

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 51
3246479

BETWEEN XIAOYU KAN
Applicant

AND WORLDWIDE HOLIDAYS
LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: Keziah Singleton, counsel for the Applicant
Garry Pollack, counsel and Joan Watson, advocate for
the Respondent

Investigation Meeting 24 and 25 September 2024 in Auckland

Submissions received: 9 and 16 October and 2024 from the Applicant
9 October and 4 November 2024 from the Respondent

Date: 3 February 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Worldwide Holidays Limited (WHL) is a travel agency which specialises in servicing the Chinese community in New Zealand.

[2] In May 2017 Xiaoyu Kan was employed as a marketing manager for WHL. Mr Kan's employment with WHL ended on 31 December 2021. Mr Kan claimed that WHL

did not pay his contractual and statutory entitlements. He has sought payment of wage arrears and holiday pay and penalties against WHL.

[3] WHL denied Mr Kan's claims and argued it correctly paid all his contractual and statutory entitlements. WHL also raised a counterclaim against Mr Kan claiming he had breached the terms of his employment agreement of fidelity and loyalty, and his obligations of good faith under the Employment Relations Act 2000 (the Act).

The Authority's Investigation

[4] For my investigation I received written statements and supporting documents from Mr Kan, his partner Tianshuai He, WHL employees Shiyang Zhao, Dajie Huang and business colleague Yang Li. From WHL I received written statements and supporting documents from Jing Jun Yu, WHL managing director, Jessie Liu, Mr Yu's partner and WHL accountant, and WHL managers Stephen Cao and Vincent Lu,

[5] All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also lodged written closing submissions with the Authority.

[6] After discussions between the parties during the investigation meeting, WHL withdrew its counterclaim. It was agreed by the parties there would be no issue as to costs on that matter except insofar as it contributed to the overall length of the investigation meeting.

[7] As permitted by s 174E of the Act this preliminary 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. In determining this matter, I have carefully considered all the material before me, including all the evidence provided by the parties and their submissions.

Issues

[8] The issues for investigation and determination are:

- (a) Were bonus payments correctly made to Mr Kan by WHL?

- (b) Are there unpaid contractual entitlements owing to Mr Kan for wage arrears and holiday pay by WHL?
- (c) Should a penalty be granted against WHL for its failure to pay Mr Kan's wages between 1 October and 31 December 2021 in breach of section 4 of the Wages Protection Act 1983?
- (d) Should either party contribute to the cost of representation of the other party?

Background

Mr Kan's employment arrangement with WHL

[9] Mr Kan was employed by WHL on two separate occasions. The first was between 2013 and 2016. The second was from May 2017 until 31 December 2021.

[10] Mr Yu, on behalf of WHL, employed Mr Kan as a marketing manager on 8 May 2017. Because of Mr Kan's first term of employment, Mr Yu considered Mr Kan an intelligent and trusted employee. Mr Yu also regarded Mr Kan as a friend.

[11] Mr Kan was not provided a written employment agreement for his second term of employment. The terms of his employment were by a verbal agreement with WHL. Mr Kan was to be paid a base salary of \$65,000 plus a minimum bonus of not less than \$40,000. Mr Kan's bonus was to be paid for what was described as 'new projects' and was calculated at 20 percent initially, then increased to 30 percent of the future net income of projects, or a minimum of \$40,000 per annum, whichever was greater.

[12] Mr Kan's responsibilities included overseeing the budget for WHL marketing, and being responsible for staff management, profitability and sustainability. He was also in charge of a number of business divisions including Acrossia, a China destination sale of products to the NZ market.

[13] Mr Kan was a member of the WHL leadership team, which also included Vincent Lu, Stephen Cao, Jundong Xia and Selina Ma.

[14] As marketing manager, Mr Kan set up the WHL WeChat account using his personal name, Chinese identity number and Chinese mobile number, thereby becoming the administrator of the account.

Mr Kan's salary and bonuses

[15] During his employment with WHL Mr Kan received a total of \$113,140.31 as bonus payments.

[16] In June 2018 his salary was increased to \$66,950 per year and in April 2019, his salary was increased to \$80,000 per year.

[17] At the end of 2018, WHL changed its accounting system, and the bonus payments were brought in line with the financial year. Mr Kan's second profit share calculation was therefore from 1 January 2018 until 31 March 2019.

[18] At the same time WHL also changed its payroll system. Previously salaries were paid monthly on the anniversary of the employees first day of work for the previous month. This was changed to payments being made at the beginning of the month for the previous month. The change resulted in a one-off extra payment for Mr Kan to align his payments with the monthly salary payments arrangement.

Impact of COVID-19 pandemic

[19] In January 2020 the COVID-19 pandemic (the pandemic) impacted the travel industry causing widespread disruption and forcing WHL to cancel a large number of holiday bookings. On 25 March 2020 New Zealand went into lockdown and WHL lost nearly all its travel related business.

[20] The last outbound group Mr Kan was involved with was a group tour to Fiji, which was interrupted by the sudden lock down. Mr Kan said he spent his time helping guests of WHL who had become stuck in Fiji due to New Zealand's border closure.

[21] As a result of the loss of income WHL implemented a number of cost saving measures. Some of these measures impacted WHL employees' income. It is WHL's position that the cost saving measures were implemented by an agreed variation to each employee's individual employment agreement. Mr Kan denied there were any agreed variations to his employment agreement with WHL.

First pay reduction

[22] In April 2020 WHL reduced Mr Kan's salary payments by 20 percent. His salary remained at this level until October 2020.

Second pay reduction and non-payment of bonus

[23] In October 2020 WHL further reduced Mr Kan's pay to 50 percent of his contracted salary. As WHL was not making a profit during the pandemic WHL ceased to make employee bonus payments.

[24] Mr Kan did not receive bonus payments for the 2021 and 2022 financial years.

Holidays

Mr Kan's leave history report records he took annual leave from 4 October 2021 to 31 December 2021.

Resignation

[25] Mr Kan resigned on 31 December 2021.

[26] After resigning Mr Kan had agreed to transfer ownership and administration of the WHL WeChat account to WHL. It appeared the parties had ended their employment relationship on amicable terms.

Post employment issues

[27] During 2022 a dispute arose between WHL and a travel company affiliated with Mr Kan. As a result, WHL took legal action to enforce the transfer of ownership and administration of the WHL WeChat account from Mr Kan to WHL. As a result of the dispute and litigation, the relationship between Mr Kan and WHL deteriorated. This led to Mr Kan's current claims against WHL before the Authority.

Are there unpaid contractual entitlements owing to Mr Kan for wage arrears, bonuses?

[28] Mr Kan claimed WHL did not pay his contractual and statutory entitlements, because:

- (a) he was not paid the full amount of his bonus entitlements; and
- (b) his wages were twice reduced without his consultation and his consent; and
- (c) his annual leave entitlements were used to pay him, without his knowledge, for a period of time in which he was working.

[29] WHL disagreed and said Mr Kan agreed at the time to vary his terms of employment to accept the reductions in salary and forgo the payment of bonuses.

[30] WHL submitted it was unjust and unreasonable for Mr Kan to raise his claims for salary, holiday pay arrears and bonus issues over a year after his employment with WHL ended.

[31] WHL also submitted Mr Kan only raised his claims after the litigation and the breakdown of his relationship with Mr Yu. It said he now belatedly proposes that he never agreed to reduce his salary or nonpayment of bonuses, nor intended to take extended annual leave.

[32] Mr Kan submitted his claims are within the statutory time limit.¹

Was Mr Kan paid the full amount of his bonus entitlements?

[33] During his employment with WHL Mr Kan received a total of \$113,140.31 as bonus payments:

- (a) \$30,220.81 gross of tax in July 2018;
- (b) \$52,622.00 gross of tax in September 2019; and
- (c) \$30,297.50 gross of tax in December 2020.

¹ Wages Protection Act, Section s11.

[34] Mr Kan was employed by WHL based on an oral individual employment agreement. However, the terms of his bonus were recorded in a WeChat exchange between Mr Yu and Mr Kan on 18 July 2018.

The company means that the annual guaranteed bonus is 40,000 when the basic salary remains unchanged (as 2017). Then increase the commission of net profit to 30%, whichever is more counts.

[35] Mr Yu stated he explained to Mr Kan that his bonuses were calculated on profitability of his business divisions based on sales of his team members less deductions for various costs including salaries and office expenses.

[36] I accept that the bonuses were calculated on this basis and if Mr Kan's business divisions did not profit in the period Mr Kan was employed, he was protected by the \$40,000 guarantee.

[37] Mr Kan worked two thirds of the calendar year of 2017. His business divisions were not launched on the market and therefore made zero profit. As he had only worked two thirds of the year, he was paid the agreed bonus of two thirds of \$40,000 in 2018.

[38] During 2018 calendar year, Mr Kan's base salary remained unchanged, but the bonus was increased to 30% of net profit. The bonus covered 15 months with the change in financial year, which meant the minimum was then \$50,000. Net profit was such that he was paid the greater amount which was \$52,622.00.

[39] During the 2020 year the profit was low and less than his minimum. He was entitled to \$40,000 less a bonus he was paid for in advance, which was \$9,7025.51.

[40] I find up to the end of 2020 Mr Kan was correctly paid his bonuses.

Were Mr Kan's pay cuts implemented by WHL without consent or consultation?

[41] Mr Yu stated that as a member of the leadership team, Mr Kan participated in all decisions about changes to salaries and bonuses, and how to manage the loss of business due to the borders closing. This included decisions about their own salary changes, the stopping of bonuses, and how to communicate the changes to their teams.

[42] Mr Yu conceded that he did not ask Mr Kan personally about his first salary reduction. Mr Yu stated Mr Kan did not voice any opposition to this reduction during team meetings and never approached Mr Yu personally about his concerns. When the change was announced via WeChat in April 2020 Mr Kan and the other team members responded with “Got it, thank you boss”.

[43] WHL witnesses stated that as managers they attended the same meetings with Mr Kan where these issues were discussed. They say Mr Kan agreed to the reductions in salary and non-payment of bonuses in the circumstances. However, they were not able to describe when the actual meetings took place or who attended.

[44] Mr Kan states he never agreed to have his salary payments reduced by 20 percent.

Second pay reduction and non-payment of bonus

[45] In regard to the second salary deduction Mr Kan agreed he attended a meeting September 2020. The discussion at the meeting concerned the lack of income being generated by the company. It was agreed that for the survival of the company it would be necessary to implement further pay cuts. As a manager Mr Kan was asked to obtain written confirmation from his staff that they agreed to the 50% reduction in salary. He then provided WHL with written confirmation from his employees. However, he did not provide his own written confirmation. Mr Yu said he did not check the letters to see if they had been signed as he trusted Mr Kan.

[46] Mr Kan stated he objected to the 50 percent reduction in salary and felt pressured to agree to the pay reduction, as he needed to pay his mortgage and expenses at the time. He also said he did not agree to forgo his bonus payment.

[47] Mr Yu stated Mr Kan did not object to the further reduction in salary. Mr Yu also said Mr Kan consented to forgo his bonus payments in the course of a group meeting with managers in 2020. Mr Yu stated that no bonuses were paid that year and that the management team, including Mr Kan, agreed to the non-payment of bonuses as the company was barely trading.

[48] Mr Yu's recollection was supported by WHL manager and leadership team member Mr Coe, who said that everyone in the leadership team understood and accepted there would be no bonuses paid as WHL was not making any profit.

Conclusion on whether Mr Kan's pay cuts were implemented by WHL without consent or consultation.

[49] It is accepted WHL suffered substantial financial impact to its business and cash flow over the pandemic lockdown period and this led to WHL seeking to reduce its overheads including salaries. In doing so it was incumbent on it to ensure any variation to terms of employment were reached fairly with affected employees within the express terms of their employment agreements and statutory obligations.²

[50] It is undisputed that Mr Kan was employed by WHL on an oral individual employment agreement. Although a written employment agreement is required under the Act,³ the Court of appeal in *Warwick Henderson Gallery Ltd v Weston* confirmed that oral individual employment agreements can be enforced. Oral variations to an employment agreement can also be enforced.⁴

[51] The question for me to decide is whether at the time that the pay cuts were implemented Mr Kan had agreed to vary the terms of his individual employment agreement and accept the pay cuts and non-payment of bonuses.

[52] The fact that Mr Kan has no written employment agreement, or written variations to his employment agreement, and the lack of any written corroborative evidence make it difficult to assess whether Mr Kan had agreed to the reduction in salary and non-payment of bonuses at the time these decisions were implemented. This is not assisted by the delay in compiling witness statements, in which there is a lack of detail, or written notes as to dates of meetings, who attended and what was discussed.

² *Unsworth v Helloworld Travel Services (NZ) Ltd* [2022] NZERA 313, at [54]. This determination was challenged, but the plaintiff accepted that the Authority's finding in this respect was correct (see [2023] NZEmpC 180 at [20]).

³ Employment Relations Act 2000, Section 64.

⁴ *Warwick Henderson Gallery Ltd v Weston* [2006] 2 NZLR 145 (CA).

However, there was consensus among WHL's witnesses that the meetings did take place, and decisions were implemented after those meetings.

[53] This case is similar to the Courts decision in *Wilson-Grange Investments v Guerra* where the employer also claimed that wage reductions had been agreed to by all staff in the course of a meeting. The Court found that no agreement with Mr Guerra had been reached on the basis that:⁵

- (a) the meeting took place some time ago;
- (b) no notes of the meeting were put in evidence;
- (c) written communications to staff about the reductions did not refer to any agreement;
- (d) no variation was recorded in writing; and
- (e) evidence from the employer suggested that staff had been told about the reduction rather than being consulted.

[54] The Court concluded that while the plaintiff had a good reason for wanting to decrease its wages bill, because of the significant slow-down in trade prior to the lockdowns and because it was unable to trade, it had failed to establish that the pay cut was done in a procedurally fair way that was consistent with its good faith and contractual obligations.

[55] Although Mr Kan did respond by WeChat to the first proposal to reduce salary in April 2020, Mr Yu accepted in evidence that the 20 percent reduction was imposed on employees without consultation.

[56] In regard to the second pay reduction Mr Yu stated there was consultation about the 50% reduction, and it was agreed to by all employees including Mr Kan. Mr Kan stated in evidence that he objected and did not agree to the reduction in salary.

[57] In regard to whether Mr Kan agreed to forgo his bonus payments, Mr Yu said Mr Kan consented to forgo his bonus payments in the course of a group meeting with managers in early April 2020. Bonus payments were calculated on the basis of WHL

⁵ [2023] NZEmpC 39, at [11]-[13].

making a profit. The two business divisions Mr Kan was in charge of had no work during this period and therefore there was no profit on which a bonus could be calculated.

[58] However, it was an agreed term of Mr Kan's contract that if WHL did not make a profit Mr Kan would receive a bonus payment of \$40,000. WHL did not pay Mr Kan's entitlement of \$40,000 in 2021 or 2022.

[59] As the Employment Court has stated in *Gate Gourmet NZ Ltd v Sandhu*, the Government's response to the pandemic did not act to suspend employee rights or employer obligations.⁶

[60] A deduction from wages cannot be made without the written consent of the employee.⁷ WHL did not obtain written consent from Mr Kan to any deduction. Therefore, the reductions could only have been lawfully made by way of variations to Mr Kan's employment agreement.

[61] I am satisfied that Mr Kan did not agree with the proposals regarding the salary reductions and non-payment of bonuses, and subsequently did not agree to vary his employment agreement to implement the proposals. Whilst there may have been some discussion or communication as to WHL's proposal, there is no written record of the terms and conditions of employment being varied, nor any other written record of the purported agreement. Although WHL has submitted Mr Kan acquiesced to the changes by not objecting to the salary reductions and non-payment of bonuses, he didn't really have a choice as WHL had already imposed them and he needed to remain employed to receive some amount of income. The salary cuts and non-payment of bonuses were not implemented in a procedurally fair way and was not consistent with WHL's good faith and contractual obligations.

[62] From May 2020 to October 2020 Mr Kan should have received a total of \$39,999.96 before tax in salary, but WHL only paid \$31,999.39. WHL must pay Mr Kan the amount of \$8,000.57 (gross).

⁶ *Gate Gourmet NZ Ltd v Sandhu* [2020] NZEmpC 237, at [23].

⁷ Wages Protection Act 1993, Section 5(1).

[63] From November 2020 to January 2022 Mr Kan should have received a total of \$99,999.90 before tax in salary, but instead WHL only paid him \$50,156.60. WHL must pay Mr Kan the amount of \$49,843.30 (gross)

[64] Mr Kan did not receive a bonus for the period financial year 31 March 2021. Mr Kan is entitled to a bonus payment of \$40,000 (gross).

[65] Mr Kan did not receive a bonus for the period financial year 31 March 2022, WHL advised that he was not entitled to any bonus or pro rata rating of that bonus because he did not work the full financial year. This position is inconsistent with his earlier pro rata payment that Mr Kan received in 2018. Mr Kan is entitled to a pro rata payment based the 43 weeks of the 2022 financial year. Mr Kan is entitled to a bonus payment of \$33,076.92 (gross).

Holiday pay on arrears

[66] WHL must also pay annual holiday pay of 8% on the arrears of salary arrears and bonuses set out above.⁸ WHL is to pay Mr Kan:

- (a) \$4,627.56 (gross) holiday pay on the salary arrears; and
- (b) \$5,846.15 (gross) holiday pay on the unpaid bonus arrears.

Interest

[67] Ms Kan is able to recover interest on the arrears calculated on paragraphs [62], [63], [64], [65], and [66] from 31 December 2021 until the arrears are paid in full. Interest is to be calculated using the civil debt calculator on the Ministry of Justice website.⁹

⁸ Holidays Act 2003, s 28.

⁹ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

Were Mr Kan's annual leave entitlements used to pay him, without his knowledge, for a period of time in which he was working?

[68] WHL submitted that as a senior manager Mr Kan was trusted to manage his own leave applications and approvals in the smart payroll system. He was not required to seek WHL's approval for any leave he chose to take and was trusted to manage his work and leave time.

[69] WHL holiday records show that Mr Kan was recorded as having been on annual leave for all of October, November and December 2021.

[70] WHL submits that from 1 October until 31 December 2021 there was minimal contact with Mr Kan until his resignation on 31 December 2021. There was some work available during October to December, but Mr Kan refused to do this.

[71] Mr Yu stated that he did contact Mr Kan once during this period by email regarding an airline issue, but nothing came of it.

[72] Mr Kan submitted he did not take any annual leave between October and December 2021. WHL has withheld payment of wages for these months and instead wrongfully deducted the payments owed from his leave entitlements.

[73] Mr Kan stated that he was working as usual during that period, and did not know that annual leave was being used to pay him. His employees Mr Zhao and Mr Huang gave evidence that they were in contact with Mr Kan during the period in question. Mr Kan's partner also stated that during this period Mr Kan would sometimes say he was talking to someone from WHL on the phone.

[74] Although Mr Kan states he was in constant contact with Mr Yu over the three-month period, none of his business divisions were operating and he was not able to provide any detail as to what actual work he was doing, or provide documentary evidence of communications with WHL over this period.

[75] I find Mr Kan is an intelligent employee and astute businessman. During this period, he operated his own bakery delivering products to customers.

[76] On the balance of probabilities, I prefer the evidence of Mr Yu on this issue and find Mr Kan was on annual leave from 4 October until 31 December 2021 when he resigned.

[77] In conclusion I find Mr Kan's annual leave entitlements were correctly used to pay him for the period of October to December 2022 when he was on leave.

Penalties

[78] I do not find WHL failed to pay Mr Kan's wages between 1 October and 31 December 2021, as Mr Kan was on leave for this period. Therefore, there is no cause of action giving rise to a penalty claim.

Summary of orders

[79] Worldwide Holidays Limited is ordered, within 28 days of the date of this determination, to make payment to Xiaoyu Kan of:

- (a) \$8,000.57 (gross) relating to the period during which his wages were unilaterally reduced to 20 per cent;
- (b) \$49,843.30 (gross) relating to the period during which his wages were unilaterally reduced to 50 per cent;
- (c) \$40,000.00 (gross) relating to the non-payment of his 2021 bonus.
- (d) \$33,076.92 (gross) relating to the non-payment of his 2022 bonus.
- (e) \$4,627.56 (gross) holiday pay on the salary arrears.
- (f) \$5,846.15 (gross) holiday pay on the unpaid bonus arrears.

[80] Within 28 days of the date of determination WHL is to calculate and pay Mr Kan interest on the wage arrears, and bonus payments as awarded in paragraph [67] above.

Costs

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

[82] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Kan may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum WHL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[83] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁰

Andrew Gane
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1