

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 710
32343998

BETWEEN

WUJI JIN
Applicant

AND

PRECISION NZ LIMITED
Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Michael Kim, counsel for the Applicant May Moncur, advocate for the Respondent
Investigation Meeting:	8 October 2024
Submissions and/or further evidence	8 and 11 October and 20 November 2024 from the Applicant 9 October 2024 from the Respondent
Determination:	29 November 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Wuji Jin, began working for the Respondent, Precision NZ Limited (Precision NZ), on or about 11 January 2022, until he resigned. Mr Jin claims he was constructively dismissed by Precision NZ because he felt compelled to resign after non-payment of wages. Mr Jin is also claiming he was unjustifiably disadvantaged by being denied statutory minimum employment entitlements.

[2] Mr Jin is seeking penalties in respect of a non-compliance with statutory employment standards. Penalties are also sought against the Second Respondent, Mr Alex Zhang, as a person involved in the breaches of minimum employment standards.

[3] Precision NZ claims that it genuinely understood that Mr Jin was an independent contractor and not an employee whilst working for Precision NZ.

[4] Precision NZ further claims that Mr Jin's claims for constructive dismissal and unjustifiable disadvantage are outside the statutory 90-day time limit for bringing the claims.

[5] Precision NZ further claims that Mr Jin's claim for penalties is outside the statutory 12 month time frame.

The Authority's investigation

[6] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Mr Jin.

[7] The Authority received written and, under oath or affirmation, oral evidence from the Respondent, Mr Zhang.

[8] Oral and written submissions were received from Mr Kim for the Applicant and Ms Moncur for the Respondent. These have been fully considered.

[9] The Authority was assisted at the Investigation Meeting by the services of a Mandarin interpreter.

[10] 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.

Issues

[11] The issues requiring investigation are whether or not:

- Mr Jin's personal grievances for unjustifiable disadvantage and constructive dismissal were raised within the statutory time frame.

If not:

- Should he be allowed to raise them outside of the statutory time frame?

If allowed to raise them:

- Was Mr Jin unjustifiably disadvantaged by Precision NZ?
- Was Mr Jin constructively dismissed by Precision NZ?
- Were Mr Jin's penalty claims raised within the statutory time frame?

Background

[12] Precision NZ was founded by Mr Zhang in 2012 as an international trading company but began operating as a construction business on or about late 2016. It was a smaller company with three employees, one of which was Mr Zhang, and utilised the services of contractor labour when required. It worked for larger construction companies on big construction projects.

[13] Mr Jin was a carpenter and had been in New Zealand for 20 years. He had permanent residency. He had undertaken a variety of work since he had been living in New Zealand, including in the hospitality sector.

[14] Immediately prior to working for Precision NZ, Mr Jin had worked for another construction company on the same construction project as Precision NZ and had become friendly with Precision NZ workers.

[15] Mr Zhang said that during late 2021 his understanding was that the construction company at which Mr Jin was working was reducing its workforce. Mr Jin had sought work at Precision NZ, but at that time Mr Zhang had been reluctant to offer Mr Jin work. However, due to Mr Jin's persistence he eventually agreed to engage him.

[16] In January 2022 Mr Jin commenced working at Precision NZ. His hourly rate was \$32.00, and he said the weekly hours differed but that he maintained a record of the hours worked which showed the hours were approximately 10 a day worked on five or sometimes six days a week. Payment was made by bank transfer.

[17] Mr Zhang said his accountant worked out the payments to the contractors. The payments had a 20 percent withholding tax deducted from them. He requested that Mr Jin provide him with an invoice, but this did not often occur. Payments were made on a monthly basis.

[18] Mr Jin said he gave one months' notice, with his last working day at Precision NZ being 28 October 2022.

[19] Mr Zhang denied Mr Jin provided notice of his intention to resign. He confirmed Mr Jin did not present for work after 28 October 2022, but Mr Zhang said he did not have an issue with this because of his understanding that Mr Jin was a contractor and that he had left to work elsewhere.

Email 12 November 2023

[20] Mr Jin said that by the end of October 2022 he had not been paid for the final period of his employment with Precision NZ and he contacted the Ministry of Business, Innovation and Employment (MBIE). On 12 November 2022 Mr Jin sent an email to Precision NZ headed "Labour Dispute Between Wuji Jin & Precision NZ Ltd" in which was stated:

In respect of unpaid wages I have been trying to claim from you:

- Our relationship is employee and employer as I have been receiving payments/wages based on the number of hours worked.
- ...

- I still have not received the three weeks pay from 10/10/22 to 28/10/22. Per my record, you owe me 139 hours for that three weeks.

[21] The parties attended mediation in April 2023, but this did not resolve the issue.

First Statement of Problem 9 June 2023

[22] Mr Jin lodged a Statement of Problem with the Authority on 9 June 2023 in which he claimed that he was an employee who was owed wage arrears and had not been paid minimum employment entitlements by Precision NZ. He claimed that he had been unjustifiably disadvantaged and constructively dismissed by Precision NZ.

[23] On 10 July 2023 Precision NZ lodged a Statement in Reply in which Mr Zhang denied that Mr Jin was an employee, stating that he was a contractor. At the conclusion of the Statement in Reply, Mr Zhang stated: "I believe the Employment Relationship Authority can decide this is not an employment problem. "

[24] The parties attended a further mediation on 31 October 2023, but this did not resolve the issue.

Amended Statement of Problem 15 November 2023

[25] On 15 November 2023 an Amended Statement of Problem was lodged with the Authority together with an application to join Mr Zhang as the Second Respondent.

[26] This Statement of Problem repeated the claims of unjustifiable disadvantage and constructive dismissal and included in the remedies sought penalty claims against (i) Precision NZ for breaches of employment standards and (ii) Mr Zhang as a person involved in the breaches.

[27] Due to Mr Zhang's ill health, an extension to lodge an Amended Statement in Reply was granted by the Authority. It was lodged with the Authority on 8 February 2024 and maintained that Mr Jin was a contractor, not an employee.

[28] In June 2024 the Authority confirmed that Mr Zhang was joined as a Second Respondent.

Amended Statement in Reply 9 August 2024

[29] Following Ms Moncur's appointment as Precision NZ's representative, a further Amended Statement in Reply was lodged dated 9 August 2024. In it, Precision NZ stated that it had accepted, following legal advice, that there was an employment relationship between the parties.

[30] It also stated that Mr Jin's wage arrears and entitlements (annual and public holiday pay) had been calculated and would be processed by 10 August 2024.

[31] The Amended Statement in Reply further stated that the penalties claim was outside of the statutory time limit.

Further Amended Statement in Reply 20 August 2024

[32] In the further Statement in Reply lodged on 20 August 2024 Precision NZ claimed that Mr Jin's personal disadvantage and constructive dismissal claims had both been raised outside of the statutory time limits.

[33] It was also confirmed that all outstanding wage arrears and statutory entitlements monies had been paid.

Did Mr Jin raise his personal grievance claims within the statutory 90-day time frame?

Raising of a Personal Grievance

[34] Sections 114(1) and (2) of the Act state:

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period;
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[35] In *Panapa v Spotless Facility Services Limited* the Employment Court stated:

[23] A grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. The raising of a grievance is the first recognised step in the problem solving process.

[24] In order for a communication to constitute the raising of a personal grievance, it must make the employer sufficiently aware of the grievance to be able to respond to it.¹

[36] I find that the language of s 114(2) of the Act as applied by the Employment Court in *Panapa v Spotless Facility Services Limited* makes it clear that it is necessary that:

¹ *Panapa v Spotless Facility Services Limited* [2021] NZEmpC 88.

- (i) there is an action by the employer which gives rise to a personal grievance before the personal grievance is raised;
- (ii) the employee has taken reasonable steps to advise the employer that he/she is alleging a personal grievance it wants the employer to address; and
- (iii) the communication about the personal grievance made the employer sufficiently aware of what it had to address.

[37] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer².

Was a personal grievance raised within the 90-day statutory time period?

[38] Mr Jin’s employment ended on 28 October 2022. Precision NZ claims that Mr Jin did not raise his personal grievance within the statutory 90-day time frame set out in s 144(1) of the Act.

Did the email dated 22 November 2022 raise a personal grievance?

[39] As stated in *Creedy v Commissioner of Police*, for an employer to be able to address a grievance, “the employer must know what to address”.³ It is insufficient for an employee to simply advise he or she has a personal grievance.

[40] In this case Mr Jin states that he was an employee, but that statement alone I find does not raise a personal grievance. Mr Jin requests arrears of wages. Whilst it is not necessary for the employee to set out in full detail the basis of the personal grievance, this email is concerned only with a wages claim. There are no other details of any personal grievance which Mr Jin wants Precision NZ to address.

[41] I find that the email dated 22 November 2022 does not constitute the raising of a personal grievance.

Did the Statement of Problem lodged 9 June 2023 raise a personal grievance?

[42] On 9 June 2023 Mr Jin lodged the first Statement of Problem claiming remedies as an employee who had been unjustifiably dismissed and unjustifiably disadvantaged.

² *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503.

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

[43] I find this was more than 90 days since Mr Jin’s employment with Precision NZ had ended, and it was therefore raised outside the statutory 90-day time limit.

[44] Precision NZ does not consent to Mr Jin raising his personal grievances outside of the statutory 90-day timeframe.

Should Mr Jin be granted leave to raise the constructive dismissal and unjustifiable disadvantage personal grievance claims outside of the 90-day statutory time limit?

Was there implied consent by Precision NZ to the personal consent being raised outside of the statutory time limit?

[45] Mr Kim submits that Precision NZ conducted itself in such a way as that it can be taken as reasonably consenting to an extension of time for the personal grievance being raised. Specifically, it is submitted in support that Precision NZ attended two mediation sessions without objecting to the timeliness of the grievance.

[46] The issue of whether consent could be given impliedly was considered by the Employment Court in *Hawkins v Commissioner of Police* which decided that ‘consent’ to a personal grievance being raised outside the 90-day statutory limitation period may be implied by the employer.⁴ This decision was upheld on appeal by the subsequent Court of Appeal case, in which the Court of Appeal stated:

The real issue is not whether, in formal terms, the Commissioner “turned his mind” to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.⁵

[47] Attendance at mediation is not an indicator of consent. The Act promotes mediation as the primary problem-solving mechanism for employment relationship problems. Voluntary or directed attendance at mediation, including in situations where the nature or content of the claims discussed there is disputed, does not of itself amount to consent to raising a grievance in the way described in s 114 of the Act.

[48] Rather, as discussed in *Hawkins*, the question is whether, as a matter of fact and degree, an objective observer could reasonably regard the employer as having conducted itself in a way that could reasonably be taken as consenting to an extension of time for raising a grievance outside the 90-day period.⁶ The assessment to be made in such cases has been described,

⁴ *Hawkins v Commissioner of Police* [2007] ERNZ 762.

⁵ *Hawkins v Commissioner of Police* [2009] NZCA 2009 at [24].

⁶ Above n5 at [23] and [25].

metaphorically, as looking to see if the employer had a ‘red light’, or even an ‘orange’ showing, on the issue of the 90-day time limit for raising a grievance.⁷

[49] In this case, I find that Precision NZ conducted itself throughout on the basis of not accepting and not consenting to Mr Jin raising his personal grievance outside the 90-day period, because it did not accept that he was an employee.

Should leave to raise out of time be granted by the Authority?

[50] As set out in s 114(3) of the Act, where an employer does not consent to a personal grievance being raised after the 90-day statutory time frame an employee may apply to the Authority for leave to raise it outside of that frame pursuant to s 114(3) and (4) of the Act. The relevant subsections of s 114 state;

- (3) Where an employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
- (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –

[51] Mr Jin raised no application for leave to raise the personal grievance outside of the statutory 90-day time period prior to the Investigation Meeting. Instead reference to leave was made in the Applicant’s closing submissions.

[52] I have considered whether or not an application for leave can be raised in submissions but find that does not accord with the clear wording and intention of s 114 of the Act because raising the issue in closing submission denies the employer a reasonable opportunity to consider and be heard on the subject and for the matter to be determined prior to a substantive investigation meeting.

[53] I determine that Mr Jin should not be granted leave to raise the unjustifiable dismissal and unjustifiable disadvantage personal grievance claims out of time.

[54] In making this decision I note that this will not affect Mr Jin’s wage claims which would fall under s 142 of the Act.

⁷ Above n5 at [24].

Did Mr Jin raise his penalty claims within the statutory 12-month time frame?

[55] Mr Jin is seeking penalties for breaches of the Act, in particular Mr Jin claims that he was not provided with minimum employment entitlements and was not provided with a written employment agreement. Pursuant to s 135 (5) of the Act:

An action for the recovery of a penalty under this Act must be commenced within 12 months ... after the earlier of-

- (a) The date when the cause of action first became known to the person bringing the action; or
- (b) The date when the cause of action should reasonably have become known to the person bringing the action.

[56] Pursuant to s 135 of the Act, Mr Jin had 12 months in which to commence his action for recovery of a penalty. It is therefore appropriate that I consider this issue as unless Mr Jin has brought his claim within the statutory time frame, he is time-barred and not entitled to remedies.

[57] Mr Jin must have brought his action for the recovery of a penalty either within 12 months of becoming aware of the cause of action, or within 12 months of reasonably becoming aware of the cause of action.

[58] Mr Jin's employment with Precision NZ terminated on 28 October 2022. The claim for penalties was first made in the Amended Statement of Problem dated 15 November 2023. This was more than 12 months after Mr Jin's employment with Precision NZ ended.

[59] In accordance with s 135(5)(b) of the Act a penalty can be raised within 12 months of: "the date when the cause of action should reasonably have become known ...".

[60] There is no evidence as to the exact date when Mr Jin formed the view that he was an employee, but by the email dated 12 November 2022 Mr Jin had been in communication with MBIE and had notified Precision NZ of his belief that the relationship between him and Precision NZ had been that of employer and employee.

[61] In the first Statement of Problem raised on 9 June 2023 Mr Jin repeated his claim for arrears of wages, and raised other claims, but did not seek penalties.

[62] I find that by 12 November 2022 Mr Jin should have been reasonably aware of the cause of action that might give rise to a claim for penalties.⁸

⁸ Employment Relations Act 2000 s 135(5)(b).

[63] The claim for penalties was not raised until the Amended Statement in Reply dated 15 November 2023 which sought penalties for the first time. That is three days after the 12-month statutory time limit.

[64] The Authority has no discretion in relation to an action for recovery of a penalty pursuant to s 135(5) of the Act.

[65] I determine that Mr Jin is time-barred from bringing penalty claims against Precision NZ and Mr Zhang pursuant to s 135 of the Act.

Remedies

[66] Mr Jin has been paid a sum of monies by Precision NZ which he claims is incorrect. Mr Jin claimed he had not been paid the correct amounts owed in respect of wage arrears for the final period of his employment, annual leave entitlement and public leave entitlement.

Wage arrears

[67] Mr Jin claimed 140.5 hours as wage arrears. Mr Jin was paid \$32.00 per hour; therefore, he should have been paid \$4,496.00 gross in respect of wage arrears.

Public Holidays

[68] Mr Jin claims that he did not work on the nine public holidays which fell during the period of his employment with Precision NZ. As Mr Jin did not work the public holidays he is not entitled to be paid at time and a half and to be granted an alternative day. However, he should have been paid for the public holidays not worked.

[69] Mr Jin should have been paid the sum of \$2,304.00 gross in respect of public holidays (calculated as \$32.00 per hour x 8 hours per day x 9 days).

Accrued Holiday Pay

[70] Mr Jin was also entitled to holiday pay entitlement for the period he worked for Precision NZ. The monies paid by Precision NZ are claimed to cover the outstanding annual leave entitlement. I find that the amount paid by Precision NZ as accrued annual leave should have included all the amounts earned by Mr Jin until 28 October 2022.

[71] After a recalculation, any shortfall in the amount paid to date is to rectify by Precision NZ.

Orders

[72] **I order that Precision NZ pay to Mr Jin the following amounts:**

- **\$4,496.00 as wage arrears**
- **\$2,304.00 gross in respect of public holidays**
- **Accrued annual leave**

[73] As noted, Precision NZ has already made Mr Jin a payment in respect of wage arrears and outstanding leave entitlements. That sum is to be recalculated in accordance with the amounts due to be paid outlined above, and any shortfall in the payment owed to Mr Jin is to be paid to him within 28 days.

[74] The parties are granted leave to revert to the Authority if the payment balance cannot be agreed. Such application must be accompanied by precise and detailed calculations.

Costs

[75] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[76] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum other Respondent 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.

[77] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[78] 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.⁹

Eleanor Robinson
Member of the Employment Relations Authority

⁹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].