

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 335
3244999

BETWEEN	SISI LI Applicant
AND	MASTER Z FOOD LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	May Moncur, advocate for the Applicant Aimee Choi, advocate for the Respondent
Investigation Meeting:	23 January and 19 March 2025
Submissions and information received:	At the investigation meeting
Determination:	13 June 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sisi Li was employed by Master Z Food Limited (MZF) as a baker for seven and a half weeks from 20 March until 14 May 2023 when her employment ended. She says she was unjustifiably dismissed for which she seeks remedies to compensate lost wages, injury to feelings and a contribution to costs. Ms Li also says she was unjustifiably disadvantaged in her employment because of MZF's failure to pay wages at the agreed hourly rate and a meal and accommodation allowance. To remedy this grievance, she seeks arrears of the allowances and compensatory damages for hurt feelings. Findings and penalties are sought for breach of the statutory duty of good faith and the employment agreement. The parties have resolved Ms Li's wage arrears claim as it relates to hours worked.

[2] MZL operates a bakery business in Auckland. MZF denies Ms Li was unjustifiably disadvantaged or unjustifiably dismissed or that its actions were not in compliance with the parties' employment agreement or the obligation of good faith. It says it always engaged fairly and reasonably with Ms Li. On 29 January 2025 MZF withdrew its counterclaim lodged on 20 January 2025.

The Authority's investigation

[3] The Authority has received evidence from Ms Li and for MZF, Hua Zhang, who owns and manages the business, Wenting Ru, a partner in the business who has operational responsibilities, Ling Li, the payroll manager and Feiyan Wang and Junhua Huang, who work in the bakeries.

[4] 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. In determining this matter, the Authority has carefully considered all the material before it, including all information received from the parties and the submissions of their representatives. At the investigation meeting the Authority was assisted by an interpreter of the Mandarin language.

Issues

[5] The issues identified for investigation and determination are:

- i. Was Ms Li unjustifiably disadvantaged and/or unjustifiably dismissed?
- ii. If so, is she entitled to a consideration of remedies sought including:
 - a. Compensation from \$10,000 and \$20,000 under s 123(1)(c)(i) of the Act.
- iii. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Li which contributed to the circumstances which gave rise to their grievances?

- iv. Should a penalty be awarded against MZF for any found breach of the statutory duty of good faith and/or breach of the parties' employment agreement?
- v. Is either party entitled to an award of costs?

Relevant law

The test for justification

[6] In considering personal grievances for unjustified action and dismissal, as here, the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully assess the reasons given to the employee by the employer and decide, on an objective basis, whether the employer's actions were reasonable. In addition, a fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations which include at s 4(1A)(b):

The duty of good faith in subsection (1)—
(a)...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;...

[7] Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action "because a fair and reasonable employer will comply with the law".¹

[8] Further, in accessing the fairness and reasonableness of the employer's actions in a s 103A setting focus is required on the employment relationship overall. In *FMV v TZB* the Supreme Court discussed this emphasis in the Act and its relationship with the statutory good faith obligations:²

[46] ...As its name suggests, the current Act takes a relational approach, insisting that employment is more than a market transaction theoretically conducted at arm's length between individuals with equal bargaining power. The result is that while the employment agreement remains very important, it is the employment relationship that is the real focus under the current Act. The scope of the employment relationship is

¹ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

² *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740 at [46].

wider than the employment contract and it adds an additional dimension to contractual rights and obligations. This is reflected in two important ways.

[47] The first is the statutory incorporation of the principle of good faith into the employment relationship. This principle underpins the Act's relational approach.

[48] Part 1, "Key provisions", begins by stating that the object of the Act is:
to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship...

[49] This is to be done, first and foremost, by:
... recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour...

[50] Section 4 then provides that parties to an employment relationship "must deal with each other in good faith". This means, of course, that parties must not mislead or deceive one another, but its effect is wider than that. Parties must also actively and constructively establish and maintain a productive employment relationship; they must be responsive and communicative; and employers must comply with procedural fairness requirements...Parliament was at pains to ensure that the principle of good faith should be the driver of all employment relationships, independently of and in addition to obligations in the employment contract.

Discussion

(i) *Was Ms Li unjustifiably disadvantaged – meal and accommodation allowance?*

[9] The parties entered a written individual employment agreement (the employment agreement) on 15 December 2022. The employment agreement provided Ms Li would:³

- work 40 to 50 hours per week from Monday to Sunday;
- have working hours each day between 5am to 4.30pm; and
- be paid \$28 per hour.

[10] Ms Li says in addition to the terms recorded in the employment agreement MZF was bound to pay her a meal and accommodation allowance. She relies on WeChat messages between her and Mr Zhang prior to their entering the written employment agreement and in particular, the following exchange on 23 November 2022:⁴

³ Sisi Li individual employment agreement 15 December 2022, clause 2 and 3.

⁴ Certified translation.

Mr Zhang: Working on public holidays 1.5 times the salary, plus an extra day of paid leave. Other benefits include an 8% holiday based [on an] annual salary of 250,000 RMB. Also included are meal allowances and accommodation allowances.

The 250,000 RMB annual salary doesn't include daily meal allowances. On public holidays and rest days, meal costs are not included, and annual salary doesn't include accommodation subsidies.

[11] Mr Zhang elaborated further on the allowance in WeChat messages to Ms Li on 2 February 2023:⁵

Mr Zhang: The food and housing subsidy is in addition to the annual salary of 250,000.

...

Mr Zhang: However, it will all be included in your salary, and then you will pay the landlord because there is no concept of including food and housing directly in New Zealand. So it must be calculated into the salary, and you can then pay the landlord.

Mr Zhang: The basic principle of providing subsidies after a 250,000 annual salary will not change.

[12] The parties do not appear to have discussed the issue in any more detail including the amount of the meal and accommodation allowance prior to them entering the employment agreement. The written terms of the employment agreement provide Ms Li will be paid an hourly rate of \$28 for every hour worked. There is reference to or provisions for a meal or accommodation allowance.

[13] MZF says the meal and accommodation allowance are not expressed separately in the employment agreement because they are folded into Ms Li's hourly rate of pay. It says Ms Li understood this because it was discussed in the WeChat messages.

[14] Ms Li says she did not agree to such an arrangement and MZF is bound to pay her the allowance as claimed - \$260 and \$180 per week - because those figures were set by MZF. She relies on a WeChat exchange with Mr Zhang on 9 August 2023, after her employment ended, which attached a photograph of a handwritten note sent to MZF's payroll manager, Mrs Li, with instructions as to how to calculate Ms Li's pay. The note, translated, includes a breakdown of Ms Li's hourly pay rate of \$28 (gross):

Annual salary 250000 43[exchange rate to \$NZ] 58139.53

⁵ In translation.

Week: $58139.53 \div 52 = 1118.06/\text{week}$

Rent: 260/week Living: 180/week

Remaining: 1588.06/week 25.96 / hour after tax

[15] Ms Li's argument is the allowances, having been expressed in dollar amounts by Mr Zhang to his payroll manager in writing are binding and payable in addition to the written terms agreed by the parties in the employment agreement. She also advances an argument that MZF always intended to pay her \$25.96 gross, which would, on Mr Zhang's calculation deny her the notional meal and accommodation allowance.

[16] The written employment agreement is the expression of the parties' finalised negotiations. Ms Li's claim that a collateral agreement for allowances in addition to the terms of the written employment agreement cannot succeed:

- (i) there is no evidence the dollar amount of the allowances or the detail of the calculation were agreed with Ms Li prior to the parties entering the employment agreement;
- (ii) the WeChat messages exchanged prior to execution of the employment agreement, support a finding that MZF proposed to Ms Li a salary of 250,000 RMB, which included a meal and accommodation allowance;
- (iii) Ms Li has not been short paid because the breakdown of the hourly rate reflects the salary structure described to her by Mr Zhang prior to the parties entering the written employment agreement; and
- (iv) the evidence does not support a finding MZL deliberately short paid Ms Zhang – the matter was promptly remedied on discovery and Ms Li gave compelling evidence that her error caused the short pay which is supported by Mr Zhang's calculation break down document.

[17] Ms Li's claim for meal and accommodation allowance arrears is declined.

- (ii) *Was Ms Li unjustifiably disadvantaged – paid \$25.96 per hour?*

[18] After Ms Li's employment with MZF ended and while she was arranging changes to her work visa, it was discovered that during her employment she had been underpaid – she had been paid \$25.96 (gross) per hour rather than \$28 (gross) per hour as agreed

in the employment agreement. She promptly drew this to MZF's attention. MZF accepted an error had been made, remedied it by paying Ms Li the balance and wrote to Immigration New Zealand providing an explanation. MZF said it wrote to INZ because it valued its relationship with the agency and did not wish Ms Li to suffer any negative consequence from its error.

[19] A personal grievance for unjustified disadvantage requires two elements to be established – the first, a breach of a condition of employment and second, that the effected person suffered a disadvantage consequent during employment. On these facts a personal grievance cannot be established. While it is accepted a condition of employment was breached during employment the condition is not of a type which survives the end of the employment relationship. Further on the undisputed facts, Ms Li cannot establish she suffered a disadvantage during her employment because, given the nature of the condition breached, she was unaware of the cause of action during her employment. This unjustified disadvantage grievance in relation to Ms Li's hourly rate is not established.

(iii) Was Ms Li unjustifiably dismissed?

[20] Soon after Ms Li started with MKF she raised concerns with Mr Zhang that the role was significantly different to what she had expected.⁶ In this chain of WeChat messages Ms Li outlines in detail that she understood she had been employed to develop high end bakery products and she was finding it difficult to do this work along with the high volume of day-to-day bakery work the business required. In the same WeChat message chain Ms Li raises concerns about the lengthy working hours she was expected to perform and proposed she stop trying to develop new products and work less hours making cakes as required.

[21] Mr Zhang responded by way of WeChat recognising Ms Li was new to the business and still learning operational matters such as the preferences of their customer base. He stated the hours she was working had been agreed but if she wanted to work 40 hours per week she could and, in translation, "If you have adjusted well, and our high-end orders getting more, we can discuss adjusting the time". On this basis the 2 April message exchange ended. On 2 April the parties agreed Ms Li would work 40 hours per

⁶ Refer WeChat message 27 March to 2 April 2023.

week, would scale down her product development role and focus on adjusting to the business.

[22] On 9 April Ms Li sent a WeChat message to Mr Zhang seeking confirmation her hourly rate was \$28 per hour after tax. This communication was no doubt prompted by the drop in pay Ms Li would experience consequent to her reduced working hours. The following exchange needs to be set out in full:⁷

Ms Li: By the way, let me confirm again, my current hourly rate is 28 dollars per hour after tax.

Ms Li: I said I don't want rent and meal allowance [a reference to a comment made in the 2 April We Chat message chain], and based on 28 dollars per hour. I mean the 28 dollars after tax deduction as agreed before, not before tax. Let's confirm it.

Mr Zhang: Our understanding is a little different. We are told to strictly follow the contract we signed. New Zealand contracts are all based on pre-tax wages. Our contract stipulates that the salary is \$28/hour before tax, and based on you recent work efficiency and technology, this salary is also in line with you.

Ms Li: We've always talked about after-tax.

Mr Zhang: Of course, if you think you can find a better job and get a higher salary, then I support you. Just like you said, we walk away on good terms, and we can still be friends in the future.

[23] This WeChat message, objectively assessed, communicates:

- (i) Ms Li understood her rate of pay included the meal and accommodation allowance, as raised by Mr Zhang in the November 2022 WeChat, but was not expressed in the parties' written employment agreement;
- (ii) she was seeking to renegotiate the terms of her employment agreement to increase her hourly rate; and
- (iii) Mr Zhang did not accept the proposal or the asserted basis of such.

[24] The parties' employment agreement provides Ms Li is to be paid \$28 per hour. Ms Li had no reasonable basis to believe the printed pay rate was after tax. She has not pursued such a claim before the Authority.

⁷ In translation.

[25] Mr Zhang's reference to "walking away on good terms" echoes Ms Li's suggestion made during earlier message exchanges.⁸ The possibility of Ms Li ending her employment by way of resignation was a live matter between the parties.

[26] Also on 9 April Mr Zhang raised a customer complaint with Ms Li about the quality of a cake MZF believed Ms Li had produced. In her evidence to the Authority Ms Li did not accept she was responsible for the cake or that MZF knew with certainty that she had produced the cake.

[27] Mr Zhang and Ms Ru decided they needed to meet with Ms Li to clarify the issue she had raised about her pay rate and to discuss the complaint. They say the meeting occurred on 10 April. Ms Li says they met on 16 April. No written invitation was sent for the meeting and no notes were taken. The parties agree by the end of the meeting Ms Li's employment had ended. What is in dispute is whether Ms Li's employment ended at the initiative of MZF, or whether she resigned.

[28] The first dispute to resolve is the date the meeting occurred. This is important because it assists with understanding how the meeting proceeded. Ms Li was not at work on 10 April.⁹ Ms Li and Mr Zhang say in their evidence they agreed at the meeting she would work for MZF for a further one month. This one-month timeframe is consistent with the meeting occurring on 16 April and Ms Li's last day at work on 14 May. It is more likely than not that the meeting occurred on 16 April.

[29] What happened at the meeting? This too is disputed. Mr Zhang and Ms Ru say the discussion mainly concerned Ms Li's wages and her wish to be paid \$28 per hour after tax, that they told her the business could not meet that request and confirmed her pay rate was as recorded in the employment agreement. Mr Zhang said Ms Li said she had received an offer of employment and resigned at the meeting. He said she continued to work for MZF until 14 May because they were in an employment relationship, and they recognised she needed time to finalise matters with her new employer.

[30] Ms Li said Mr Zhang and Ms Ru arrived at the bakery and asked to meet. The meeting was held in the open, lobby area of the bakery. Ms Li says they told her they had decided to dismiss her, she could work out the week and they were firm in their

⁸ For example, refer Ms Li WeChat message to Mr Zhang 2 April 2023, 12.28pm, translated "Of course, if you think I am not ok, I will fully accept it. We can walk away on good terms, and you can also find new employees to train. We will still be friends in the future".

⁹ MZF's wage and time records for Ms Li record no hours for her on 10, 11 and 12 April.

decision. Ms Li said they said her visa would expire on dismissal, but they would not do that because they wanted to treat her nicely and asked her to accept the decision. Ms Li said she had no choice but to accept her employment was over, and she asked for one month's notice because one week was not enough time for her to find another job.

[31] Ms Li did not receive prior notice of the meeting or notice of what was to be discussed. There were no notes of the meeting or record of the outcome. When asked, if Ms Li had resigned as advanced by MZF, why she had not put her resignation in writing, as required under clause 7.5 of the employment agreement, Mr Zhang said she had already resigned. This is understood to be a reference to earlier WeChat discussions between Mr Zhang and Ms Li where she said she could resign. There is no evidence Ms Li resigned prior to the meeting. As stated above, the possibility of Ms Li resigning was a live issue between the parties, but she had not resigned prior to the 16 April meeting.

[32] How then did this employment relationship end at the April meeting? The background to the meeting is relevant.¹⁰ Neither party was happy in the employment relationship. Ms Li was unhappy with her hours of work, the type of work and her pay rate. All of which she sought to renegotiate. It is fair to say Mr Zhang was frustrated with Ms Li – he was concerned about her 'fit' with the business and her skills. Also relevant is that Ms Li was new to the job with MZF to whom she was connected under the terms of her work visa, and she was new to New Zealand. Not much weight can be put on Mrs Ling Li's evidence that she recalls Ms Li told her she was leaving MZF to take a road trip. Ms Li denies saying that to Mrs Ling Li and there is no other evidence to corroborate the recollection.

[33] The parties' conduct following the meeting is also relevant. Ms Li worked out her one month notice period. On 10 May the following WeChat exchange occurred:¹¹

Ms Li: Since the next employer is already processing, I just want to confirm that there will be no issues during the background check that could effect my onboarding. Since you want me to leave, it would be beneficial for both of us if I could smoothly join the next employer. If I encounter issues due to the background check that prevent my smooth onboarding. I will have to proceed with legal action. I hope it doesn't come to that and we can part on good terms.

Mr Zhang: What process are you referring to? Have you signed a contract? Regarding the background check, I've already told you last

¹⁰ *Ellish v Network Service Providers Ltd* [2021] NZEmpC 175 and

¹¹ In translation.

time, it's just that your product isn't what we need right now. Or what do you want me to say? Don't scare people with legal action. During the probation period, it's reasonable and lawful not to employ someone if they are not qualified.

[34] In this message, just over three weeks after the 16 April meeting, Ms Li asserts her employment ending was at the initiative of MZF – “Since you want me to leave” – and Mr Zhang appears to justify this action based on a probationary period. The parties’ employment agreement does not include a probationary or trial period. In his evidence Mr Zhang said he did not know the employment agreement did not contain such a provision, but this was not relevant because Ms Li resigned at the April meeting.

[35] Consideration has been given to whether Ms Li’s apparent confidence in raising matters with her employer as expressed in the WeChat messages is likely to have set the tone for the 16 April meeting and given that it is likely she resigned because she wished matters to end well with MZF and she had found another job or believed she could find another job within the notice period. Such a conclusion is not open to the Authority because the evidence does not support such a finding including Ms Li’s unchallenged evidence that she was not offered a job, she was trying to find another job and the job she referred to in the 10 May message did not eventuate.

[36] MZF’s constitution and management of the 16 April meeting has left it vulnerable to the claim it’s actions towards Ms Li were not those a fair and reasonable employer could have taken in all the circumstances. MZF is not a small business, employing up to 30 people, and has engaged in complex employment processes including recruiting staff from overseas. It could reasonably be expected to meet the minimum requirements of a fair and reasonable process in meeting with an employee with whom it had performance concerns including the 16 April meeting with Ms Li. Having started the meeting, when issues turned to those performance concerns and Ms Li’s employment ending, which on both accounts occurred, MZF could have minimised the risks by adjourning the meeting so the parties could reflect on the issues and Ms Li could get advice. Further MZF’s actions, on its evidence, in not requesting Ms Li record her resignation in writing or confirm in writing the terms on which her employment was to end has amplified this risk and is not consistent with its earlier insistence to Ms Li that all employment matters had to be fully compliant with the agreed terms of employment. Weight must also be given to Mr Zhang’s response to Ms Li on 10 May and on balance I find it is more likely than not to accurately reflect that her employment ended at the initiative of MZF at the 16 April meeting. It is accepted Mr Zhang was alarmed by what

he perceived as a threat from Ms Li of legal proceedings, but it does not follow that his 10 May response does not accurately reflect what occurred on 16 April.

[37] Given the above, it is more likely than not MZF dismissed Ms Li at the meeting on 16 April and that that dismissal does not meet the test for justification set out at s 103A of the Act. The actions by which MZF has fallen short of the statutory justification test are in addition, inconsistent with good faith obligations.

Remedies

[38] Ms Li has established a personal grievance for unjustified dismissal. She is entitled to a consideration of the remedies sought.

Reimbursement of lost wages

[39] Ms Li seeks an award of 18 weeks lost wages. After reviewing the evidence of loss and Ms Li's attempts to mitigate that loss the Authority is satisfied, she is entitled to an award of lost wages of 12 weeks being \$13,440 (gross).¹² Though, as a migrant worker, Ms Li is in a category of vulnerable employee, and faced difficulties finding another job, I am not satisfied the evidence justifies exercising my discretion and awarding more than 3-months ordinary time remuneration.¹³

Compensation for humiliation, loss of dignity and injury to feelings

[40] The circumstances of Ms Li's personal grievances have caused her to experience uncertainty and stress which has had an ongoing negative impact. She said after her dismissal she was unable to sleep and when she could she had nightmares. She said dealing with the immigration consequences of her dismissal to her visa status was stressful and costly. Ms Li is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$15,000.

Contribution

[41] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

¹² \$28/hour x 40 x 12 = \$13,440 (gross).

¹³ Employment Relations Act 2000, s 128.

[42] MZF says Ms Li misrepresented her skills, in particular, her ability to make and decorate fresh cream cakes, to the necessary standard. It says this lack of skill negatively impacted her work and contributed to the circumstances the parties found themselves in in mid-April 2023. This would be stronger if MZF had included this requirement in the job description or if, in the negotiation period before the parties entered the written employment agreement the discussion had focussed on the production of that product. Misrepresentation is not established. For completeness, MZF raised a concern of alleged misconduct of Ms Li's discovered post-employment which it abandoned and is taken no further.

[43] Consideration has also been given to whether Ms Li's expressions of dissatisfaction with the role and her active engagement with Mr Zhang to clarify her role and vary her terms of employment, which were in part why the 16 April meeting was convened were blameworthy. Parties to employment relationships are required to be active and constructive, responsive and communicative.¹⁴ Ms Li took that obligation seriously and her raising of issues was a significant factor in MZF's decision to convene the 16 April meeting but how the meeting was conducted and its outcome was within MZF's control.

[44] Ms Li has not contributed in a blameworthy way to the circumstances which have given rise to her personal grievance.

(i) *Should a penalty be ordered breach of good faith?*

[45] The established breach of good faith arises from the same circumstances as Ms Li's dismissal. She had been awarded remedies for that and this is not a matter where further orders by way of penalty is warranted.

Summary

[46] Within 28 days of the date of determination Master Z Food Limited is to make the following payments to Sisi Li:

- a) \$15,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and

¹⁴ Employment Relations Act 2000, s 4(1A).

b) \$13.440 (gross) pursuant to section 123(1)(b) of the Employment Relations Act 2000.

Costs

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Li may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum Master Z Food Limited will then have 14 days to lodge any reply memorandum.

[48] On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. 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.

Marija Urlich
Member of the Employment Relations Authority