

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 145  
3079732

BETWEEN

LONGSHENG LING  
Applicant

AND

SUPERCUISINE GROUP  
LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Paul Young, advocate for Applicant  
William Tan, counsel for Respondent

Investigation Meeting: 26 January 2021

Submissions and other information received: 3 and 8 February 2021 from Applicant  
29 January and 5 February 2021 from Respondent

Determination: 14 April 2021

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**DETERMINATION OF THE AUTHORITY**

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- A. SuperCuisine Group Limited is ordered to pay to Mr Ling the sum of \$3,801.60 gross within 28 days of the date of this determination under s 131 of the Act.**
- B. Mr Ling was not constructively dismissed.**
- C. The application for penalties by both parties is declined.**
- D. Costs are reserved.**

## **Employment relationship problem**

[1] SuperCuisine Group Limited (Super Cuisine) owns and operates the Top Seafood Restaurant in Auckland. Mr Ling is a Chinese national who was issued with a work visa to work as a Chef in Auckland for Laoguangzhou Cuisine Group Limited (Laoguangzhou) after he was offered employment while still resident in China.

[2] In February 2018 Laoguangzhou sold its business to Super Cuisine.

[3] The discussions leading to Mr Ling's employment were largely conducted through Mr Ling's immigration consultant and Mr Chi Yongie, Laoguangzhou and subsequently Super Cuisine's Manager.

[4] After Mr Ling had accepted the offer of employment Mr Yongie offered to assist Mr Ling in finding accommodation and offered to pick him up from the airport on his arrival in New Zealand. The company assisted Mr Ling in purchasing his airline ticket and paid the bond for his accommodation.

[5] Mr Ling started his employment on 7 August 2018. By that time the company had changed its name and his employment was with Super Cuisine.

[6] Mr Ling worked for Super Cuisine as a Chef for a period of about 4 months from 7 August 2018 to 14 January 2019. I note here that when he started work on 7 August Mr Ling's work visa was in the name of Laoguangzhou but he successfully applied for a Variation of Conditions and the name of the employer was amended to reflect the correct name of Super Cuisine.

[7] Mr Ling alleges he had no option but to resign from his employment after Super Cuisine failed to pay him for all hours worked at the contracted rate of pay. Mr Ling claims remedies for unjustified dismissal, seeks payment of arrears of wages and asks the Authority to impose penalties on Super Cuisine for breaches of the Minimum Wage Act 1983 (MWA) and the Holidays Act 2003 (HA).

[8] During a case management call with the parties timetable directions were made in respect of the lodgement of amended statements of problem and in reply, witness statements and additional documents. In its statement in reply Super Cuisine alleges Mr Ling breached all of the timetabled directions and seeks a penalty under s 134A of the Employment Relations Act 2000 (the Act).

## Issues

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

- a) Is Mr Ling owed arrears of wages?
- b) Was Mr Ling constructively dismissed and if so, what if any remedies should be awarded?
- c) Should Super Cuisine be ordered to pay a penalty for breaches of the Minimum Wage Act or the Holidays Act?
- d) Should a penalty be imposed on Mr Ling for his failure to meet the directed timetables set by the Authority.

[10] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant information lodged with the Authority.

## Arrears of wages

[11] The following are the relevant terms from Mr Ling's employment agreement:

### **6 Hours of work**

#### **6.1 Full time hours with an obligation to perform overtime as necessary but without extra payment**

The Employee's normal hours of work shall be **40** hours per week, between the hours of **5pm and 2am on Tuesday to Thursday, and 6pm and 3am on Friday to Saturday**. The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. The Employee's salary fully compensates for all hours worked.

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### **7 Wages/Salary/Allowances**

#### **7.1 Annual Salary**

The Employee's salary shall be **\$41,600** per annum, which shall be paid **weekly** on **Wednesday** into a bank account nominated by the Employee.

[12] Mr Ling says Super Cuisine have produced a fake time sheet to show that he worked 48 hours each week. The time sheet was not signed by Mr Ling. He says it is unlikely he worked exactly 8 or 7.5 hours each day as recorded on the timesheet. Mr Ling says he worked 10 hours each day on six days each week.

[13] Mr Ling seeks payment of outstanding wages totalling \$7,143.

[14] Super Cuisine has provided an extract from its wages and time records which it says shows the following hours recorded in respect of Mr Ling's hours of work:

- (a) For the period from 17 August to 31 October 2018 inclusive Mr Ling worked 48 hours each week (six days of eight hours per day);
- (b) For the week 2 to 7 November 2018 Mr Lang worked 46.5 hours (three days each of eight hours plus three days each of 7.5 hours); and
- (c) For the period 9 November 2018 to 2 January 2019 inclusive Mr Lang worked 45 hours each week (six days at 7.5 hours per day).

[15] I am not satisfied the time records produced by Super Cuisine accurately records the hours worked by Mr Ling each day. However, neither am I satisfied by the evidence from Mr Ling. I have reviewed all of the evidence from the witnesses including those who have worked for Super Cuisine and the terms of the employment agreement, when reaching conclusions on the hours worked by Mr Ling.

[16] It was common ground at the investigation meeting that Mr Ling would attend work about 30 minutes before his shift commenced each day to enjoy a meal with his colleagues. The evidence also shows that employees worked a split shift. That is they worked in the morning, had an unpaid break during the afternoon, and returned to work in the late afternoon to prepare for and conduct the dinner time service.

[17] The breaks in shifts are not identified in the time records and is not reflected in Mr Ling's evidence or his claim.

[18] The employment agreement provides for payment of a salary of \$41,600 with a requirement to work at least 40 hours each week Tuesday to Saturday inclusive. The salary equates to an hour rate of \$20.00 per hour. The employment agreement states

that Mr Ling may be “...required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties.”

[19] Mr Ling was paid \$800 gross each week which equates to a payment of \$20 per hour for 40 hours work.

[20] The evidence shows Mr Ling regularly worked on Sundays in addition to the five days set out in the employment agreement. I do not accept that the work undertaken by Mr Ling on a Sunday could be considered reasonable overtime as contemplated by the wording in the employment agreement.

[21] The work undertaken by Mr Ling on a Sunday was in addition to the hours set out in the employment agreement. The salary did not encompass a six day week or it would have been specified. Mr Ling was entitled to be remunerated for his Sunday hours over and above his salaried rate.

[22] Based on Mr Ling’s contracted hours or work he is entitled to be paid for eight hours worked for each Sunday he worked during his employment. This equates to \$3,520 gross calculated on 8 hours per Sunday for 22 weeks at his ordinary rate of \$20 per hour.

***Public Holiday pay***

[23] During his employment Mr Ling says he worked on four public holidays:

- (a) Labour Day – 22 October 2018;
- (b) Christmas Day – 25 December 2018;
- (c) Boxing Day – 26 December 2018; and
- (d) New Year’s Day – 1 January 2019.

[24] Mr Ling seeks payment for each of the four days at half rate extra (\$10) for each hour worked plus payment for a day in lieu. This equates to a claim of \$960 gross. This is calculated on the basis of \$320 (8 hours at half rate of \$10 per hour) for each of the days plus four alternative holidays of 8 hours at \$20 per hour.

[25] Super Cuisine has paid Mr Ling his final pay which includes payment for the public holidays set out above. In total Mr Ling was paid \$1,000. I am satisfied Mr Ling has received payment for time worked on public holidays and is not owed any further arrears of wages for public holidays worked.

### ***Annual holiday pay***

[26] In his final pay calculation Mr Ling received payment for annual leave calculated at 8 per cent of his total gross earnings including the payment for public holidays. Mr Ling is entitled to payment of annual holiday pay of 8 per cent on his arrears of wages claim relating to work on Sundays. This totals \$281.60 gross.

### ***Conclusion***

[27] Mr Ling has established his claim for arrears of wages for time worked and not paid and holiday pay. SuperCuisine Group Limited is ordered to pay to Mr Ling the sum of \$3,801.60 gross within 28 days of the date of this determination under s 131 of the Act.

### ***Personal grievance***

[28] Mr Ling alleges he was dismissed on 20 January 2019 after Super Cuisine failed to pay him in accordance with the terms of his employment for all hours worked. Super Cuisine denies the claims and says Mr Ling resigned and left of his own accord to take up new a position with a different employer.

[29] Mr Ling claims his resignation was in reality a constructive dismissal. The legal principles relating to constructive dismissal are well established and are not in dispute. Constructive dismissal includes, but is not limited to cases where:<sup>1</sup>

- a) An employer gives the employee the choice of resignation or dismissal;
- b) An employer follows a course of conduct with the “deliberate and dominant purpose” of coercing an employee to resign;
- c) A breach of duty by the employer leads the employee to resign.

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<sup>1</sup> *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Limited* [1985] 2 NZLR 372.

[30] The present case concerns the third of these categories in respect of which the Court of Appeal has stated:<sup>2</sup>

In such a case as this we consider that the first relevant question is whether the resignation has been caused by breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[31] If, after applying the above principles, I conclude there has been a constructive dismissal, I must then determine objectively whether it was justifiable in terms of the statutory test of justification under s 103A of the Act. To this end Super Cuisine must satisfy me that its actions were what a fair and reasonable employer could have done in all the circumstances at the time.

[32] On 20 December 2018 Mr Ling sent a WeChat message to Mr Yongjie as follows (verbatim):

I have worked in the restaurant for over four months and am quite confident in handling my job and I can help others too. As you promised that you will subsidize my accommodation. Now the business is pretty good, could you please consider pay-rise?

I am now paid \$800 for 60 hours per week, and the average wage is about \$13 per hour. I wish to get \$100 more per week.

[33] Mr Yongjie was travelling overseas at the time and advised Mr Ling he would meet with him on his return to New Zealand.

[34] Mr Yongjie met with Mr Ling on or around 31 December 2018. Mr Ling did not seek to discuss his request for a pay review, instead he advised Mr Yongjie he was resigning to take up another job and his work Visa had been varied to allow him to do so. Mr Ling asked Mr Yongjie if he could work for another week to fill the gap between leaving Super Cuisine and starting his new employment.

### **Was there a breach of duty by Super Cuisine?**

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<sup>2</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168 (CA).

[35] Mr Ling relies on the failure by Super Cuisine to pay him for all hours worked at his contractual rate of pay to support his application that he had no option but to resign. The difficulty with Mr Ling's position on this point is that except for his request for a pay rise on 20 December 2018 he never raised any concerns about his wages until after he left the employment relationship.

[36] Having said that however, I am satisfied Super Cuisine did breach its duty to Mr Ling when it failed to correctly pay him for all hours worked.

### **Was Mr Ling's resignation caused by the breach?**

[37] Having found a breach of duty on the part of Super Cuisine I must now consider whether Mr Ling's resignation was caused by the breach. I am not satisfied it was.

[38] Mr Ling applied to Immigration New Zealand for a change of conditions to his work visa to allow him to work for a new employer based in Albany. The application is dated 27 September 2018 and was lodged with Immigration New Zealand on or about 3 October 2018.

[39] When Mr Ling applied to Immigration New Zealand he included evidence of his job offer. I have concluded that about a month after starting work with Super Cuisine Mr Ling had applied for and been offered an alternative position for another restaurant.

[40] The amended work Visa was issued on 3 January 2019. It was for this reason that Mr Ling then resigned his employment on 20 January 2019 and not as a result of any breach by Super Cuisine.

[41] Mr Ling was not constructively dismissed.

### **Penalties**

[42] Both parties have applied to have penalties imposed on the other party.

#### ***Mr Ling's application for penalties***

[43] In his statement of problem Mr Ling seeks the imposition of "pecuniary penalties" for breach of the MWA and HA. The Authority does not have the jurisdiction to impose pecuniary penalties. That jurisdiction lies with the Employment Court and applications for such penalties are limited to Labour Inspectors.

[44] Mr Ling has been represented by an advocate experienced in the Employment Relations Authority and as such I have concluded that the application was worked purposefully and was not in error. However, in the event that my conclusion is mistaken, I have considered whether it is appropriate to impose ordinary penalties on Super Cuisine.

[45] The Act requires proceedings for the recovery of penalties to be commenced within 12 months of the date when the cause of action first became known or should reasonably have become known to the person bringing the action.

[46] Mr Ling lodged an amended statement of problem in the Authority on 18 May 2020 commencing proceedings for the recovery of a penalty for breaches of the Minimum Wage Act 1983 and the Holidays Act 2003.

[47] At the investigation meeting Mr Ling told me he first sought advice about his employment relationship problems in March 2019. I have concluded that the 12 month timeframe for commencing proceedings for a penalty runs from that month. In that case Mr Ling had a statutory obligation to commence his claim by the end of March 2020. Given that he did not commence his proceedings until May 2020 his claim must fail.

[48] Mr Ling's application for a penalty is declined.

***Super Cuisine's application for a penalty***

[49] During a case management call with the parties on 14 February 2020 a timetable was set for the lodgement of amended statements of problem and in reply, witness statements and additional documents. Super Cuisine claims Mr Ling breached all of the timetabled directions and seeks a penalty under s 134A of the Act.

[50] Section 134A allows the Authority to impose a penalty on any person who without sufficient cause, obstructs or delays an Authority investigation.

[51] During the case management call on 14 February 2020 the investigation meeting was scheduled for 12 May 2020. The scheduled investigation meeting was postponed due to the Covid-19 situation in New Zealand. The file was put into a list of files to be rescheduled once the Authority was able to conduct face to face investigation meetings.

[52] The matter was rescheduled for the earliest possible date being 31 July 2020. Mr Ling did not adhere to the directed timetables, however, his failure has neither obstructed nor delayed the Authority's investigation. Accordingly, Super Cuisine's application for a penalty is declined.

### **Costs**

[53] Costs are reserved. The parties are invited to resolve the matter and in doing so should take into account the mixed measure of success of both parties. If the parties are unable resolve the matter they shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. The parties shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[54] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority