] I have considered whether Mr Hu's departure from the workplace after receiving notice of dismissal impacts on whether he was dismissed. There is no indication at the time of Bestbase taking issue with his absence. This suggests the company may well have

discovered his absence through word from the site supervisor of the Chinese workers or its client, both of whom Mr Hu notified by message about his leave.

[126] I conclude Mr Hu effectively took unpaid leave during his notice period, without objection from the company. He was dismissed by Bestbase.

### *Justification*

[127] Bestbase must establish that it acted as a fair and reasonable employer could have done in dismissing Mr Hu.<sup>4</sup> Consideration must be given to whether:

- (a) having regard to its available resources, Bestbase sufficiently investigated;
- (b) it raised its concerns before dismissing;
- (c) it gave Mr Hu a reasonable opportunity to respond; and
- (d) it genuinely considered his explanations.<sup>5</sup>

[128] Bestbase's dismissal email referred to "various reasons" for not wanting to continue Mr Hu's employment long term, without specifying the reasons. That in itself is unfair.

[129] The reasons, according to Mr Hou's witness statement, are said to include the quality of Mr Hu's work, his bad behaviour and bad relations with other staff.

[130] There was little or no evidence of Bestbase investigating supposed work quality concerns, raising them with Mr Hu or giving him a chance to respond. The reference to bad behaviour is broad. Mr Hou may well have been annoyed by Mr Hu's group chat declarations of objection to Mr Hou's employment practices. On the evidence before me he made no effort to discuss or arrange a meeting with Mr Hu to discuss his annoyance. Mr Hu's refusal to take calls may not have assisted.

[131] The only evidence of any difficulties with Mr Hu's staff relations concern the Tauranga co-worker. Mr Hou was aware of this in May 2022 and chose to continue Mr Hu's work, through the Waikeria project.

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<sup>4</sup> The Act, s 103A.

<sup>5</sup> The Act, s103A(3).

[132] There is also Mr Hu's point that his dismissal came very shortly after he notified Bestbase of his intention to bring a claim.

[133] I struggle with Mr Hu's description of the "perfect crime" having been committed by his employer but find it more likely than not that Mr Hou had had enough of Mr Hu's assertive/argumentative behaviour and jumped to dismissal without undertaking any procedure.

[134] This was not a minor failure with Mr Hu being treated fairly.<sup>6</sup>

[135] I conclude that Bestbase did not act as a fair and reasonable employer could have done. Notice was simply given on the basis of a misguided belief by Mr Hou that the company was entitled to dismiss on a trial period, without identification of reasons or utilisation of a process. Mr Hu was unjustifiably dismissed by Bestbase.

### **Grievance remedies**

[136] Mr Hu seeks reimbursement of lost wages. He had hoped MBIE could direct his return to work, as he had found the other workers very friendly. He did however send his CV to companies which the project manager at the Waikeria project suggested. He has now obtained other work.

[137] Mr Hu is entitled to three months' lost wages. At the fortnightly rate of \$3,600 gross (100 hours at \$36), multiplied by 6, this gives a 12 week figure of \$21,600 gross.

[138] Mr Hu's IRD evidence establishes he obtained other work from the start of April 2023. However, I am not persuaded to extend the three months' lost wages figure.<sup>7</sup> It seems unlikely that Mr Hu would realistically have continued with Bestbase beyond that period.

[139] In terms of compensation for humiliation, loss of dignity and injury to feelings, Mr Hu claims \$20,000. Mr Hu's confidence for future employment was damaged. The situation with Bestbase was very stressful for him. Mr Hu describes suffering from insomnia and depression. A doctor prescribed sleeping medication shortly after Mr Hu was notified of dismissal.

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<sup>6</sup> The Act, s 103A(5).

<sup>7</sup> The Act, s 128.

[140] Other aspects of Mr Hu's allegations are less well established, for example that his reputation was damaged.

[141] I assess that compensation of \$17,000 should be the starting point.

[142] Mr Hu sought the rent he paid for the Hamilton accommodation after his dismissal. Bestbase had agreed to pay his rent and discussion about the possibility of him contributing did not come to conclusion. There is bank evidence of him renting the Hamilton accommodation from November 2022 to February 2023. In the three month period Mr Hu paid a total of \$1,560 in rent. This is a lost benefit which he would have obtained but for being dismissed.

[143] I now go on to consider contribution – were Mr Hu's actions causative of the dismissal outcome and blameworthy? I consider a modest deduction is warranted on the basis of Mr Hu's refusal to take phone calls from Mr Hou over an extended period. This made it difficult for Mr Hou to have a more informal discussion about the two's concerns rather than just send escalating messages, including on the group chat.

[144] I deduct 10% for contribution off the amounts above. Bestbase is to pay Mr Hu the following grievance remedies within 28 days of the date of this determination:

- (a) \$19,440 gross as lost wages;
- (b) \$15,300 as compensation under s 123(1)(c)(i) of the Act; and
- (c) \$1,404 for the lost rent benefit.

### **Disadvantage – bullying**

[145] Mr Hu argues he had been bullied into liking the job at Waikeria Prison in order to silence any voices that question him. He points to Mr Hou's 9 August message which he takes as - leave or move to another site. Yet Mr Hu remained at Waikeria.

[146] Overall the events Mr Hu describes as bullying are caught up in other claims and also cover allegations about other employees which there is little direct evidence about. I take this no further.

## Penalty imposed

[147] Mr Hu seeks penalties on a wide variety of subjects - good faith, bargaining, personal grievances, arrears and records. He seeks 40% of the penalty be paid to him.

[148] Some of the penalties sought by Mr Hu concern obligations about which no penalty is provided – for example, unfair bargaining or personal grievances.

[149] I have indicated above some matters on which a penalty is not warranted or are effectively globalised with other obligations listed below. A penalty is warranted regarding the following remaining breaches:

- (a) not providing an employment agreement at the start of employment in breach of s 63A of the Act;<sup>8</sup>
- (b) providing an agreement which does not comply with the requirements in s 65 of the Act;<sup>9</sup>
- (c) late payment of wages in breach of s 4 of the Wages Protection Act;<sup>10</sup>
- (d) unlawful deduction by way of reduction in pay rate in breach of s 4 of the Wages Protection Act;<sup>11</sup>
- (e) unlawful deduction for rent under s 4 of the Wages Protection Act;<sup>12</sup> and
- (f) failure to provide wages and time records in breach of s 130 of the Act.<sup>13</sup>

[150] In assessing the appropriate penalty quantum, account is taken of the factors set out in s 133A of the Act and the judgments in *Borsboom (Labour Inspector) v Preet PVT Limited and Anor*, *Nicholson v Ford* and *Labour Inspector v Daleson Investment Limited*.<sup>14</sup>

[151] I globalise the four payments at the reduced hourly rate of \$33 into one breach, the late payments into one breach and the two deduction elements into one breach. There

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<sup>8</sup> Penalty in s 63A(3) of the Act.

<sup>9</sup> Penalty in s 65(4) of the Act.

<sup>10</sup> Penalty in s 13 of Wages Protection Act.

<sup>11</sup> Penalty in s 13 of the Wages Protection Act.

<sup>12</sup> Penalty in s 13 of the Wages Protection Act.

<sup>13</sup> Penalty in s 130(4) of the Act.

<sup>14</sup> *Borsboom (Labour Inspector) v Preet PVT Limited and Anor* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

are then five breaches, each with a maximum of \$20,000 penalty for a company, thus totalling \$100,000.

[152] In terms of seriousness, the actions involve a mix of employment standards, minimum entitlements and other breaches. Mr Hu was a migrant although his visa was not dependent on Bestbase and so he was less vulnerable than many migrants for whom such claims are brought. He had also been in New Zealand before the Covid pandemic and was capable of undertaking his own research into employment rights and towards the end of his employment, accessing legal services. Mr Hu was paid a substantial amount above the minimum wage.

[153] Mr Hu repeatedly requested an employment agreement, with such requests being ignored for periods. The late payments were deliberate although Mr Hou tried to justify these on the basis of the company not receiving timely payment itself.

[154] Both the late payments and reduced payrate went on for relatively short periods although the Wages Protection Act breaches are employment standards matters and so regarded particularly seriously.

[155] Bestbase deserves some credit for paying Mr Hu for the reduced pay rate and rent deduction.

[156] Mr Hu's position is that his concerns were really collective with Bestbase taking what he describes as improper or unlawful steps with a number of employees, with tax and employment standards issues. However, there is an absence of cases from those workers or determinations against Bestbase.

[157] There is a need to deter Bestbase and others in the industry from not complying with employment standards. As Mr Hu indicated, other companies in the construction industry suffer if their competitors are allowed to operate without meeting their legal obligations to employees.

[158] In terms of Bestbase's financial position there was some indication to Mr Hu, whilst employed, of the company being in a tight position. The Authority was also told about Mr Hou being unwell and overseas for treatment which impacted on the business.

These matters were disputed by Mr Hu and in the absence of better evidence I make no deduction.

[159] I have assessed the penalty against other cases involving multiple breaches but only one employee, as well as considering the relatively modest total amount which was owing before being paid recently by Bestbase.

[1] Standing back, I conclude that a fair penalty is \$9,000. Mr Hu seeks that 40% of the penalty be paid to him. There is a strong public interest in Wages Protection Act matters which are both minimum entitlement provisions and employment standards. However, the breaches had a significant impact on Mr Hu and thus he should receive 40% of the penalty.

[2] Bestbase is ordered to pay a penalty of \$9,000 within 28 days of the date of this determination, with \$3,600 paid to Mr Hu and \$5,400 paid into the Authority's bank account to be forwarded to the Crown account.

### **Tax to be paid**

[160] Mr Hu identifies concerns about Bestbase's practices regarding the IRD. It appears no tax was paid to the IRD by Bestbase for the \$666 paid for Mr Hu's work in Tauranga.

[161] Bestbase is to pay any tax outstanding to the IRD and correct any incorrect material provided to the IRD.

### **Summary of orders**

[162] Within 28 days of the date of this determination Bestbase is to pay:

- (a) Mr Hu grievance remedies of:
  - (i) \$19,440 gross as lost wages;
  - (ii) \$15,300 as compensation under s 123(1)(c)(i) of the Act; and
  - (iii) \$1,404 for the lost rent benefit; along with
- (b) Penalty payments of \$3,600 to Mr Hu and \$5,400 paid into the Authority's bank account to be forwarded to the Crown account.

## **Costs**

[163] Costs are reserved.

[164] The parties are encouraged to resolve any issue of costs between themselves.

[165] If they are not able to, the Authority will consider costs. Mr Hu succeeded in a substantial number of his claims and so could be awarded costs if he has incurred relevant expenses. He was not represented at the investigation meeting but did provide a bill from November 2022 for legal costs. Assuming he wants to claim in that regard he should provide the schedule of hours referred to in the bill and any other submission to the Authority within 28 days from the date of this determination. From the date of service of that submission Bestbase would then have 14 days to lodge any reply.

[166] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would be considered.<sup>15</sup>

Nicola Craig  
Member of the Employment Relations Authority

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<sup>15</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).