

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 483
3198419

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| BETWEEN | LIN YANG Applicant |
| AND | THORNDON CAFÉ LIMITED Respondent |

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| Member of Authority: | Shane Kinley |
| Representatives: | Stephen Parry, counsel for the Applicant Xiaoyan Zhang, director, for the Respondent |
| Investigation Meeting: | 23 June 2023 at Wellington |
| Submissions and further information: | Submissions at the Investigation Meeting from Applicant Further information from Applicant and Respondent on 26, 27 and 29 June 2023 |
| Determination: | 28 August 2023 |

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Lin Yang was employed by Thorndon Café Limited (TCL) from June 2020 until December 2021 as a chef, although his last day of pay was in January 2022. Following a change in the ownership (by way of shareholding) and the director of TCL Mr Yang says he was unjustifiably dismissed by TCL. Mr Yang also says he was not paid correctly during his employment and did not receive his correct annual holiday pay when his employment ended.

[2] TCL denies that it dismissed Mr Yang and says that it has paid him correctly and it is willing to pay any amounts that are found to be properly owed.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mr Yang and on behalf of TCL. At the investigation meeting I was advised that the witness statement for TCL included evidence on behalf of Xiaoyan Zhang and Shanshan (Mandy) Yang¹, who were both shareholders and directors of TCL at different times (as discussed at paragraphs [11] and [12] below). Mr Yang, Ms Zhang and Ms Yang answered questions, under oath, from me and from Mr Yang's counsel, and in the case of Mr Yang, from Ms Zhang. Mr Yang's counsel and Ms Yang, for TCL, also provided oral closing submissions.

[4] The investigation meeting was assisted by a professional translator as both Mr Yang and Ms Zhang's primary language of communication was Mandarin, with significant amounts of evidence also being provided of exchanges in Mandarin on the WeChat messaging service. Questions for Mr Yang and Ms Zhang were primarily translated, as were their responses.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

- (a) Was Mr Yang unjustifiably dismissed by TCL?
- (b) If TCL's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
 - (i) lost wages under s 123(1)(b) of the Act; and
 - (ii) compensation under s 123(1)(c)(i) of the Act.
- (c) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Martin that contributed to the situation giving rise to his grievance?
- (d) Is Mr Yang entitled to payment for outstanding entitlements in relation to unpaid wages, annual holidays, public holidays, sick leave or payment for his notice period?

¹ While sharing a surname, there was no evidence or suggestion that Mr Yang and Ms Yang were related.

- (e) If so, should penalties be imposed on TCL under s 75 of the Holidays Act 2003 (HA2003)?
- (f) Should either party contribute to the costs of representation of the other party.

Was Mr Yang unjustifiably dismissed by TCL?

Relevant law

[7] The test of justification is set out at s 103A of the Act.

[8] The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[9] In reaching my conclusion, I must consider:

- a. having regards to the resources available to it, did TCL sufficiently investigate before taking action;
- b. did TCL raise concerns that it had with Mr Yang before taking action;
- c. did Mr Yang have a reasonable opportunity to respond; and
- d. did TCL genuinely consider Mr Yang's explanation or comments.

[10] I may also take into account any other factors I think are appropriate.

Context of change of shareholding and director of TCL

[11] Before determining whether Mr Yang was dismissed or not, it is useful to record events related to the shareholding and directors of TCL, as these are relevant to who had conversations with Mr Yang on behalf of TCL in December 2021, which led to the ending of his employment.

[12] The Companies Register records for TCL show that on 14 July 2021 Ms Zhang was allocated 60 of the 100 shares of TCL, with Ms Yang's shareholding reducing from 100 shares to 40 shares. A further change is recorded on 23 December 2021 with Ms Zhang's shareholding increasing to 99 shares and Ms Yang's shareholding decreasing to 1 share. Ms Zhang is also recorded as having been appointed a director of TCL on 14 July 2021, with Ms Yang ceasing to be a director on 17 December 2021.

Was Mr Yang dismissed or did he resign?

[13] On 17 December 2021 Ms Yang says that she told the staff of TCL that Ms Zhang was taking over as the “sole trader” of TCL. I was told that TCL had a three staff in addition to Ms Yang, Mr Yang and Ms Zhang, being two student workers and a dishwasher.

[14] While Ms Yang says that she wanted Mr Yang to continue being employed by TCL, she also acknowledged that she told Mr Yang that he needed to resign from being employed by her and sign a new contract with Ms Zhang. Ms Yang’s rationale for this was that she needed to sort out all payments for staff and clear everything so there was “a new company for her (Ms Zhang) to start with”. Ms Yang then had discussions with Mr Yang about what payments were due to him on the ending of his employment and allegedly asked Mr Yang to sign a resignation letter related to this. In early 2022 TCL paid Mr Yang his final pay, which Ms Yang had calculated.

[15] Ms Zhang’s evidence was that she did not want Mr Yang to leave as this would mean she would not have a cook, but she said she tried to negotiate new hours of work with Mr Yang, specifically a change to starting times. She also acknowledged taking over the business of TCL with a goal of wanting to earn more money and said she had an agreement with Ms Yang to pay for purchasing the business later.

[16] TCL provided a recording of a conversation between Mr Yang and Ms Zhang in the kitchen of TCL, conducted in Mandarin, along with a translation of that conversation. This recording was played at the investigation meeting and translated by the professional translator for me. Ms Zhang maintained that this recording demonstrated that Mr Yang had resigned in order to drive Uber.

[17] The challenge with Ms Zhang’s position is that none of the translations of the recording had Mr Yang saying this. While it was clear that Mr Yang discussed that he was earning good money driving Uber, at no time did he say he wanted to leave his job at TCL to drive Uber. Mr Yang acknowledged that after leaving his employment at TCL he did drive Uber more than he had been previously, but said he did this in order to support his family.

[18] Mr Yang’s evidence was that he was told by Ms Yang that he needed to resign (which is consistent with Ms Yang’s evidence) and that Ms Yang would sort out his

payments and notice for the change of ownership. He also said that Ms Zhang asked to talk to him outside the café in the parking areas and said that the café did not need him.

[19] All of the witnesses agreed that further discussions were between Mr Yang and Ms Yang, including whether Mr Yang would work between Christmas and New Years (which had not happened the previous year) and when his notice period would run until.

What resources were available to TCL

[20] In relation to justification for TCL's actions I am required to consider the resources available to it. I asked Ms Zhang and Ms Yang what advice they took in relation to employment matters and also the sale and transfer of shareholding in relation to TCL. Both Ms Zhang and Ms Yang said the only advice they had was from an accountant. I consider that the limited advice that Ms Zhang and Ms Yang obtained meant that they had limited understanding of employment law obligations, particularly where there was a sale of the shares of a company which they conflated with the sale of the business of TCL.

Mr Yang was dismissed by TCL

[21] I consider that Ms Yang and Ms Zhang mistakenly considered that they needed to end Mr Yang's employment when they reached an agreement over the sale of shares of TCL. I find, on a balance of probabilities, that this was presented to Mr Yang as him needing to resign (which he did not) and that he would be paid his notice period, with subsequent conversations being about what notice period would be due to him, rather than whether he was resigning.

[22] I find in these circumstances that Mr Yang was dismissed, without any further process including advising Mr Yang of a proposal to sell the business (which there was some suggestion may have been in Ms Yang's consideration, as she referred to the different notice periods in Mr Yang's employment agreement for termination for cause, a resignation or a "proposal to sell all or part of the business"). Mr Yang was not provided any opportunity to respond to TCL's decision and was left to negotiate over what notice he would be provided and paid for.

[23] At the time Ms Yang communicated that she had "sold" TCL to Ms Zhang she was still acting with authority on behalf of TCL over employment matters and I was not provided with any evidence of attempts by TCL to resile from the position that Mr Yang needed to resign once Ms Zhang took over responsibility for TCL's operations.

[24] No justification was provided of Mr Yang's dismissal and none would likely have been possible given the absence of any process or substantive justification, given my finding that Mr Yang was told he needed to resign. Instead Ms Zhang and Ms Yang repeated their position that Mr Yang had resigned to drive Uber, even when faced with the proposition that their own evidence did not support that position. In doing so Ms Zhang and Ms Yang did not appear to take into account Mr Yang's evidence that he did so to provide for his family because his employment had been ended by TCL.

What remedies should be awarded to Mr Yang in relation to his unjustified dismissal?

[25] Having determined that Mr Yang was unjustifiably dismissed, I need to consider what remedies should follow. Mr Yang has sought lost wages under s 123(1)(b) of the Act and compensation for hurt and humiliation under s 123(1)(c)(i) of the Act. I consider that both remedies are appropriate.

[26] Mr Yang said he was unable to find permanent employment, other than increasing his driving for Uber, until September 2022. Records were provided on Mr Yang's behalf which showed that he increased his earnings from Uber significantly in the nine months after his dismissal compared to the nine months before his dismissal. The difference in his combined income from TCL and net income from driving for Uber was calculated at \$251.81 per week.

[27] Mr Yang sought this amount for the full period of nine months until he obtained other permanent employment. I was not provided with detailed evidence of Mr Yang's attempts to obtain other employment, though he did give evidence that he found it hard to find other employment and chose both to increase the amount of time he spent driving for Uber but also to spend more time with his family. In those circumstances I consider it appropriate to exercise my discretion under s 128(3) of the Act to order TCL to pay Mr Yang lost wages for the period of 26 weeks.

[28] Based on the above I order that TCL pay Mr Yang the amount of \$6,547.07 for lost wages (calculated as \$251.81 per week for 26 weeks).

[29] Mr Yang described the impacts of his dismissal as "feeling like everything was falling down" and being unable to face his young daughter. In the context of Mr Yang's dismissal, close to Christmas, he described significant impacts, including the stress due to the financial consequences of losing his job and impacts on his ability to sleep.

[30] I find that Mr Yang's unjustified dismissal had a significant impact on him and that an award of compensation is appropriate. Subject to any contribution, Mr Yang is entitled to payment of compensation in the sum of \$20,000 under s 123(1)(c)(i) if the Act. In reaching this figure I have taken into account other comparable cases.

Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Yang that contributed to the situation giving rise to his grievance?

[31] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mr Yang that contributed to the situation giving rise to his grievance. I have no evidence that would suggest that was the case. TCL's suggestion that Mr Yang had resigned to drive Uber was not advanced as contributing to the situation, although I would have been unlikely to find that to be the case, given the findings I have made at paragraphs [21] to [24] above that TCL dismissed Mr Yang without any process or substantive justification. I do not consider that Mr Yang can be viewed as contributing in any way to his dismissal. Accordingly, I do not reduce the award of remedies.

Is Mr Yang entitled to payment for outstanding entitlements in relation to unpaid wages, annual holidays, public holidays, sick leave or payment for his notice period?

[32] Mr Yang sought payment for outstanding entitlements in relation to:

- a. unpaid wages for reductions in his wages in August and September 2021 without agreement during COVID-19 lockdowns;
- b. incorrectly paid annual holiday pay on termination;
- c. an unpaid public holiday for the day after New Years Day 2021; and
- d. a combination of unpaid sick leave or payment in lieu of notice for the balance of Mr Yang's notice period.

Claim for unpaid wages for reductions in Mr Yang's wages

[33] Mr Yang says that his pay was reduced during COVID-19 lockdowns in August and September 2021 without any discussion, with a total reduction in pay of \$828 during this period. He says during this time that he would work inconsistent hours with Ms Yang sometimes telling him not to come to work, but he never agreed to this.

[34] Ms Yang said there were discussions and provided records of WeChat conversations which supported this, including messages from Mr Yang asking what salary he would receive when working shorter days, where Ms Yang replied that he

would get the full government wage subsidy. Other messages from Mr Yang showed that he requested that he be paid in one week for “two days of normal work and three days of lock down salary” which supports there having been an agreement to reduced hours and pay during this period. Mr Yang also did not challenge that he received messages that said pay for reduced hours would be at the rate of the full government wage subsidy, which supports a finding that a reduced pay rate was agreed.

[35] While there was some irregularity in the wage slips which relate to this period, with payments still appearing to be made for specified hours of work, on the balance of probabilities I prefer Ms Yang’s evidence and find that there was agreement between TCL and Mr Yang to a reduction of hours and an acceptance by Mr Yang of reduced payment to reflect that.

Claim for incorrectly paid annual holiday pay on termination

[36] Mr Yang claimed that he had taken only four day’s annual holidays in the time that he was employed by TCL (in December 2020) and the pay slips which he received, after his employment ended, showing other annual holidays had been taken were incorrect. TCL in contrast provided payslips that showed Mr Yang received pay for five day’s annual holidays at that time, with the payments received matched in bank payment records provided by both Mr Yang and TCL for that period.

[37] The hours paid for in the relevant week are more consistent with two slightly longer than normal days being worked, with 17 hours paid as “Ordinary Time”, when Mr Yang almost always worked seven-hour days. I consider it is more likely than not that in the week leading up to a Christmas that longer hours than normal were worked and Mr Yang did not provide any evidence to the contrary. That week has a paid public holiday and 14 hours of “Annual Leave”, which equates to two days or two-fifths of a week’s annual holidays. The total amount of net pay is matched with bank records provided by both Mr Yang and TCL. In relation to that period, on the balance of probabilities I prefer the evidence of TCL, based upon the corroboration of payslips to bank records.

[38] Mr Yang was adamant, however, that he had not taken other periods of annual holidays shown in the payslips and reflected in TCL’s calculations of annual holiday pay due on termination. One day recorded in Mr Yang’s payslips as annual holidays was a day when Mr Yang said he understood he had been given sick leave due to being

unwell after he had a COVID-19 vaccination. I consider it more likely than not that it was agreed he would take sick leave at that time.

[39] Mr Yang was also adamant he had not taken any annual holidays at the start of December 2021, when three days' annual holiday pay are shown in Mr Yang's payslips. No corroborating evidence was provided by either Mr Yang or TCL, but on a balance of probabilities I prefer Mr Yang's evidence, as this was relatively close to a time when he acknowledged he was expecting to take annual holidays for the period between Christmas 2021 and New Years Day 2022. There was no evidence to support why Mr Yang would have taken annual holidays shortly before then. In addition, Mr Yang's employment agreement required he apply for annual leave in writing and leave could only be taken with the authorisation of TCL. In the absence of records showing that occurred, I am not convinced that Mr Yang took annual holidays at that time.

[40] The residual claim for annual holiday pay relates to the week before Christmas in 2021, the week between Christmas 2021 and New Years Day 2022 and the week after New Years Day 2022, through to the date that the end of Mr Yang's employment was effected on 8 January 2022. Mr Yang's evidence was that he was sick on 22 December 2021, due to lack of sleep following having lost his job. He appears to have been paid a day's sick leave for that day. When he said he wished to take another day's sick leave on 23 December 2021 he was asked for a medical certificate, which he duly provided. The medical certificate said that Mr Yang was unfit to work until 17 January 2022.

[41] Unfortunately at this time it appeared that Mr Yang and Ms Yang, who was negotiating the payment of Mr Yang's final pay and notice period, were focussed on what the period of notice was and there was a talking past each other in relation to the taking of sick leave. TCL chose to treat the remaining days of Mr Yang's notice period as annual holidays, with the exception of the public holidays. At the same time there were disagreements about whether TCL would be open for the days between Christmas 2021 and New Years Day 2022, which Mr Yang understood would be annual holidays, based on the previous year's approach and conversations prior to the time of Mr Yang's dismissal.

[42] As Mr Yang had not commenced any period of agreed annual holidays, which I find had been agreed to be taken for the days between Christmas 2021 and New Years Day 2022, when he presented a valid medical certificate he was entitled to have those

days treated as sick leave under s 38 of the HA2003. While TCL may not have been aware of that provision, given its limited knowledge of employment law, it cannot benefit from that. As the only days recorded as sick leave in the payslips provided by are in December 2021 and Mr Yang commenced work in June 2020, he should have had an entitlement to another 12 days of sick leave, taking into account the day that he says should have been sick leave after he had a COVID-19 vaccination.²

[43] Mr Yang's claim for unpaid annual holiday pay on termination was calculated as being \$1,882.32 short, based on payments that he received compared to payments that he calculated he was owed (which was corroborated by the payslips provided). Other than one day where I have found Mr Yang more likely than not took annual holidays in December 2020, I accept Mr Yang's calculations. Reducing the amount claimed by one fifth of a week for that one day (which I calculate as \$161, being the same amount as Mr Yang used for his days based calculations and was paid for an ordinary seven hour day in the payslips provided) results in the amount due for unpaid annual holiday pay being \$1,721.32.

Claim for an unpaid public holiday

[44] Mr Yang claimed \$140 for an unpaid public holiday for the day after New Years Day 2021. The payslips provided showed this amount was due and had been paid, however, Mr Yang's bank records did not record this payment having been received. I had asked TCL to provide bank records that show this payment was made but they did not do so (although they provided bank records to support the payment of annual holiday pay and wages for the preceding three weeks). In these circumstances, I find that this payment was not made and is owed by TCL to Mr Yang.

Claim for a combination of unpaid sick leave or payment in lieu of notice for the balance of Mr Yang's notice period

[45] Mr Yang claimed for a one month notice period on the basis that he was made redundant. I have found at paragraphs [21] to [24] above that TCL dismissed Mr Yang without any process or substantive justification, however, I am not convinced that he was made redundant due to that lack of process. Therefore, I am not convinced that he

² Mr Yang would have become entitled to five days sick leave under s 63 of the HA2003 in early December 2020, when he completed six month's employment with TCL and a further ten days in early December 2021, when he completed a subsequent 12 months of employment with TCL.

is entitled to the notice period under his employment agreement for a circumstance where TCL's business was sold and he was not offered employment.

[46] It is clear from discussions that Mr Yang had with Ms Yang about his notice of termination that he thought he was entitled to one month's notice, while she thought that TCL was ending his employment under the general notice provisions, which provided for two weeks' notice or payment in lieu of notice.

[47] Of that two weeks' notice, there were seven days where TCL paid Mr Yang annual holidays and he received four paid public holidays. As I have found at above that annual holidays were applied incorrectly to days when Mr Yang was entitled to sick leave during his notice period, I consider that he was due to be paid those seven days as sick leave, which was payable at \$161 per day. Mr Yang was paid at that rate for those days and I have ordered that he be paid the annual holiday pay that was used for those days, there is no further short-fall of pay due for Mr Yang's notice period.

Should penalties be imposed on TCL under s 75 of the HA2003?

[48] Mr Yang sought is seeking penalties for TCL's breaches of the HA2003, although submissions for Mr Yang acknowledged that those breaches could be considered to be non-feasance rather than malfeasance.

[49] I have found above that Mr Yang's annual holiday pay on termination was incorrectly calculated, in large part due to TCL's lack of understanding that sick leave should have been provided when Mr Yang provided a medical certificate for the time at the end of his employment with TCL. I have also found, on a balance of probabilities, that TCL recorded Mr Yang as having taken annual holidays when he did not and failed to pay for a public holiday which it recorded as having been paid. I agree with submissions for Mr Yang that the breaches can largely be viewed as non-feasance rather than malfeasance, in circumstances where a small business did not take specific advice on employment law obligations.

[50] Penalties are provided under s 75 of the HA2003 for breaches of the relevant provisions relating to annual holiday pay, payment for public holidays and payment for sick leave (ss 25, 49 and 71 of the HA2003). For a company the maximum penalty for each of these breaches is \$20,000.

[51] In deciding whether to impose a penalty, and if I decide to, deciding how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*.³

[52] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

Step One – Identify the nature and number of statutory breaches

[53] There are potentially four statutory breaches identified as there are two different breaches related to annual holiday pay, with each meriting a penalty to a maximum amount of \$20,000. This is a potential total penalty of \$80,000. However, I consider in light of the fact that I did not grant any remedies in relation to the non-payment of sick leave and the remaining breaches relate to similar facts of non-payment or misclassification of payments for HA2003 entitlements, it appropriate to globalise these into one breach under the HA2003 only. This reduces the total to \$20,000.

Step Two – Assess the severity of the breach

[54] Reflecting submissions on behalf of Mr Yang I have characterised TCL's breaches to be non-feasance rather than malfeasance. TCL's actions in incorrectly paying Mr Yang did have significant impacts on him, though I consider this was largely negligent not intentional and there was no evidence of previous breaches. I consider that the penalty amount should be reduced to 30%, taking into account penalties in other similar cases.

Step Three – Financial circumstances of the Respondent

[55] No submissions were made about TCL's financial position. In the circumstances, no reduction is made to the penalty on this basis.

Step Four – Proportionality of outcome

[56] In considering the level of penalties awarded in similar cases decided since *Borsboom*, I consider the appropriate level of the penalties in this matter to be \$1,500.

³ *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143.

[57] No request was made for any portion of the penalties to be paid to Mr Yang.

[58] TCL is to pay the Authority to be forwarded to the Crown account a penalty of \$1,500 within 28 days of the date of this determination.

Summary of outcome

[59] I have found:

- a. Lin Yang was unjustifiably dismissed by Thorndon Café Limited;
- b. Lin Yang's lost wages as a result of his dismissal were offset by increased income from driving for Uber;
- c. Thorndon Café Limited have not correctly accounted for or paid Lin Yang's annual holiday pay or public holidays entitlements under the HA2003; and
- d. Lin Yang's claims for unpaid wages, sick leave and bereavement leave are not made out.

[60] For the above reasons I order Thorndon Café Limited to pay Lin Yang:

- a. \$6,547.07 for lost wages under s 123(1)(b) of the Act;
- b. compensation in the amount of \$20,000.00 without deduction under s 123(1)(c)(i) of the Act;
- c. \$1,721.32 for unpaid annual holiday pay; and
- d. \$140.00 for an unpaid public holiday.

[61] Thorndon Café Limited is also to pay the Authority to be forwarded to the Crown account a penalty of \$1,500 under s 75 of the HA2003.

Costs

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

[63] If they are not able to do so and an Authority determination on costs is needed, Mr Yang may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum TCL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[64] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴ As the investigation meeting for this matter took until mid-afternoon, my preliminary view is that three quarters of the notional daily rate is the appropriate starting point for a determination of costs.

[65] Finally, I note that while Mr Yang's representative acknowledged that Mr Yang has been legally aided, he will likely be required to pay his legal aid debt.

Shane Kinley
Member of the Employment Relations Authority

⁴ See www.era.govt.nz/determinations/awarding-costs-remedies.