

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 744
3282979

BETWEEN JASPER WONG
Applicant

AND TBS TRADING LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Tim Vogel, advocate for the Applicant
Guiju Han, advocate for the Respondent

Investigation Meeting: 27 September 2024 in Auckland

Submissions Received: 11 October 2024 from the Applicant
No submission from the Respondent

Determination: 16 December 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jasper Wong was employed by TBS Trading Limited (TBS Trading) as a salesperson from on or about 1 February 2024 until the employment relationship ended on 12 February 2024. He was employed on a full-time basis.

[2] TBS Trading is a duly incorporated company having its registered office in Auckland and carrying on the business of supplying containers for restaurants and takeaway businesses. Its sole director is Guiju Han (Helen).

[3] Mr Wong has a number of employment relationship problems that he wants the Authority to resolve.

[4] A claim of unjustified disadvantage related to an alleged failure to be paid for 40 hours work was withdrawn in final submissions after the investigation meeting.

[5] The remaining claims are set out below:

- (a) An alleged unjustified disadvantage that there was a failure to pay holiday pay in the final pay (breach of s 27(2) of the Holidays Act 2003).
- (b) An alleged unjustified dismissal.
- (c) Statutory breaches for failing to provide an employment agreement, wage, time, holiday and leave records when requested and failure to pay holiday pay in the final pay.

[6] Mr Wong seeks the following remedies clarified following the investigation meeting in final submissions:

- (a) Reimbursement of lost wages in the sum of \$8,640.00 for nine weeks when Mr Wong was without employment after 12 February 2024.
- (b) Compensation for the disadvantage and dismissal claims in the combined sum of \$25,000.00.
- (c) Holiday pay on outstanding wages.
- (d) Interest on outstanding wages.
- (e) Penalties for alleged statutory breaches:
 - (i) Failure to provide an employment agreement under s 64 of the Act.
 - (ii) Failure to provide wage and time records under s 134 of the Act and failure to provide copies of holiday and leave records under ss. 75 and 82 of the Holidays Act 2003.
 - (iii) Failure to pay annual holiday pay in the final pay period of employment.
- (f) Mr Wong seeks that the whole or part of any penalty recovered be paid to him, together with costs and reimbursement of the filing fee.

[7] TBS Trading did not lodge a statement in reply in the required form within the timeframe prescribed in the regulations. From the documents that were provided with the statement of problem and the evidence, TBS Trading says it did not dismiss Mr Wong from his employment. Ms Han said that the wage and time and holiday and leave records had been provided but accepted there was no employment agreement provided.

The investigation meeting

[8] Ms Han took part in a case management conference with Mr Vogel and the Authority on 11 June 2024. The Authority identified the employment relationship problems for investigation and timetabled for a statement in reply to be lodged by TBS Trading.¹ The direction to lodge a statement in reply was not complied with.

[9] The Authority directed the parties to participate in mediation in its notice of direction. They subsequently attended mediation however the employment relationship problems remained unresolved.

[10] In the event that the matter did not resolve, the Authority set a date for an investigation meeting on 27 September 2024 in Auckland and timetabled for statements of evidence to be lodged and served. Mr Wong provided a statement of evidence. Ms Han did not. On the day of the meeting the Authority was told Mr Wong would be arriving a little bit later than the scheduled time for commencement of 10.00am. Ms Han was also running late. The Authority delayed the starting time for the investigation meeting until at or about 11.00am when both were present. Mr Vogel had asked the Authority to attend the meeting by audio visual connection. The Authority agreed to this.

[11] Mr Wong and Ms Han gave sworn evidence at the Authority investigation meeting. The Authority asked for further information and scheduled for written submissions. Ms Han was reminded that she could submit submissions, but she did not. Written submissions were received on behalf of Mr Wong.

¹ Directions of the Authority 11 June 2024.

The issues

[12] The Authority needs to determine the following issues in this matter:

- (a) How did the relationship end?
- (b) If the relationship ended by way of dismissal, was it unjustified?
- (c) Was Mr Wong unjustifiably disadvantaged because of the overdue payment of holiday pay?
- (d) If grievances are established what remedies should be awarded and are there issues of mitigation and contribution?
- (e) Is Mr Wong entitled to interest payments and the lost benefit of holiday pay on lost wages?
- (f) Were there statutory breaches for which penalties are available?
- (g) If there are breaches should the Authority impose penalties?
- (h) If there are penalties awarded who should the Authority order those penalties be payable by?
- (i) Should there be an award of costs and, if so, in what amount?

How did the employment end?

[13] Mr Wong said in his oral evidence that on Monday 12 February 2024 Ms Han told him not to come into work. Further she told him that if he thought the hours were less than he wanted he could find another job. Ms Han was in China at the time of this discussion. Mr Wong said that Ms Han made these comments because he refused to drive a company van for which he did not have the required driver's licence and because he was questioning the number of hours provided to him. Mr Wong said that he interpreted Ms Han's comments to mean that he was dismissed and he spoke to Ms Han and asked for his final pay.

[14] Mr Wong said that he went to the Warehouse after the conversation because he was concerned he would not be paid. Mr Wong accepts that he took the keys to the warehouse and stayed there for two hours. He did not accept that the other worker present was scared or that she rung the Police. He said that he encouraged her to ring

the police because he was concerned about not being paid. He left the warehouse after two hours.

[15] There was no further communication with Mr Wong about working. He was paid his final pay on 14 February 2024 and his holiday pay on 4 July 2024.

[16] Ms Han did not accept that she dismissed Mr Han. She denied saying “don’t come to work.” There is a transcribed text message undated from Ms Han about Mr Wong which if sensibly assessed, was sent after 12 February 2024. It states amongst other matters:

I didn’t tell you don’t come forever.

I only said don’t come on Monday.

You told me to pay off the salary.

Even came to the shop, took all the keys and tried to steal or rob my products.

[17] There is the possibility of a misunderstanding between Mr Wong and Ms Han initially about what was intended with Mr Wong’s employment.

[18] It would have then been clear to Ms Han from a letter raising a personal grievance of unjustified dismissal on 16 February 2024 some four days later that Mr Wong regarded himself as dismissed.

[19] An emailed letter that was on its face signed by Ms Han was sent to Mr Vogel on 19 March 2024. It sets out at the outset that:

I am writing to address the charges brought forth by Jasper Wong through his legal team and to provide a comprehensive account supported by concrete evidence of his employment conduct and the resulting termination from our company.

The letter then sets out various matters under four headings:

Clear Communication and Expectations

Inadequate Skills and Software Proficiency

Misconduct, Misrepresentation and Financial Irregularities

Security Breach and Professional Boundaries

[20] After these matters are set out there is a heading “termination justified” that provides as follows:

Based on the accumulated evidence of Jasper’s inability to meet job requirements, his repeated policy violations, and his threatening behaviour, our decision to terminate his employment was both justified and necessary.

[21] Ms Han when questioned said that she had asked a friend to write the letter. Ms Han maintained in her evidence that there was no termination and Mr Wong had simply not turned up to work. When questioned about what the policy violations were Ms Han said that she did not know what a policy was. It is likely that Ms Han needed assistance with writing the letter as English is not her first language but it is less likely that she had not had input into the letter content. For example, there is reference in the letter to TBS Limited communicating to Mr Wong at the outset of his employment that three specified skills were to be mastered. The Authority has seen a WeChat message about that from Ms Han to Mr Wong. The person writing the letter must have been told about that.

[22] It was clear to Ms Han within four days of 12 February 2024 that Mr Wong understood he had been dismissed. If, as Ms Han says, this was not in fact what occurred, there was no proper attempt in good faith to disabuse Mr Wong of this and invite him to return to work or to a meeting.²

[23] A letter was then sent responding to the personal grievances raised confirming the employment relationship had ended by dismissal with reasons. It is unlikely that the person writing the letter would have recorded the relationship had ended by way of termination if they had not been advised of that by Ms Han

[24] The relationship ended by way of dismissal.

Was the dismissal unjustified?

[25] The Authority is required to apply the justification test in s 103A of the Employment Relations Act 2000 (the Act) in considering whether Mr Wong was justifiably dismissed. The Authority does not determine justification by considering

² *New Zealand Cards Ltd v Ramsay* [2012] NZEmpC 51.

what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of TBS Trading and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[26] The Authority must consider the procedural fairness factors set out in s 103A (3) of the Act. They are whether allegations against Mr Wong were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them and whether such responses were considered genuinely before dismissal. The Authority may take into account other factors as appropriate and must not determine a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Mr Wong being treated unfairly. A fair and reasonable employer could also be expected to comply with good faith obligations that are set out in s 4 of the Act.

[27] There was no compliance with the procedural fairness factors in s 103A (3) of the Act by TBS Trading. The Authority is not satisfied that Mr Wong understood the concerns that TBS Trading had as set out in the letter of 19 March 2024 that it says justified its decision to terminate Mr Wong's employment. He did not have a proper opportunity to respond to the concerns and have that response genuinely considered before his termination. The procedural defects were not minor and they did result in Mr Wong being treated unfairly. The procedural defects overlap with any conclusions a fair and reasonable employer could have reached that Mr Wong's actions amounted to serious misconduct in all the circumstances.

[28] Mr Wong was unjustifiably dismissed. Having made out a personal grievance of unjustified dismissal, Mr Wong is entitled to a consideration of remedies.

Unjustified disadvantage

[29] Mr Wong has asked the Authority to consider the failure to pay holiday pay in the final pay as an unjustified disadvantage. Holiday pay has now been paid. A penalty has also been claimed for this breach of the Holidays Act 2003. There is the potential for TBS Trading to be penalised twice for the same failure. The focus for the Authority

is on resolving the employment relationship, not how the parties describe it. This aspect falls more appropriately to be considered in a penalty setting.

Remedies

Reimbursement of lost wages

[30] The Authority may provide for the reimbursement to the employee of a sum equal to the whole or any part of wages lost as a result of the grievance.³

[31] There must be a link between the grievance and the loss suffered.

[32] Section 128 of the Act provides:

- (1) This section applies where the Authority or the Court determines, in respect of any employee,—
 - (a) that the employee has a personal grievance; and
 - (b) that the employee has lost remuneration as a result of the personal grievance.
- (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
- (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[33] Mr Wong says that he was without employment for a period of nine weeks from 13 February 2024 to 17 April 2024. His actual loss is the lesser of the sum equal to lost remuneration or 3 months ordinary time remuneration. Mr Wong said that he tried to look for another job after 12 February 2024 but was unable to for a time. He said that he was unprepared for what occurred, did not know what he had done wrong and had no “plan B”. Mr Wong saw a doctor and was able to look for and secure other

³ Employment Relations Act 2000 section 123(1)(b).

employment in April 2024. There were adequate attempts to mitigate in the circumstances.

[34] The Authority is required to consider whether the relationship would have lasted for nine weeks. There was a level of discontent from both parties developing at the early stages in the relationship. The Authority does not have the level of required certainty to conclude that the relationship would not have lasted a further nine weeks. There is no reduction on that basis of the level of reimbursement of lost wages accordingly.

[35] Text messages at the start of the relationship between Mr Wong and Ms Han support that the role was to be full time and 40 hours per week. Subject to issues of contribution Mr Wong is entitled to be reimbursed the sum of \$8,640 gross for lost wages calculated on a 40-hour week at \$24 per hour for nine weeks from 13 February 2024 until 17 April 2024.

Lost benefit of holiday pay

[36] There is a claim for the lost benefit of holiday pay on wages reimbursed being a benefit that Mr Wong would have received if the personal grievance had not arisen. The Authority is minded to award compensation for the lost benefit of holiday pay. Subject to issues of contribution Mr Wong is entitled to the sum of \$691.12 gross being 8% of \$8,640.

Interest

[37] The Authority does not in the exercise of its discretion order the inclusion of interest under clause 11 of the second schedule of the Act in the above amounts ordered payable.

Compensation

[38] Mr Vogel submits that an award of \$25,000 would be justifiable under this head. Mr Wong's evidence was that after he was dismissed he could not sleep or face people. He said these feelings went on for "quite a while" until he obtained medical advice to relax and not think about it. His mental state improved when he obtained new

employment. These was evidence of financial strain whilst Mr Wong was unemployed. Mr Wong needed to have full time employment to be able to survive financially. Mr Wong's attendance at the warehouse when he understood that he had been dismissed supports a highly emotional reaction and a level of distress.

[39] The evidence of emotional harm when considered with other similar cases of a similar nature falls within the top end of the first level of compensation. I conclude an appropriate award subject to any issues of contribution is \$12,000.

Contribution

[40] Section 124 of the Employment Relations Act 2000 requires the Authority in deciding the nature and extent of the remedies to be provided to consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance. If the actions require the Authority will reduce the remedies that would otherwise have been awarded.

[41] The Authority needs to be satisfied that the alleged conduct on the part of Mr Wong was blameworthy. There needs to be a causal link between the actions of an employee and the situation that gave rise to the personal grievance. The Authority needs to then assess the extent of the contribution and how the reduction should be applied.

[42] Mr Wong went to the Warehouse after he believed he was dismissed on 12 February 2024. There was concern about his behaviour there. That behaviour was after the dismissal which impacts the establishment of a causal link between that action and the situation that gave rise to the personal grievance. Whilst the attendance at the Warehouse including taking a key was unwise, the evidence supported a real fear on the part of Mr Wong that he would not be paid. He referred to another employee of TBS Limited being in this position and heightening his fear. The letter of 19 March from TBS Trading refers to attached staff testimonies about threatening behaviour that day. Mr Vogel when asked by the Authority after the investigation meeting for the attachments confirmed that no attachments of that nature accompanied that letter. Ms Han was unable to establish they did. The Authority is unable to conclude on the balance of probabilities that Mr Wong was threatening.

[43] There were aspects in the letter of 19 March 2024 of performance that could not be considered to be contribution to the situation giving rise to the grievance. If there are performance concerns with an employee then a process is required to raise these and advise what is required to achieve performance and allow time for this. Mr Wong had only been employed for two weeks. There was no process.

[44] The issue of concerns about financial demands appears to relate to a request from Mr Wong for a salary advance to take his grandparents out for dinner during his second week of work as they were in Auckland. No blameworthy contribution could flow from the request which TSB Trading could either grant or refuse.

[45] The only other matter the Authority considers in respect of contribution is whether Mr Wong as alleged by TBS Trading misrepresented his driving status. Ms Han said that she knew he did to have a full driver's licence but thought he had a restricted licence. Text messages refer to knowledge about the absence of a full licence. One message provided after the investigation meeting could indicate knowledge by Ms Han that Mr Wong needed a driver with him however the Authority does not have the benefit of the full context of the exchange. The starting rate was set at \$24 per hour for the first month for Mr Wong until the full driver's licence was obtained. When the full driver's licence was obtained the rate was to increase to \$26 per hour. Mr Wong had a learner's licence and could only drive with a person who had a full drivers licence. The Authority cannot rule out some misunderstanding by Ms Han about the licence but does not conclude on the balance of probabilities deliberate misrepresentation and blameworthy conduct in that respect.

[46] The Authority is not satisfied that Mr Wong contributed to his dismissal in a blameworthy manner and the remedies set out above are not reduced.

Were there statutory breaches and should penalties be awarded?

Failure to provide an employment agreement

[47] There was no dispute that Mr Wong was not provided with a written employment agreement. That is a breach of s 65 of the Act that requires that the individual employment agreement must be in writing. Although expressed to be a

breach of s 64 of the Act in the statement of problem, what constitutes the breach is clear and no prejudice arises.

[48] It is important that employers comply with s 65 of the Act and provide a written employment agreement. Ms Han said she intended to provide an employment agreement on return from China and the relationship had only been on foot for two weeks.

[49] The maximum penalty is \$20,000 for a company.

[50] It is appropriate to award a penalty for this breach. Moderate penalties are usually awarded for a breach of this nature. The Authority does not discount the possibility that an employment agreement may have been provided on Ms Han's return from China had the employment relationship remained on foot. There was no information provided that the Authority or Court had found TBS Trading to have engaged in similar conduct. Taking all factors into account a penalty in the sum of \$300 is to be imposed to recognise the importance of complying with the long-standing statutory requirement to provide a written individual employment agreement.

Failure to provide wage and time records under s 130(4) of the Act and holiday and leave records under s 27 (2) of the Holiday's Act 2003.

[51] Records were requested in the letter of 16 February 2024 from Mr Vogel. The letter of 19 March from TBS Trading referred to the payroll records being attached. Mr Vogel said when asked after the investigation meeting for attachments that there were no attachments to the letter of records. Ms Han said that the records had been provided. The Authority was provided with the records for the investigation meeting, and these are attached to this determination as "A."

[52] The Authority cannot be satisfied to the required extent that the full records were provided when Mr Vogel requested them. The records when provided were mostly compliant with the requirements of s 130 of the Act except that the copy before the Authority did not have Mr Wong's name and occupation. The employment relationship was too brief to be able to ascertain whether there was full compliance with s 81 of the Holidays Act 2003. It did appear that the holiday and leave records may

have been kept as part of the wage and time record which is permissible under s 81(5) of the Holidays Act 2003. A public holiday that it is now accepted as likely one that Mr Wong did not work but was paid for is shown on the record for the second week.

[53] The failure to provide the records at an earlier time meant some claims were pursued initially that otherwise would not have been, such as payment at time and a half for a public holiday that the records showed was not worked.

[54] There were breaches of the obligations to provide the records to Mr Vogel as soon as possible and/or immediately on request.

[55] Having heard evidence from Ms Han that there was an intention to provide payroll records, the failure to attach them to the 19 March 2024 letter may have been inadvertent. The information was subsequently provided by the time of the investigation meeting.

[56] Taking all matters into account the Authority in the exercise of its discretion does not intend to impose a penalty about failure to provide the records when requested.

Failure to pay annual holiday pay in the pay that relates to final period of employment.

[57] Under s 27(2) of the Holidays Act 2003 when an employee's employment has ended the employer must pay annual holiday pay in the pay that relates to the employee's final period of employment.

[58] Attachment "A" shows holiday pay was not paid until 4 July 2024 although the relationship ended on 12 February 2024.

[59] There was a breach in that respect of the obligation at s 27(2) of the Holidays Act 2003 and there is liability for a penalty is for non-compliance of this provision in s 75(1) of the Holidays Act 2003.

[60] The Authority considers a penalty should be awarded because of the importance of compliance with this statutory entitlement to be paid holiday pay when employment ends in the final pay.

[61] Taking all matters into account an appropriate penalty is \$500.

To whom should the penalties be paid?

[62] Under s 136 of the Act the Authority may order that the whole or any part of the penalty may be payable to a person and not the Crown.

[63] The Authority orders that the penalty with respect to the breach found of the failure to provide an employment agreement of \$300 be paid to the Crown.

[64] The penalty with respect to the breach for failing to pay holiday pay in the final pay of \$500 is to be paid by TBS Limited as follows. Fifty percent is to be paid to the Crown and fifty percent to Mr Wong to reflect that Mr Wong has not otherwise been compensated for the overdue payment of holiday pay.

Costs

[65] Mr Wong has been the successful party. The investigation meeting did not occupy a full day. The Authority minute book shows that with the late attendance the meeting went from 11am to 2.00pm with half an hour luncheon adjournment between 1pm and 1.30 pm. An award of half of the daily tariff for costs is appropriate in the sum of \$2,250 together with reimbursement of the filing fee of \$71.55.

Summary of orders made:

[66] TBS Trading Limited unjustifiably dismissed Jasper Wong and is ordered to pay the following:

- (a) The sum of \$8,640 gross being reimbursement of lost wages under s 123 (1)(b) of the Act.
- (b) The sum of \$12,000 without deduction being compensation under s 123 (1)(c)(i) of the Act.
- (c) The sum of \$691.12 gross being the loss of the benefit of holiday pay that Mr Wong may have expected to obtain if the grievance had not arisen under s 123 (1)(c)(ii) of the Act.

- (d) There is no reduction of the above amounts for contribution.
- (e) Within 28 days TBS Trading Limited is ordered to pay the penalties awarded as set out below.
- (f) The sum of \$300 to the Crown being a penalty for failing to provide a written employment agreement under s 65 of the Act.
- (g) The sum of \$500 for failing to pay holiday pay as required in Mr Wong's final pay under s 27(2) of the Holidays Act 2003 to be paid as follows.
 - (i) The sum of \$250 to the Crown.
 - (ii) The sum of \$250 to Mr Wong
- (h) TBS Trading Limited is ordered to pay to Jasper Wong costs in the sum of \$2,250 together with reimbursement of the filing fee of \$71.55.

Helen Doyle
Member of the Employment Relations Authority

“A”

Records for Mr Wong

Week one of employment

<u>Date</u>	<u>Times</u>	<u>Hours Worked</u>
Thursday 1 February	10.00am to 5.00pm	7
Friday 2 February	10.00am to 5.30pm	7.5
Saturday 3 February	No hours worked	0
Sunday 4 February	3.00pm to 8.00pm	5
	TOTAL HOURS	19.5
<u>Paid</u>	<u>Tax</u>	<u>Net Paid on 5 February</u>
\$468.00 gross	\$69.88	\$398.12

Week two of employment

<u>Date</u>	<u>Times</u>	<u>Hours Worked</u>
Monday 5 February	10.00am to 6.00pm	8
Tuesday 6 February <i>Public holiday</i>	Did not work	6
Wednesday 7 February	10.00am to 7.00pm	9
Thursday 8 February	10.00am to 5.30pm	7.5
Friday 9 February	10.00am to 1.00pm	3
Lunchtime deducted		-2.5 hours
	TOTAL HOURS	31 (cont.)

<u>Gross week two</u>	<u>PAYE</u>	<u>Net</u>
\$744.00 gross	\$122.73	<p>\$621.27 but records show \$554.18 paid on 14 February 2024 with \$67.09 still owing.</p> <p>Balance of \$67.09 and holiday pay calculated as 8% of \$1,212 gross being \$96.96 was paid on 4 July 2024. The amount paid was \$144.33 net being \$164.05 gross less PAYE of \$19.72.</p>