

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 111
3252840

BETWEEN

DAIYING XU
Applicant

AND

BIG SKY FOOD LIMITED
Respondent

Member of Authority: Natasha Szeto

Representatives: Ursula Nicholls and Rosa Hehir, counsel and advocate
for the Applicant
Lennon Xi, advocate for the Respondent

Investigation Meeting: 5 September 2024 in Palmerston North

Submissions and further information received: 14 October 2024 and up to 10 January 2025 from the
Applicant
14 October 2024 and 10 January 2025 from the
Respondent

Date of Determination: 24 February 2025

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Big Sky Food Limited (BSF) trades as Phat Phillip and runs ice creameries, including in The Plaza Shopping Centre in Palmerston North. Daiying Xu (known as Eileen) was first employed by BSF in February 2021. She worked at the Phat Phillip store in The Plaza for over 18 months before she resigned.

[2] The second time Ms Xu was employed by BSF in 2023, she worked there for less than five months. In that time, Ms Xu returned to China twice to facilitate the sale of her house. After she returned the second time, Ms Xu was not rostered on to work for BSF again.

[3] Ms Xu says she was unjustifiably dismissed from her employment and was unjustifiably disadvantaged by BSF's failure to pay her holiday pay. Ms Xu also says BSF has breached a number of statutory obligations including failing to provide her with a written individual employment agreement, to keep accurate records relating to her employment and to act in good faith.

[4] BSF denies Ms Xu's claims and makes a number of counter-claims relating to losses it says Ms Xu caused the business with her unauthorised absences from work.

[5] This determination resolves the issues of whether Ms Xu was unjustifiably dismissed and unjustifiably disadvantaged, and whether BSF has breached its statutory obligations. It also resolves whether BSF has valid counter-claims against Ms Xu for damages.

The Authority's Investigation

[6] Written witness statements were lodged by Ms Xu and three witnesses from the company: Ms Nicole Ji, Regional Manager; Mr Mark Millar, Director; and Ms Heloise Bao, National Manager. All witnesses attended the Investigation Meeting either in person or by AVL, and answered questions under oath or affirmation.

[7] 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 the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

Issues

[8] The issues the Authority is to investigate and determine are:

- (a) Whether Ms Xu was unjustifiably dismissed from her employment with BSF;
- (b) Whether Ms Xu was paid minimum entitlements including holiday pay;
- (c) Whether Ms Xu was unjustifiably disadvantaged by BSF failing to pay her wages, and holiday pay;
- (d) Whether BSF has breached:

- (i) Section 27(2) of the Holidays Act 2003 (HA) by failing to pay Ms Xu holiday pay and s 81 of the HA by failing to keep accurate holiday and leave records;
- (ii) Section 130 of the Act by failing to keep accurate wages and time records;
- (iii) Section 65 of the Act by failing to provide Ms Xu with a written individual employment agreement.
- (iv) Section 4 of the Act in terms of its good faith obligations to Ms Xu.

[9] On 26 August 2024, BSF lodged a counter-claim for:

- (i) Travel cost for arranging cover for Ms Xu including one week's accommodation of \$3,000.00; and
- (ii) Loss of sales due to having to close early because of Ms Xu's absence (lack of staff) of \$5,000.00.
- (iii) Travel costs to attend the investigation meeting (\$1,500.00) and other costs incurred by it.

[10] Following the investigation meeting, BSF paid Ms Xu the sum of \$443.19 in settlement of her annual holiday pay claims, and in recognition of the employment relationship being irreconcilable.

Relevant Background

[11] Ms Xu first worked for BSF as a Store Manager at the Phat Phillip ice creamery in The Plaza Shopping Centre in Palmerston North from February 2021 to September 2022. Ms Xu resigned in September 2022 because she says she was taking time to recover from Covid-19.

[12] In February 2023, Mark Millar took over as director of the company. In April 2023 BSF advertised for a permanent full-time worker on Chinese social media including WeChat.

[13] Ms Xu saw the advertisement and contacted Heloise Bao, National Manager, who she had previously worked with, to ask her if there was a position. In mid-April, Ms Xu met with Ms Bao (based in Christchurch) and Ms Nicole Ji (based in Auckland)

at a coffee shop in The Plaza. During this initial meeting, Ms Xu says she suggested starting work as a crew member, but the company insisted on her being an Operations Manager. Ms Xu told Ms Bao and Ms Ji she had put her house in Shanghai on the market in March 2023 and was in the process of trying to sell it.

[14] Ms Xu was clear in her own mind that she could not take a job with BSF if the company would not agree to her returning to China to facilitate the sale of her house. At the stage that she was discussing employment with Ms Bao and Ms Ji, Ms Xu did not know how many times she might have to return to China, or for how long. For its part, BSF was concerned about Ms Xu taking leave and was particularly concerned about ensuring there was coverage in the store for the first two weeks of July, being the busy school holiday period. BSF did not want Ms Xu to take more than one period of leave, and did not want her to be away for more than a week or two at most. BSF says when Ms Xu was interviewed, she confirmed she needed to go back to China once to sell a property, and that she would be available for the upcoming July holidays. BSF says if Ms Xu had said she would not be available for the whole of the July school holidays, it would not have employed her.

[15] Shortly after the meeting, Ms Bao confirmed the wages with Ms Xu. Ms Bao says the two of them met and she gave Ms Xu a hard copy of her individual employment agreement which included the intended start date of Ms Xu's employment, being 27 April 2023. Ms Bao says she took Ms Xu through the terms of the agreement and gave her the only hard copy she had, having scanned an electronic copy to herself earlier. Ms Bao says she asked Ms Xu to go through the agreement and said she would get the signed copy off her the next time Ms Bao was in Palmerston North. As events transpired, no company representative returned to Palmerston North prior to the relationship breaking down so Ms Bao did not receive the signed employment agreement back from Ms Xu.

[16] Ms Xu denies this follow-up meeting ever took place. She says she received emails from "Jennie" at an HR Phat Phillip gmail address asking her for personal identification and visa information so that her contract could be prepared, but she never received a copy of her employment agreement in hard copy or electronically.

[17] Ms Xu was added to the Phat Phillip group chat and roster on 23 April 2023 and her first day of employment with BSF was 27 April. Around 5 May, Ms Xu communicated with her managers on WeChat to tell them she needed to go back to

China to facilitate her house sale. Later Ms Xu clarified she would be away from work from 23 May until 3 or 4 June. She also said she would need to go back to China one more time to hand over the property, but that she needed to work and did not want to stay in Shanghai. On 21 May, Ms Xu sent her managers a WeChat notification reminding them of her upcoming leave. On 23 May, Ms Xu left for China as she had planned and returned on 3 or 4 June. The first trip back to China passed without incident.

[18] On her return from China, Ms Xu told her employers that she would need to go back to China again on 27 June, and this time would be gone for three weeks. BSF responded that Ms Xu's request covers the entire school holidays and it would prefer Ms Xu to work at least one week of the school holidays. There was some back and forth communication between Ms Xu and Ms Bao about what was agreed prior to Ms Xu starting her employment. On 13 June, Ms Bao asked for clarification of when Ms Xu would return to China and which week of the school holidays Ms Xu would be in the store. Ms Xu told her she would be gone from 25 June to 10 July and would be back for the second week of the school holidays. Ms Bao said the company would approve Ms Xu's leave on the basis that Ms Xu would be back at work for the second week of the school holidays. Ms Xu then flew to China on 27 June.

[19] A couple of nights before Ms Xu was due to return to New Zealand, she lost her Chinese identification document. Ms Xu said this caused her some stress and anxiety because of her house sale and she needed to get a new identification document before she left China. On 10 July, the night before she was due to return to New Zealand, Ms Xu messaged the company via WeChat to advise of the change in her circumstances. BSF was not happy because it said Ms Xu should have advised as soon as she lost her passport, and it was clear that Ms Xu would not be returning to work in time to cover the busy school holiday period as she had agreed.

[20] BSF says it tried to contact Ms Xu in China on 11 July to tell her it had sent her an important email. Ms Xu reminded the company that she was unable to access Google products including gmail in China. BSF preferred to contact Ms Xu via email rather than WeChat because it wanted to be formal and have everything in writing and it did not consider WeChat messages to be "in writing".

[21] During this time, Ms Xu says she did not feel pressured to return to New Zealand and did not realise her absence would cause BSF difficulties. She ended up staying in China for a further six weeks, close to eight weeks in total.

[22] In early August, Ms Xu was using WeChat to communicate with Ms Bao and Ms Ji regarding her return to work. Ms Ji was corresponding directly with a person working in human resources or administration for BSF, who called themselves "HO". HO was sending emails to Ms Xu's gmail account.

[23] HO sent Ms Xu an email asking her to advise the company about her return to work, or if she wished to abandon her job. Ms Xu told BSF that she was not getting any emails. The parties then embarked on a series of laborious communications where HO would write an email to Ms Xu, Ms Ji would advise Ms Xu via WeChat that an email had been sent to her with a summary of what it said, Ms Xu would hand-write a response and send a photo of her response to the company via WeChat, HO would write an email to Ms Xu, and Ms Ji would send a screenshot of HO's email to Ms Xu via WeChat.

[24] Through this process, Ms Xu confirmed she could return to work on 20 August or a little earlier. On 3 August, the company conveyed to Ms Xu she had not met a key requirement of the job which she had agreed to, which was to be available for the July school holidays. BSF also advised Ms Xu it had failed the food control verification inspection because Ms Xu had not prepared documentation which she was responsible for as Operations Manager. BSF said it had to roster people into Ms Xu's shifts and could no longer guarantee her 20 hours of work per week immediately after her return to New Zealand, but would "try to fulfil the 20 hours in the coming weeks". BSF concludes that if there are "less responsibilities" Ms Xu wants to take, the company will need to discuss this with her to resolve it. Ms Xu then responded that less than 20 hours' work is okay because she understands other employees had to increase their hours to provide coverage in her absence.

[25] Ms Xu arrived back in New Zealand on 21 August. That day, BSF emailed her to say that because Ms Xu had changed her availability significantly and no longer wished to undertake management responsibilities, there would be "difficulties accommodating your needs unless the changes [changes] can be reflected from the employment agreement". HO said there would have to be a negotiation process.

[26] Ms Xu says this was the last communication she had from the company. Ms Xu responded the next day on 22 August, saying she understands the situation because “different positions have different pay scales” and asked how much her wage will be. From 21 August, Ms Xu says she was removed from the Phat Phillip rosters.

[27] BSF says it responded to Ms Xu’s 22 August email on 25 August 2023 at 18:50. The email produced for the Authority – which Ms Xu says she never received - confirms Ms Xu will be paid the minimum legal wage, she is to let BSF know what she thinks, and that BSF is open to negotiations.

[28] On 30 August, Ms Xu contacted Ms Bao via WeChat saying she was back in New Zealand, she had replied to the company’s emails, she wanted a change to crew member full time or part time and she accepted the normal crew member wage. She provided her hours of availability for work. There was no response from Ms Bao or the company to the WeChat messages from Ms Xu.

[29] On 18 September 2023 at 16:33, BSF says it sent Ms Xu an email to her personal gmail address entitled: “amendment follow up” which states:

We called you many times, but you did not answer your phone. Can you please respond?

[30] Ms Bao says she made unanswered calls to Ms Xu, and she instructed someone called “Otis” at the company to send emails to Ms Xu. Ms Xu says she never had any missed calls from Ms Bao, and never received the emails on 25 August and 18 September 2023 from BSF. When Ms Xu did not receive any communications from the company after 21 August and was removed from the rosters, she lodged a statement of problem with the Authority on 11 October 2023.

[31] Following the Authority’s investigation meeting, BSF paid Ms Xu her final pay including holiday pay because it had “realised that the relationship cannot be fixed”. Ms Xu provided a screenshot showing BSF made a direct credit payment of \$443.19 to her on 10 January 2025.

Was Ms Xu unjustifiably dismissed?

Was Ms Xu dismissed?

[32] Ms Xu says she was unjustifiably dismissed by BSF on or around 21 August 2023. Ms Xu says the company's actions in removing her from the Phat Phillip rosters from 21 August, failing to respond to her email on 22 August, failing to respond to her WeChat message to Ms Bao on 30 August, and failing to make any other efforts to contact her, constitute a dismissal. Ms Xu submits it is completely untrue and unreasonable to suggest that she was still an employee of the company as at the date of the Authority's investigation meeting more than a year later.

[33] BSF disagrees that Ms Xu was dismissed, and says up until the investigation meeting Ms Xu was still its employee. It did not pay her final pay and holiday pay until after the investigation meeting, partly because it did not want its actions to be considered a constructive dismissal. BSF submits it did not dismiss Ms Xu and her position was open for her return at any time she was willing to engage over negotiating new terms and conditions.

[34] Whether Ms Xu was dismissed is a factual matter. Ms Xu did not resign, and BSF did not clearly and transparently terminate her employment. It was accepted that Ms Xu was a permanent part-time employee working a minimum of 20 hours per week (and consistently more than 20 hours per week) before she went to China. This was also recorded in the alleged employment agreement¹ where it states that Ms Xu's permanent contract hours will be rostered within the agreed available working times. Putting to one side that Ms Xu says she did not receive a written employment agreement, BSF had agreed to give Ms Xu 20 hours of work a week when she was available for work under the terms of its agreement with her. BSF was clearly aware of this obligation, because the company did not recruit anyone to replace Ms Xu in order to give Ms Xu her guaranteed contracted hours when she returned from China. Although Ms Xu told BSF she would accept less than 20 hours work, there was no agreed reduction to Ms Xu's hours. In August communications, BSF told Ms Xu that despite the ongoing negotiations it would "try to fulfil the 20 hours in the coming weeks". It did not do so.

¹ IEA, clause 8.2.

[35] BSF does not dispute that Ms Xu was removed from the WeChat group where rosters were posted, and she was not added back onto the roster after her return from China in August 2023. Rosters from 21 August to 17 September show Ms Xu was not rostered on to work at all in this period, despite BSF being aware that she had returned to New Zealand.

[36] While I accept the parties were ostensibly open to discussing a change to Ms Xu's terms and conditions of employment, Ms Xu had done what she could by indicating her availability for work when she returned from China and the specific days and hours of her availability. BSF removed her from the rostering group, did not roster her on to work, and did not pay her.

[37] Based on all of the above, it was reasonable for someone in Ms Xu's position to have considered that her employment had been terminated. The totality of BSF's conduct was consistent with a sending away. I conclude Ms Xu's permanent employment was terminated by BSF on or about 21 August 2023 and she was dismissed.

Was Ms Xu's dismissal unjustifiable?

[38] In determining whether an action by an employer (including dismissal) was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and must consider the four procedural fairness factors as set out in s 103A(3) of the Act. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment.²

[39] I need to assess on an objective basis, whether BSF's actions (which I have found constitute a dismissal) and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time including whether:

- (a) It fully and fairly investigated the allegations against Ms Xu before dismissing her;
- (b) It raised the concerns it had with Ms Xu (including giving her relevant information) before dismissing her;

² Section 4(1A) of the Act.

- (c) It gave Ms Xu a reasonable opportunity to respond to its concerns before dismissing her;
- (d) It genuinely considered Ms Xu's explanations before dismissing her (decisions were made without predetermination).

[40] Based on the evidence before the Authority, BSF has not acted as a fair and reasonable employer could and as a result, Ms Xu has not been treated fairly. Through its communications with Ms Xu in August, BSF led Ms Xu to believe that it accepted (albeit unhappily) her absence from work during the school holiday period, and would be open to negotiating a change to her role when she returned to New Zealand. Neither of these things were accurate.

[41] I find the main reason that BSF did not roster Ms Xu on to work after her return to New Zealand is that Ms Xu had not returned to work for at least one week of the school holidays and it did not accept her explanations for her absence. BSF says it would not even have employed Ms Xu if she could not cover the school holidays and therefore her failure to do so breached a key term of her employment. BSF says Ms Xu did not act in good faith because she did not tell the company the truth at the time of her interview.

[42] BSF has attempted to persuade the Authority that Ms Xu did not lose her identification document and fabricated this as a reason to stay in China. It says having analysed Ms Xu's travel arrangements, her delay in returning to New Zealand from China was a "calculated strategy". However, there is no evidence that BSF fully investigated and then raised this concern with Ms Xu at the time. If BSF did not believe the reason for Ms Xu's delay and it required her to return to work, it should have been very clear with her about that. While BSF did raise an issue with Ms Xu in the email it sent to her while in China, it did not clearly and transparently convey that the company did not believe her reasons for staying in China, or that Ms Xu's failure to return was a breach of her contract, or could be considered misconduct and become a disciplinary issue. A fair and reasonable employer could have investigated its concerns, raised the concerns it had transparently with Ms Xu, given Ms Xu a reasonable opportunity to respond to its concerns, and genuinely considered any response. BSF did not take any of these steps.

[43] BSF says it could not roster Ms Xu back on shift without knowing her availability and suitability for the role that was available. If Ms Xu was no longer going to be an Operations Manager, then she was potentially a worker (crew member), but it did not know without discussing with her. BSF says it did not respond to Ms Xu's messages on WeChat because it did not consider communications on WeChat to be formal enough. BSF also says Ms Xu did not contact Ms Bao, her manager, until 30 August via WeChat. Ms Bao acknowledged she received that message but chose not to reply on that forum.

[44] Based on the evidence before the Authority, I am not persuaded BSF was genuinely open to negotiating with Ms Xu to change her role to reduce the scope of her responsibilities and decrease her hours and wages. After Ms Xu arrived back in New Zealand on 21 August, HO emailed Ms Xu ostensibly to begin negotiations about new hours and duties but BSF later said the changes Ms Xu wanted were not feasible for the company, without providing any reasons. If BSF did not have a crew member position available then a fair and reasonable employer could have advised Ms Xu of that. If BSF was genuine in its intention to continue the employment relationship, it could have utilised all communication channels available (calls, texts, WeChat, emails) to engage with Ms Xu.

[45] BSF says it did try to call Ms Xu many times to discuss the detail of her new role, and to attempt resolution of the issue, but Ms Xu did not respond. BSF did not provide any documentary evidence to support its claims of trying to call Ms Xu. Ms Xu says she did not receive any calls from the company. She says she did not receive the email BSF says it sent on 16 September, and the only explanation she could offer is that the email has been manufactured. BSF says it is Ms Xu who has demonstrated an overall lack of veracity, so her statements that she did not receive the company's emails or phone calls should not be given any weight.

[46] Based on the evidence before the Authority, I am more persuaded by Ms Xu's evidence that she contacted BSF to demonstrate her availability for work, and her openness to negotiate a reduction in role, responsibilities, hours and pay. There is no evidence to support BSF's submission Ms Xu was technology-averse and wanted everything done "old school". To the contrary, the company's reluctance to engage in agreement negotiations with Ms Xu over WeChat suggests it was BSF that was reliant on email as the primary mode of communication throughout August. This was an

unreasonable position for BSF to take when Ms Xu had made it clear she could not access Google products while in China and because WeChat had been the primary mode of communication between Ms Xu, Ms Ji and Ms Bao, including for the purposes of organising rostering. Ms Bao also acknowledged she received Ms Xu's WeChat message on 30 August 2023 indicating her availability for work in some detail, but Ms Bao chose not to reply on that forum. It would have been open to BSF to tell Ms Bao that failure to engage would be considered abandonment of employment. There is no evidence before the Authority that BSF took this step.

[47] For all these reasons, I accept Ms Xu's evidence that she was trying to contact the company through various means, and BSF stopped engaging with her. On the balance of probabilities, I find it more likely than not that the company decided not to engage with Ms Xu because she had not returned for the school holidays as she said she would, and because the company needed an Operations Manager and not a part-time crew member. This is supported by the company's submission that after Ms Xu returned to New Zealand and advised of the changes she wanted: "it was not feasible for the company to entertain these changes".

[48] Based on the evidence before the Authority, I conclude that BSF has not acted as a fair and reasonable employer could, because it did not raise its issues of concern with Ms Xu, it did not give her a reasonable opportunity to respond and it did not genuinely consider the responses she did give. These are clear breaches of s 103A of the Act and led to Ms Xu being unfairly treated. Ms Xu was unjustifiably dismissed.

Was Ms Xu paid minimum entitlements including holiday pay?

[49] Ms Xu says there is a shortfall in her pay of \$967.50 because there was a discrepancy between her last payslip for 2023 (on which her year to date earnings are shown as \$4,470.00), and her IRD detailed income breakdown (which shows her income earnings from BSF in 2023 total \$3,482.50). BSF disputes Ms Xu is owed any wage arrears and says the individual payslips for 2023 demonstrate Ms Xu earned approximately \$5,245.00 (gross) which exceeds the \$4,470.00 recorded on her final payslip.

[50] I am unable to determine why there is a discrepancy between the IRD record and Ms Xu's final payslip, but it appears that based on individual payslips, BSF paid Ms Xu more than the IRD records show. Ms Xu has not provided sufficient evidence

there was any shortfall to satisfy me that any orders would be appropriate. Accordingly, I decline to make orders.

[51] In terms of her claim to unpaid holiday pay, Ms Xu has provided bank account confirmation that the sum of \$443.19 was paid to her on 10 January 2025 in settlement of her annual holiday pay claims. This amount is 8% of \$5,539.88 (gross) which is slightly higher than the \$5,245.00 BSF says Ms Xu earned. Consequently, I find there is no outstanding holiday pay owing to Ms Xu, and I therefore decline to make any orders.

Was Ms Xu unjustifiably disadvantaged?

[52] For her disadvantage claim to succeed, Ms Xu must establish that one or more conditions of her employment was affected to her disadvantage by an unjustified action by BSF.³ This means I need to determine whether Ms Xu suffered a disadvantage in her employment, and – if so – whether this was caused by an action by BSF and whether that action was unjustified.

[53] BSF's actions are assessed in light of the test under s 103A of the Act and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[54] Ms Xu says she was financially and emotionally disadvantaged by the company's failure to pay her holiday pay as required by s 27(2) of the HA.

[55] BSF says it genuinely believed Ms Xu may return to work and then did not want to pay her holiday pay in circumstances where to do so may be considered to be an admission it had dismissed her, which it denies. However, Ms Xu first claimed an unreasonable (unjustified) dismissal in her statement of problem. As at 11 October 2023 when BSF was served with Ms Xu's statement of problem, the company was on notice Ms Xu believed her employment to have ended. From that date, BSF's failure to pay Ms Xu her holiday pay was an unjustified action. Ms Xu has been disadvantaged by not having the benefit of her holiday pay for a significant time after her employment ended. It follows that Ms Xu's claim of unjustifiable disadvantage succeeds.

³ *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).

Has BSF breached its statutory obligations?

Record-keeping breaches

[56] Ms Xu says BSF did not keep accurate holiday and leave records as required by s 83 of the HA and did not keep accurate wages and time records as required by s 130 of the Act. Ms Xu submits BSF has breached these sections because its only timekeeping mechanism appears to have been via rosters, and records were generated in pay slips which were not compliant with the Act.

[57] BSF has not specifically responded to allegations about its record-keeping. To the extent that the rosters and payslips constitute BSF's holiday and leave records and wages and time records, they are incomplete because they do not contain the information required under the Act and HA.

Provision of written employment agreement

[58] Ms Xu says she did not have a written employment agreement, which is a breach of s 65 of the Act. At the time of lodging her statement of problem, Ms Xu stated "There is no employment agreement, only an email confirmation". BSF says it provided Ms Xu with an individual employment agreement (which was later provided to the Authority) and Ms Xu failed to return the signed copy to the company.

[59] There is a conflict in the evidence as I have set out above. According to BSF, Ms Bao handed Ms Xu a copy of her individual employment agreement in "hard copy" at The Plaza following Ms Xu's interview and before she started work on 27 April 2023. However this account is inconsistent with the record of a WeChat message exchange from 27 April 2023 where Ms Bao asked Ms Xu to provide her with an email address so that HR can send her a copy of her employment agreement. Ms Xu has also provided a copy of an email dated 27 April 2023 from "Jennie" in HR at Phat Phillip asking her to confirm identification and visa information and saying "We will prepare your contract". This evidence supports Ms Xu's recollection that she did not have an employment agreement before her first rostered day of work on 27 April.

[60] In addition to this, in May or June 2023 approximately a month after Ms Xu started working for BSF, she asked the company for a letter confirming her employment in order to secure a bank loan for a car. Ms Xu says she could not give the bank her employment agreement because she did not have one. BSF says Ms Xu could have

asked for a copy at this time, and the only reason she did not “press” for a copy of her employment agreement was because she already had it. In addition, BSF says it was probably a bank requirement that Ms Xu needed proof of current employment in the form of a letter.

[61] For the reasons given above, but particularly based on the WeChat communications between Ms Xu and BSF, I conclude on the balance of probabilities that BSF did not provide Ms Xu with a written employment agreement and it has breached s 65 of the Act.

Breach of good faith obligations

[62] The duty of good faith requires both parties to be active and constructive in maintaining a productive employment relationship which includes a duty to be responsive and communicative.

[63] Ms Xu says BSF has failed to be active and constructive in maintaining a productive relationship with her. She says the company was not responsive or communicative in dealing with her because it did not reply or respond to her messages, did not consult with her, and did not give her a notice period or pay her holiday pay. She says BSF failed to meet s 4 of the Act in all respects.

[64] BSF says Ms Xu has breached her duty of good faith by not being fully transparent with the company about her second trip back to China. It says she had two opportunities to tell the company the exact dates she would be away on her second trip and she did not do so. BSF says the damage to the company could have been reduced if Ms Xu had informed it of her plans at an earlier stage.

[65] The duty of good faith is a mutual obligation. BSF was not active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. A fair and reasonable employer could be expected to actively and constructively engage with an employee in Ms Xu’s position. BSF had a responsibility to raise issues with Ms Xu rather than effectively shutting her out of her employment by not offering her rostered shifts. Consequently, I find BSF has not acted in good faith towards Ms Xu.

[66] However, equally Ms Xu was not responsive and communicative with BSF when she was in China. Although I accept that lack of access to email presented some

practical difficulties with communicating, I am not persuaded Ms Xu was responsive and communicative around her plans to stay in Shanghai for almost another six weeks after losing her identification document. An employee acting in good faith may have been expected to check with their employer about extending their trip but there is no evidence Ms Xu did so. I therefore also find that Ms Xu has not acted in good faith towards BSF.

Conclusion on breaches

[67] Ms Xu alleges BSF has breached its statutory obligations. However, these breaches were initially raised as grounds for her personal grievance (in the Memorandum lodged six months after her statement of problem) and no separate claim has been made for penalties. It is likely that if a late claim for penalties had been made, it would have been out of time because an action to recover a penalty has to commence within 12 months of the cause of action.⁴ It would also be contrary to natural justice to consider a penalty when BSF has not had notice of any claim. Accordingly, while I have made findings in respect of breaches, I decline to order any penalties.

Remedies

[68] I have found Ms Xu was unjustifiably dismissed and disadvantaged in her employment and she is therefore entitled to an assessment of remedies.

[69] Ms Xu seeks:

- (a) Compensation under s 123(1)(c) of the Act.
- (b) Reimbursement of lost wages under s 123(1)(b).

Compensation

[70] Ms Xu seeks compensation for her unjustified dismissal claim of \$25,000 and for her unjustified disadvantage claim of \$15,000. Ms Xu says she was incredibly upset and hurt by the company's actions. She felt she had been a good worker, and was embarrassed and frustrated by being "ghosted". She has experienced a loss of confidence, and found it difficult to obtain other employment without a reference or certificate of service. Specifically in relation to the disadvantage claim, Ms Xu says

⁴ Section 135(5) of the Act.

she has been unable to mitigate the financial burden of not having received final holiday pay, and being deprived of her entitlements caused her hurt and humiliation.

[71] BSF does not accept that it was responsible for Ms Xu's struggle to find work as a manager. It says Ms Xu effectively only worked for BSF for less than two months, and it is unreasonable and unfair to blame BSF for her inability to get a managerial job. It also says Ms Xu can draw on her previous experience with the company and other employers as references.

[72] I have considered the general range of compensation awards in other cases. I consider a global amount of compensation is appropriate for both personal grievance claims because while Ms Xu's unjustified disadvantage claim was made out, I am not persuaded the failure to pay holiday pay caused her significant humiliation or injury to feelings. I take into account the relatively brief duration of Ms Xu's employment with BSF. Standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$10,000.00.

Lost wages

[73] Under s 123(1)(b) of the Act, the Authority is able to order the employee be reimbursed a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128 says the Authority must order the employer to pay lost remuneration or three months' ordinary time remuneration where the Authority determines an employee has a personal grievance and has lost remuneration as a result of the grievance.

[74] Ms Xu asks the Authority to award her three months' lost wages amounting to \$7,500.00 (12 weeks based on 25 hours per week at \$25.00 per hour). The three month period between 21 August and 21 November consists of 13 weeks, or a total of \$8,125.00. Ms Xu said she found it difficult to find work, and suffered months of financial loss. She was able to obtain two weeks' work in October 2023 with Life Gift Limited, which she has demonstrated in her IRD records.

[75] BSF says it should not be responsible for any lost wages.

[76] I find no reason to depart from the default position that an employee should be reimbursed their actual lost remuneration or 3 months' ordinary time remuneration. In

this case, Ms Xu found two weeks' work within the first three months after her effective dismissal around 21 August 2023. I consider it is appropriate to deduct her earnings for this job (\$1,620.00) from the three months' ordinary time remuneration. BSF is consequently ordered to pay Ms Xu the sum of \$6,505.00 (gross) as reimbursement for lost wages.

Contribution

[77] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Ms Xu may have acted in a way that contributed to the situation that gave rise to her grievances.⁵

[78] The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:⁶

- (a) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- (b) Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[79] The Court also stated:⁷

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[80] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[81] Ms Xu says she has not contributed to her personal grievance. BSF says Ms Xu is the only contributor to the situation.

[82] Based on the evidence before the Authority, I do not accept Ms Xu contributed to the situation giving rise to her dismissal, rather she was attempting to communicate with BSF about a change to her role when she returned from China and to indicate she was available for work as a crew member. She did not contribute to the circumstances

⁵ Section 124 of the Act.

⁶ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

⁷ Above n6 at [17].

where BSF decided not to pay her holiday pay. I decline to reduce an otherwise appropriate award on the basis of any contribution by Ms Xu.

Counterclaims

[83] BSF seeks to be reimbursed for costs and damages. It says it has suffered a loss of \$7,251.22, presented in a “financial loss summary” as follows:

- (a) Loss of sales due to Ms Xu’s absence, based on total average daily sales for dates the store was “not open” (\$4,946.12);
- (b) Ms Ji’s travel costs for travel from Wellington to Palmerston North (\$325.10);
- (c) Ms Ji’s accommodation costs in Palmerston North for the three occasions she went to Palmerston North to cover both stores (\$980.00);
and
- (d) Ms Bao’s wages for working overtime to cover Ms Xu’s absence (around \$1,000.00).

[84] Ms Xu says there is no merit to BSF’s claim. She points out that no substantiating evidence has been provided to support the company’s alleged losses such as invoices, receipts or detailed statements. The document “loss support” contains a table with estimated missing sales figures and estimated travel and accommodation dates for Ms Ji, but no invoices, receipts or detailed statements have been provided to substantiate the estimated loss of \$7,251.22 claimed.

[85] I agree with Ms Xu’s submission that there is a lack of specificity and supporting information for the counter-claims which means I cannot be satisfied that any losses suffered by BSF are directly attributable to Ms Xu.

[86] Firstly, it is not clear what information the “Total loss in sales” is based on. The figures cover the period 1 July 2023 to 30 August 2023, but Ms Xu was not initially planning to return to work until 10 July (which the company knew) and she was back in New Zealand on 20 August (which the company also knew). BSF has not provided any evidence to support its submission that the store had to be closed on specific dates, and why the closures were directly attributable to Ms Xu’s absence.

[87] Secondly, the company's claims for Ms Ji's travel and accommodation costs and overtime worked by Ms Bao when Ms Ji was allegedly covering Ms Xu's absence also lack specificity. If Ms Ji was working in place of Ms Xu, there should not be any lost sales claims for those days, but on the information provided, it is not possible to determine whether claims are duplicitous.

[88] Supporting evidence for the counter-claims – particularly invoices for travel costs and accommodation, should have been easily accessible to BSF. The screen shots of bank transfers are insufficient. Irrespective of the evidential difficulties, it is fatal to the counter-claims that BSF has not persuaded me any losses it says it suffered were directly attributable to Ms Xu's absence from work. I find the counter-claims by BSF against Ms Xu to be unsubstantiated and I decline to make any orders.

Orders

[89] I order within 28 days of the date of this determination Big Sky Food Limited is to pay Daiying Xu:

- (a) Compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act for both her unjustified dismissal and unjustified disadvantage claims, in the amount of \$10,000.00.
- (b) Reimbursement under s 123(1)(b) and s 128 of the Act for lost wages, in the amount of \$6,505.00 (gross).

Costs

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

[91] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Xu 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 BSF 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.

[92] 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.⁸

Natasha Szeto
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1