



## **The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged from Mr Wang, Enterprise director Kelvin Guo and Enterprise employees, Yong Guo and Lina Lin. Dejan Pan a witness to the altercation also lodged a witness statement. Mr Wang, Kelvin Guo and Yong Guo answered questions under affirmation from me and the parties' representatives. The representatives also lodged written closing submissions.

[4] 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. It has not recorded all evidence and submissions received.

## **The issues**

[5] The issues requiring investigation and determination were:

- (a) Was Mr Wang unjustifiably disadvantaged during his employment with Enterprise?
- (b) Was Mr Wang constructively dismissed from his employment with Enterprise?
- (c) If Mr Wang was found to be constructively dismissed and/or unjustifiably disadvantaged during his employment with Enterprise, to determine whether he is entitled to:
  - (i) compensation under s 123(1)(c)(i) of the Act; and
  - (ii) reimbursement for lost wages?
- (d) Did Enterprise breach:
  - (i) its obligations of good faith to Mr Wang under the Act?
  - (ii) the terms and conditions of Mr Wang's individual employment agreement?
  - (iii) the requirements of the Holidays Act by failing to provide proper notice when requiring Mr Wang to take his annual leave; and deducting sick leave from his entitlements while he was on ACC?
- (e) For any established breaches, to determine:

- (i) whether a penalty should be imposed against Enterprise in relation to each breach; and
  - (ii) whether any wages or Holidays Act arrears are owing to Mr Wang by Enterprise?
- (f) Whether one party is to pay the costs of representation of the other?

## **Context**

### *Mr Wang's employment*

[6] Enterprise operates as a car repair company situated in the North Shore and is operated primarily by its director Kelvin Guo. Mr Wang started his employment as a car groomer with Enterprise in February 2023. At the time of Mr Wang's employment, Enterprise's operation consisted of four or five workers which included Kelvin Guo.

[7] Although Mr Wang's employment agreements identified his role as a "Car Painter", the parties agreed his role was as a car groomer. His duties were primarily to groom and on occasion, return vehicles back to Enterprise customers.

[8] Yong Guo's role for Enterprise was as a supervisor and he was responsible for supervising and allocating work to Mr Wang and one other employee. Given the small size of the business, Yong Guo would also share the same car grooming duties as Mr Wang.

### *Mr Wang's annual leave*

[9] In October 2023 Enterprise struggled to provide work for its staff. As a result Mr Wang took nine days of annual leave from 9 October to 27 October 2023. Mr Wang claimed he was required by Enterprise to take annual leave against his will.

[10] Enterprise disputed Mr Wang's claims and said, due to the lack of work at the time, Enterprise convened a meeting with its staff to address the lack of available work. During the meeting, it said the staff agreed for each staff member to rotate turns taking time off paid as annual leave.

### *The altercation*

[11] On 1 November 2023 Mr Wang and Yong Guo were working in Enterprise's workshop. While working together, Mr Wang accused Yong Guo of only allocating

easy tasks to himself. This led to an argument between them with both parties shouting at each other. Mr Wang claimed Yong Guo verbally abused him and threatened him by saying “you wait, I will hit you when we get off work”. The argument escalated into a physical altercation when Yong Guo pushed Mr Wang.

[12] A neighbouring business owner, Mr Pan overheard the noise caused by the altercation and intervened by separating Mr Wang and Yong Guo. At this point, Kelvin Guo (who was not on the premises at the time) was contacted by Yong Guo who arrived at the worksite sometime shortly after.

[13] During the altercation, Mr Wang also said Yong Guo had held him by the neck and threw a plastic object at him. He provided photo evidence of his injuries of which Yong Guo denied he had caused the injuries. Yong Guo explained the injuries were likely caused by Mr Pan’s attempts to separate Mr Wang and Yong Guo.

#### *Kelvin Guo’s intervention*

[14] Upon arriving on the site, Kelvin Guo spoke individually to Yong Guo and Mr Wang. At the time, Enterprise had a CCTV camera operating in the workshop. When Kelvin Guo spoke to him, Mr Wang said he requested a copy of Enterprise’s CCTV footage of the incident. He said Kevin Guo declined his request.

[15] Shortly after speaking to both parties individually, Kelvin Guo then met with both Yong Guo and Mr Wang together to address his understanding of the situation. To resolve the matter, Kelvin Guo tried to deal with the matter through verbal apologies between Mr Wang and Yong Guo. Due to Kelvin Guo declining his request for the CCTV footage, Mr Wang secretly used his mobile phone to record the meeting with Yong Guo and Mr Wang (the altercation meeting).

[16] Mr Wang was still upset by the altercation and said he wanted to call the Police. Kelvin Guo accepted Mr Wang’s preference and helped Mr Wang call the Police. On the same day of the altercation Mr Wang went on sick leave. He did not return to the workplace.

#### *Mr Wang and Yong Guo’s written warnings*

[17] On 9 November 2023 Enterprise issued written warnings each to both Mr Wang and Yong Guo for their involvement in the altercation. Mr Wang was still on sick leave

at the time and had obtained medical certificates confirming his inability to attend work until the end of January 2024.

[18] Mr Wang again requested a copy of the CCTV footage of the altercation. This was not provided by Enterprise. Around this time, Mr Wang continued to communicate with the Police about his complaint.

[19] On 5 December 2023 Mr Wang raised a personal grievance against Enterprise through his representative for unjustified disadvantage in relation to its actions arising from the altercation. Mr Wang also raised concerns about his safety in the workplace which he claimed made his work situation untenable.

[20] After continued interactions between Mr Wang and Enterprise through their respective representatives, Mr Wang contacted Kelvin Guo confirming his resignation on 5 February 2024. It should be noted, the Police did not take any further action in respect of Mr Wang's claims.

### **Unjustified disadvantage**

#### *Mr Wang's claims*

[21] A personal grievance includes a claim that an employee's employment, or one or more conditions of employment, was affected to the employee's disadvantage by some unjustifiable action by the employer.<sup>1</sup>

[22] As a result of the altercation and Enterprise's actions in response to the altercation, Mr Wang did not return to the workplace. He said the reason for this was because he felt Enterprise was unable to maintain a safe and healthy workplace environment.

[23] After the altercation, Mr Wang said Enterprise failed to carry out a proper investigation into the altercation. Instead, he said Kelvin Guo tried to persuade him to resolve the matter through an apology from Yong Guo.

[24] Mr Wang also referred to two aspects of Enterprises' written warning to him as evidence of flaws in respect of Enterprise's response to the altercation. Firstly, the letter clearly referred to evidence obtained from review of the CCTV footage. Mr Wang said

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<sup>1</sup> Employment Relations Act 2000, s 103(1)(b).

he was not given an opportunity to see the footage and his multiple requests for the footage were declined. Secondly, the warning letter referred to Mr Wang's violation of Enterprise's code of conduct and its workplace policies. Mr Wang said he was not aware of any formal policy or document which amounted to a code of conduct or even a general workplace policy.

*Enterprise's arguments in response*

[25] Enterprise claimed it had followed a reasonable and fair process in addressing both Mr Wang and Yong Guo's behaviour because of the altercation. It said it immediately investigated the altercation and relied on Kelvin Guo's discussions with both Mr Wang and Yong Guo on the day of the altercation. It also said it had reviewed the CCTV footage on three to four occasions. Together with information obtained from Mr Wang and Yong Guo during the altercation meeting, Enterprise said it rightfully determined:

- (a) there was no need to conduct a further formal investigation into the altercation;
- (b) Mr Wang was responsible for instigating the altercation by complaining to Yong Guo about work allocation;
- (c) It had appropriately reached the conclusion that Mr Wang and Yong Guo's actions during the altercation did not amount to serious misconduct; and
- (d) it had appropriately reached the decision to issue written warnings to Mr Wang and Yong Guo.

*Authority's assessment*

[26] The parties did not dispute how the altercation started and that Yong Guo was the first to physically react by pushing Mr Wang first. Based on Mr Wang's evidence (including evidence in respect of his injuries), Yong Guo also threw something at Mr Wang which caused Mr Wang's injuries. I accept at some point Yong Guo had also verbally threatened Mr Wang. The physical escalation of the altercation had effectively increased the seriousness of the matter and warranted a full and fair investigation.<sup>2</sup>

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<sup>2</sup> *Housham v Juken New Zealand Ltd* EMC Auckland AC17/07, 5 April 2007 at [25] where the Employment Court emphasised an employer's obligation for critical assessment of an employee's actions during a physical altercation.

[27] Enterprise's investigation into the altercation was limited to Kelvin Guo's interactions with Yong Guo and Mr Wang (on the day of the altercation) and his own view of the CCTV footage. Enterprise's investigation was flawed for the following reasons:

- (a) Mr Wang was entitled to a proper opportunity to state his case.<sup>3</sup> Although he was able to express his recollection of the altercation during the altercation meeting, he was put in a situation to explain his views so quickly after the altercation and in front of the person who physically assaulted him. He was also not given an opportunity to seek advice or obtain assistance from a support person.
- (b) As previously stated, the seriousness of the altercation warranted a fuller and fairer inquiry into the incident. Kelvin Guo's attempt to try and resolve the matter through a verbal apology by Yong Guo to Mr Wang during the altercation meeting was unacceptable. This was especially given Kelvin Guo had not yet reviewed the CCTV footage.
- (c) At no point was the CCTV footage made available to Mr Wang for him to be able to comment on any of Enterprise's findings based on what was seen from the footage. Both Mr Wang and Yong Guo were not shown the CCTV footage which Enterprise claimed, was no longer available by the time Mr Wang lodged his claim to the Authority.
- (d) Enterprise should have given Mr Wang a chance to comment on its findings given its references to the CCTV footage, a code of conduct and workplace policies which were either not made available to him or did not exist.

[28] These procedural failures in Enterprise's investigation deprived Mr Wang of a fair opportunity to be heard and ultimately tainted the outcome of its investigation. Enterprise's actions were not those of a reasonable employer and accordingly, Mr Wang's claims for unjustified disadvantage were proven.

### **Constructive dismissal**

[29] A constructive dismissal is when an employer's conduct compels a worker to resign. This includes circumstances where an employee's disadvantage was caused by

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<sup>3</sup> *Auckland City Council v Hennessey* (1982) ERNZ Sel Cas 4 (CA) at [9].

an employer's breach of obligations owed to the employee. A resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee an employee would resign rather than put up with the ongoing breaches.<sup>4</sup>

[30] Because of Enterprise's response to the altercation, Mr Wang was not satisfied it was safe for him to return to the workplace. Enterprise intimated there was no evidence to show the workplace was unsafe. It said there was also no evidence to show there was a threat to Mr Wang or that Mr Yong had threatened him with his life.

[31] There was no solid evidence to suggest Yong Guo had threatened Mr Wang's life. However the physical assault by Yong Guo and Enterprise's failure to properly investigate the altercation supported Mr Wang's fear of returning to the workplace.

[32] After the altercation and receiving a written warning, Mr Wang through his representative, continued to engage with Enterprise about his concerns of its investigation into the altercation. This ultimately led to his resignation.

[33] Although Enterprise had likely expected Mr Wang to return to the workplace (after issuing a written warning), a constructive dismissal may still exist if its actions were likely to destroy or seriously damage Mr Wang's confidence and trust.<sup>5</sup> For reasons already stated, Enterprise's actions in addressing the altercation were unjustified. Enterprise's actions had also sufficiently damaged Mr Wang's confidence in the company and his resignation should have been reasonably foreseeable. For these reasons, Mr Wang was constructively dismissed from his employment.

## **Remedies**

[34] Mr Wang has established his personal grievance for unjustified disadvantage and constructive dismissal. He is entitled to consideration of the remedies he has sought. Because both Mr Wang's grievances are closely related to the same factual matrix, any assessment of remedies will be treated on a global basis.

### *Lost wages*

[35] Mr Wang sought an order for reimbursement for lost wages under the Act from the end of his employment on 5 February 2024 to when he commenced new

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<sup>4</sup> *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374-375.

<sup>5</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 at 172.

employment on 19 February 2024. As a result he claimed lost wages for two weeks calculated at 40 hours a week at his pay rate of \$28 per hour (as set out in his written employment agreement).

[36] In response, Enterprise disputed Mr Wang's claims because it said, he had failed to provide any evidence showing when he commenced employment with his new employer. It also relied on evidence showing Mr Wang had told Police he had commenced new employment on 15 January 2024.

[37] Upon review of the evidence, there was insufficient evidence to support Mr Wang's claims for lost wages and when he had commenced subsequent employment after resigning from Enterprise. For this reason, no award of lost wages is made in favour of Mr Wang.

#### *Compensation*

[38] Mr Wang claimed compensation for hurt and humiliation because of Enterprise's failure to address the issues which arose because of the altercation. Mr Wang provided little evidence about the impact of Enterprise's failures leading to his grievances.

[39] However after the altercation, it was clear Mr Wang was concerned about the visa implications of losing his employment with Enterprise. At the investigation meeting Mr Wang was also clearly troubled by his numerous unsuccessful attempts to obtain the CCTV footage from Enterprise.

[40] I am satisfied Mr Wang suffered some form of hurt and humiliation because of Enterprise's actions leading to his unjustified disadvantage and resignation. Considering similar cases, an appropriate starting point is for Enterprise to pay Mr Wang an amount of \$12,000 for hurt and humiliation.

#### *Contribution*

[41] Where the Authority determines an employee has a personal grievance, it must also consider the extent to which the employee's actions contributed towards the situation giving rise to the personal grievance and if the actions require, then reduce remedies it would otherwise have awarded.<sup>6</sup>

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<sup>6</sup> Employment Relations Act 2000, s 124.

[42] Mr Wang's grievance claims arose from the altercation. He clearly was involved in the altercation and his actions also started the altercation by making accusations against Yong Guo about choosing easier tasks for himself. There were clearly alternative actions available to Mr Wang which included escalating the matter to Kelvin Guo.

[43] Instead, Mr Wang chose to engage in an intense argument with Yong Guo which escalated into a physical altercation which required intervention by Enterprise. For this reason he had contributed to the situation giving rise to his personal grievance. It is appropriate in this case to reduce Mr Wang's total remedies by 20 per cent in recognition of his contributory conduct. Applying the reduction, Enterprise is ordered to pay Mr Wang and a remedy of \$9,600.

### **Breach of good faith**

[44] Mr Wang said Enterprise had breached its obligation of good faith to him because it failed to properly engage with him to resolve the matter during his employment. Specifically Mr Wang claimed Kelvin Guo (through his company's representative, Martin Lyttlelton) misrepresented its reasons for not being able to attend mediation because it was purposely trying to delay the process to ensure Mr Wang's work visa would expire. The inference being, Mr Wang would have to leave the country without any conclusion to his complaints against Enterprise.

[45] Enterprise disagreed with Mr Wang's claims and alleged Mr Wang and his representative Aimée Choi, had hastily tried to arrange mediation without prior engagement with Enterprise and its representative. This led to miscommunication between Kelvin Guo and his representative about availability to attend mediation.

[46] Based on the available information, there is insufficient evidence to show Enterprise had acted nefariously in terms of its availability to attend mediation. I accept there was likely some miscommunication between each party and their representative and between the representatives themselves. This was especially given the parties were attempting to arrange mediation prior to the Christmas break on 20 December 2023. For these reasons no breach of good faith by Enterprise was established.

### **Alleged breach of employment agreement**

[47] Mr Wang also claimed Enterprise had breached the terms of his written employment agreement when it failed to pay him his rate of \$28 an hour. From the start of his employment Mr Wang was paid below this rate up until the end of his employment. Mr Wang said he acknowledged there was a shortfall but did not raise it with Enterprise because he feared he would lose his job if he raised any issues about his pay.

[48] Enterprise disagreed with Mr Wang's claims and accused Mr Wang of making false claims and was trying to extort money from the company.

[49] Although a written employment agreement existed between the parties, it was clear the parties did not operate in accordance with the agreement. As previously set out in this determination, the employment agreement referred to Mr Wang as a car painter. There was insufficient evidence to show this was a task Mr Wang carried out for the company.

[50] The written employment agreement also stipulated a pay rate of \$28 an hour, yet Mr Wang was paid around \$22.50 an hour from February 2023 to March 2023, \$23.50 an hour from 31 March to 26 July 2023 and \$25 an hour up until the end of his employment. Mr Wang did not at any point raise his concerns to Enterprise about his pay rate.

[51] Apart from the altercation with Yong Guo, there was also no evidence to show Mr Wang's employment was in jeopardy if he had decided to raise any issues about his pay rate. The only possible conclusion taken from the available evidence was Mr Wang and Enterprise had operated on a separate arrangement between them and the written employment was formulated to facilitate Mr Wang's visa and his ability to work for Enterprise. Mr Wang had not established his claims against Enterprise for breach of his employment agreement.

### **Alleged breach of the Holidays Act 2003**

#### *Annual leave requirements*

[52] Mr Wang claimed he was required to take annual leave by Enterprise in October 2023. This was within the first year of his employment which was before his

entitlement to annual holidays had arisen.<sup>7</sup> Under the Holidays Act, an employer may allow an employee to take annual leave in advance.<sup>8</sup>

[53] An employer may also require an employee to take annual leave if the parties cannot reach agreement as to when an employee is to take annual leave. Under these circumstances, an employer must give an employee no less than 14 days' notice.<sup>9</sup>

*The parties' arguments*

[54] Mr Wang claimed he did not want to take annual leave and was required to do so by Enterprise. Contrary to Enterprise's views, he also said there was no staff meeting to discuss an arrangement for staff rotation to take time off as annual leave.

[55] Both Kelvin Guo and Yong Guo provided evidence supporting the view that a staff meeting took place in October 2023 and all staff agreed to the arrangement for staff rotating turns to take time off on annual leave.

*Did Enterprise breach the Holidays Act 2023 requirements?*

[56] Based on the available evidence it was likely the October 2023 staff meeting took place and Mr Wang had agreed to take annual leave during this time. Although Mr Wang said he did not want to take annual leave, he confirmed he had not raised any objection to the annual leave he had taken (and was paid for) in October 2023. This was consistent with Enterprise confirming it did not know about Mr Wang's reservations about the October 2023 annual leave arrangement until Mr Wang raised his personal grievance through his representative in December 2023.

[57] In accordance with the Holidays Act, Mr Wang agreed to take annual leave in advance and therefore his claim against Enterprise for breach of the Holidays Act was not established.

*Mr Wang's sick leave claim*

[58] As a result of the altercation, Mr Wang was on sick leave from 1 November 2023. Mr Wang was paid sick leave by Enterprise from 2 to 8 November 2023. Mr Wang claimed he should not have been paid sick leave because under the Holidays Act,

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<sup>7</sup> Holidays Act 2023, s 18.

<sup>8</sup> Holidays Act 2023, s 20.

<sup>9</sup> Holidays Act 2023, s 19.

he was to be paid accident compensation from Accident Compensation Corporation New Zealand (ACC).<sup>10</sup>

[59] Enterprise said it was not aware of Mr Wang being on ACC until it had received confirmation from ACC on 15 November 2023. Even so, the ACC confirmation was for the period of 10 November to 10 December 2023.

[60] Enterprise had not breached the requirements of the Holidays Act as it was not aware Mr Wang was on ACC. The only information it had was Mr Wang was unable to attend work and a medical certificate was provided from his doctor on 3 November 2023. Based on this information at the time, Mr Wang was appropriately paid sick leave. For this reason, Enterprise had not breached its obligations under the Holidays Act, in respect of Mr Wang's sick leave.

### **Summary of orders and costs**

[61] Considering the findings reached in this determination, Enterprise is to pay Mr Wang a remedy of \$9,600 within 28 days of this determination.

[62] 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, Mr Wang 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 Enterprise 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.

[63] 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.<sup>11</sup>

Alex Leulu  
Member of the Employment Relations Authority

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<sup>10</sup> Holidays Act 2023, s 71.

<sup>11</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)