

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 638
3239699

BETWEEN	BOWEN ZHANG Applicant
AND	YUNFEI NIE First Respondent
AND	NYF LIMITED Second Respondent

Member of Authority:	Nicola Craig
Representatives:	Paul Young, advocate for the applicant Martin Lyttelton, advocate for the respondents
Investigation Meeting:	16 February and 13 May 2024 in Auckland and by audio-visual link
Submissions [and further Information] Received:	At investigation meeting, 15 and 31 May, 23 July 2024 from the applicant At investigation meeting, 29 May, 11 June, 1 and 23 July 2024 from the respondents
Date of Determination:	24 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] For a couple of weeks in mid-2023 Bowen Zhang undertook carpentry for Yunfei Nie (also known as Ivan Nie) or his company NYF Limited (NYF or the company). No employment agreement was provided.

[2] Mr Nie and NYF operated a business providing services in the construction industry.

[3] Mr Zhang says he was employed by Mr Nie and was unjustifiably dismissed by him. Mr Nie and the company's initial approach was to say NYF was Mr Zhang's employer and Mr Zhang abandoned his employment. At a later stage there was a pivot to submit Mr Zhang was a contractor.

The Authority's investigation

[4] This proceeding began in the Authority with Mr Nie as the sole respondent. At a case management conference held with the representatives on 5 December 2023 some of Mr Zhang's claims were withdrawn and with the parties' agreement, NYF was added as second respondent. The Authority noted that there was no application to raise a grievance out of time as regards NYF. Shortly before the investigation meeting Mr Zhang's representative Paul Young confirmed that no such application would be lodged.

[5] An investigation meeting was held in Auckland on 16 February 2024. Finding a further day, with everyone available, to complete the investigation meeting proved difficult. An additional investigation meeting day was held on 13 May 2024.

[6] The Authority was assisted on both days by interpreters of the Mandarin language. Martin Lyttelton for NYF and Mr Nie had provided an interpretation of WeChat messages, found to be undertaken by Mr Nie's wife. She attended the investigation meeting and describes providing the interpretation to assist Mr Lyttelton. A number of additional documents were provided by the parties during the investigation meeting.

[7] On the first day of the investigation meeting it became apparent that Mr Zhang was critical of aspects of that translation and had made a number of handwritten notes on the interpretation but that had not been provided to the Authority or other parties. Mr Lyttelton objected to continuing on that basis. After a break Mr Young indicated that to save time Mr Zhang was prepared to accept the translation except for one point, referred to below. Where however the interpreter at the investigation meeting provided translation, I accept that translation.

[8] Mr Zhang relied on his statement of problem as his first evidential statement and provided a reply witness statement. Mr Nie provided a written witness statement. His wife spoke to the Authority about providing the WeChat interpretation. In addition evidence was heard under oath or affirmation from Mr Zhang and Mr Nie.

[9] With agreement, material identified by the representative of Mr Nie and NYF, in a document filed for Mr Zhang, as without prejudice was set aside and not considered in this determination.

[10] Several issues arose after the meeting. Submissions for Mr Nie and NYF were accompanied by what was described as a transcript of evidence. The Authority informed Mr Lyttelton that the document was not an official transcript of the investigation meeting, which he accepted.

[11] Then Mr Nie and NYF's representative contacted the Authority about a sub-contractor form from another company which he had emailed to the Authority on 16 February 2024. Mr Lyttelton's February email asked for the attached document to be printed and brought to him at the hearing that was going on that day. I am informed that due to an administrative error the 16 February email was not directed to the relevant Authority Officer in this matter as would usually have been the case. The Officer and myself therefore did not see the email and document until 11 June. I indicated to the parties at a case management conference and in directions that the document is accepted as part of the material to be considered in this investigation. There was no objection to that course.

[12] The submissions in reply on Mr Zhang's behalf took an unorthodox form which his representative considered would be helpful to the Authority. Rather than provide a document solely dealing with submissions in reply, an amended version of the initial submissions was supplied with additional comments, said to be in reply. Mr Lyttelton objected to material said not to be in reply and also to derogatory comments, raising the need for further submissions if allowed in.

[13] On examination the submissions in reply did contain material which was in reply but also material not in meeting that description. The parties agreed to proceed with the Authority considering only submissions which were in reply and not new material.

[14] NYF's representative sent in the company's annual report for the 6 months ended 31 March 2023 and a draft report for the year ended 31 March 2024 in support of its position that it was a labour hire company, including through the use of sub-contractors.

[15] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

The issues

[16] The issues for investigation confirmed at the start of the investigation meeting were:

- (a) Was Mr Zhang employed by Mr Nie or NYF?
- (b) Did Mr Zhang raise a personal grievance within the 90 day period?
- (c) If so, was he actually or constructively dismissed or did he abandon his employment?
- (d) If Mr Zhang was dismissed, was that unjustified?
- (e) If so, what remedies, if any, should he receive?
- (f) Should either party be required to contribute to the others' costs?

[17] As mentioned above what initially seemed acceptance in the statement in reply that NYF was Mr Zhang's employer moved later into an assertion that Mr Zhang was a contractor. That issue is examined as well.

[18] At the case management conference before the investigation meeting, Mr Zhang's claims for wage arrears and a penalty for failure to provide wage and time records were withdrawn. A wage arrears claim then re-featured in closing submissions for Mr Zhang, as did a penalty for failure to provide records, along with a new penalty for failure to provide an employment agreement. Penalties are a quasi-criminal matter and it gives insufficient notice of the penalties sought to identify them in closing submissions. I disregard penalties.

The business

[19] NYF is taken from the first letters of Mr Nie's name – Nie YunFai. He describes setting it up a short time after moving to New Zealand a little while ago. The company's major clients are construction companies offering casual posts and short term contracted jobs. Mr Nie's description is of a business dependent upon the work available from clients – if they do not have a lot of work, he does not have a lot of work.

[20] There was dispute on Mr Zhang's behalf about NYF's assertion that it is a labour hire company. As detailed below, little information about the nature of the company was provided to Mr Zhang early on. At the investigation meeting however Mr Zhang said that Mr Nie and NYF arranged workers at construction sites and got paid for that. He was reluctant to speak further on the implications if there was no customer who needed labour. Under other circumstances this low level of knowledge might have been less likely, but Mr Zhang only actually worked for nine days after receiving limited information and had no employment agreement from Mr Nie or his company.

Mr Zhang's background

[21] Before coming to New Zealand Mr Zhang made and installed aluminium doors and windows and for a bit, built houses. Here his work had focused on air conditioning and heat pumps, primarily undertaking work referred by a friend. Mr Zhang described himself as registered as a self-employed sole trader for Uber driving and food delivery work.

[22] Mr Zhang had almost finished a level 3 English qualification in New Zealand when he saw an advertisement.

Mr Zhang's commencement

[23] An ad was placed on the Sky Kiwi site for an extended period specifying:

[Skill work] A commercial building worksite at North Shore recruits carpenter
Request basic tools, Site Safety card, car

Company name:	NYF
Worksite:	Not definite or fixed worksite
Position:	A commercial building worksite at North Shore recruits a carpenter with basic tools, Site Safety card, car
Wage:	Much higher than minimum wage of NZ
Work style:	Full time
Work hours:	
Contract phone:	[noted]
We Chat:	[noted]
Email:	[noted]

[24] Mr Nie says the ad was offering employment and contracting opportunities. He changed it from time to time depending on the work which assistance was needed with. The

reference to “much higher than minimum wage” was one of a range of options available which he picked.

[25] When asked about the reference to NYF in the ad Mr Zhang told the Authority he did not check the name of the company much. He lives on the North Shore so work there is attractive.

[26] Mr Zhang calls Mr Nie, they chat and then connect on WeChat on 13 June 2023. Mr Zhang cannot remember talking about NYF during the call. He denies Mr Nie mentioned having a company. They mainly discuss the nature of the work.

[27] During their initial WeChat messaging Mr Zhang asks if the workplace is based on the North Shore with Mr Zhang replying, it “depends”. Mr Nie indicates Mr Zhang would need a foundation passport in construction, which is operated by Site Safe.

[28] Mr Zhang’s description of himself refers to English level 3 and Mr Nie asks about that as they need people who speak good English to communicate with management on the sites. Mr Nie also has interest in his saw skills - having established Mr Zhang had at least some, he says Mr Zhang may “come to have a try”, in translation. Mr Zhang understands this to mean a trial.

[29] The parties agree that Mr Zhang was to be paid \$23 gross an hour.

[30] Over WeChat Mr Nie works through the information he needs from Mr Zhang for the foundation passport. Mr Nie notes the foundation fee will be deducted from Mr Zhang’s pay. Mr Nie tells Mr Zhang to take his tools and personal protective equipment to work.

[31] No employment agreement is provided.

The initial work

[32] From 14 June 2023 Mr Zhang is sent to a commercial building in the Auckland CBD for four days to build door frames.

[33] On 17 June Mr Zhang messages his IRD and bank account details to Mr Nie.

[34] On 18 June Mr Nie checks if Mr Zhang can work the next day. Mr Zhang replies that he can and notes he lives on the North Shore and “better if there is a nearby workplace”.

[35] Mr Zhang along with two other Chinese workers are sent to a site in Takanini on 19 June. However, when they try to sign in using software, problems arise. Mr Zhang has difficulty uploading his Site Safe card. An on site trainer asks Mr Zhang why it was taking him a while to fill in what was needed on the app. Mr Zhang does not have information about the company/employer and so cannot complete the sign in. The trainer asks Mr Zhang who his employer was he said “NYF” but the trainer does not know who that is. Mr Zhang then mentions “Ivan” but that does not assist. It turns out he needs to record himself as working under another company referred to here as company Z, which NYF provides workers /contractors to.

[36] His co-workers have little or no English and do not know their addresses. None of the three could sign in and so are not allowed by the worksite to work that day.

[37] Mr Nie hears about the workers not making it and asks Mr Zhang if he cannot even communicate with simple daily English. Mr Nie expected Mr Zhang to help the other workers and call him if there were difficulties but that did not happen.

[38] On the basis of the evidence Mr Nie had arranged for an employee called Bob to look after Mr Zhang and other workers but Bob did not speak English. A WeChat group was created for the Takanini work and that included Mr Nie messaging during an exchange with Bob saying that “tomorrow you will be responsible...” and Bob replying that “we will work together”.

[39] Mr Nie is expecting Mr Zhang to help on the day although there is no sign he specifically asked for that. On the other hand Bob was specifically asked and had worked at the Takanini site before. For some reason he was not onsite with Mr Zhang and the other workers on their first day.

[40] Mr Zhang is able to obtain the information he needs and goes back the following day, completing five days’ work at Takanini. However, living some 40 or so kilometres away on the North Shore, he finds the travel demanding. He spends about two hours a day on the road, without getting any reimbursement for petrol.

A message seeking work nearer home

[41] Mr Zhang messages Mr Nie on WeChat on Friday 23 June, saying it costs him more than \$10 in gas and two hours. He asks if Mr Nie can consider a pay rise or at least a rise for non-North Shore workplaces.

[42] Mr Nie told the Authority that he thought he had to pay Mr Zhang more if he worked a long way from home but Mr Nie did not want to do so. This did not match Mr Zhang's communication which was in the nature of a request. However, Mr Nie describes it as very important to have a good mood on construction sites, wanting to make Mr Zhang happy in his work placement.

[43] Later that evening Mr Nie replies that they can meet and talk about it in the weekend. Mr Nie is then too busy to meet. On 25 June he messages about finding a nearby North Shore worksite for Mr Zhang first then arrange for Mr Zhang to work and:

Before that, you may arrange yourself.

[44] Following 10 minutes later, in translation:

Next Tuesday or Wednesday North Shore will have a vacancy available.

[45] By way of background, a translation of the WeChat message provided by Mr Nie's wife refers to "there might be" some work. Mr Zhang refers to there "will" be some work and the interpreter at the investigation meeting confirmed that.

[46] Mr Zhang replies "[a]ll right" to Mr Nie.

Work dries up

[47] No contact was made with Mr Zhang about work for Tuesday or Wednesday. Mr Nie says his client had told him that there was work on those days but that did not eventuate.

[48] On Wednesday the 28th Mr Zhang messages Mr Nie asking where the work on the North Shore was and why had Mr Nie not been in contact. He comments that if there was work then "we can work together" (or get along) but "do not lie to me".

[49] Mr Zhang continues that he just said the southern (Auckland) region is far away so can wages be raised a bit. Further, he denies saying he cannot work there and:

...you can't stop employees from, going to work at will. [If] It's really impossible to arrange the construction site on the North Shore, you should tell me earlier. On Sunday night I was told not to go to work on Monday and let me make my own arrangements. How do you let me arrange things by myself in such a short time?.

[50] Mr Nie replies the construction site's situation has kept on changing and the Tuesday and Wednesday has been postponed until next week.

[51] Mr Zhang follows up asking about the previous Monday when he could not get onto the Takanini site to work, saying they had no one to guide them and asks how the salary for that will be calculated. He also seeks an explanation about the cost of the foundation passport as his friend paid less than half the price Mr Nie mentioned.

[52] Mr Nie replies that he asked Mr Zhang to arrange Monday the 26th himself but expected the Tuesday/Wednesday work but was not sure. Further, as Mr Zhang thought the southern region was too far and Mr Nie could not offer a pay rise, Mr Nie would allow him not to go. A revised price is given for the cost of signing up the foundation passport and screenshot included, showing the price.

[53] Mr Nie messages that he will ask the accountant to make up the pay and Mr Zhang can pay the foundation passport cost via WeChat. Mr Zhang queries that, as originally the passport cost was to be deducted from pay.

[54] Mr Nie replies:

I will pay you fully. Without basic trust, I don't want to spend more time to explain to IRD the reasons why certain amount had to be deducted from your pay.

I don't want to get mixup. Thank you for your understanding.

[55] Mr Zhang follows up with:

Are you making excuses for your original promise?

It's not that I don't trust you, everyone has to live with everything, you can't just think about your own interests and ignore other people's feelings.

I'll pay off the security card when you [presumably I] get paid. Let's compare our hearts, if you were me, how would you feel when you encountered this series of things?

[56] Through the evening there continues an exchange of surprisingly lengthy messages, including about how and why the foundation passport costs should be paid in particular ways, such as Mr Zhang saying:

... the payment for the foundation passport is *[to be]* deducted from my pay, which has been long agreed. ... You will not be willing to take legal action, will you think I want to take legal action? ...

[57] Mr Nie then comments that Mr Zhang said he had English level 3 but failed to do the Takanini induction and as result of his lack of even basic communication Mr Nie had lost two vacancies on the construction site.

[58] Mr Zhang continues, in translation:

... you can sue me to compensate your loss. There are places to reason things out in New Zealand.

Let's see how things go. If we can't reach agreement, try to reason that, I will definitely go and sort it out with you. I am not afraid I will sort it out with you.

[59] Mr Nie replies about there being a construction slump and not being able to offer a pay rise or nearby work instantly. He says he hardly understands what he owes the other. Mr Zhang replies that they are too far away from understanding each other and reach an agreement.

[60] That same evening Mr Nie messages that he has contacted his accountant and she says the deduction of the passport cost can be arranged. Mr Zhang agrees, continuing that he has caused Mr Nie quite a lot of loss from the induction which Mr Nie may calculate and deduct his loss too. Mr Zhang told the Authority this was sarcastic. Mr Nie replies:

I truthfully wish you all the best. We might meet each other later, We Chinese people are all not very easy in New Zealand, we should help each other.

[61] Mr Zhang replies:

You too.

Further communications

[62] On 2 July 2023 Mr Zhang WeChats Mr Nie, asking for his pay records or payslips. Having received no response within 19 minutes Mr Zhang messages:

It seems that the only way to solve it is through legal channels.

[63] Mr Zhang appoints an advocate. On 8 July 2023 Mr Young makes contact with Mr Nie and, according to Mr Zhang, is told that there was something wrong with Mr Zhang's brain and there was "Pen-ze", extortion of money going on by framing Mr Nie. A payslip was requested and sent to Mr Young which has NYF paying Mr Zhang's wages with PAYE

deducted. Mr Zhang accepts he did not ask Mr Young to request that he gets his job back (or for further shifts).

[64] Mr Nie attempts unsuccessfully to ring Mr Zhang who messages the matter has been handed to a lawyer, talk to them. Mr Nie makes a further effort to get Mr Zhang to meet and talk but without result.

Mr Zhang's employer

[65] Turning to the issues which need to be determined. There was an argument in closing submissions that Mr Zhang was a contractor. I reject that – Mr Nie/NYF may have operated on the basis that job applicants could chose employer or contractor status, but Mr Nie accepted, including in evidence, that Mr Zhang's situation was that of an employee. The ad, the initial discussions, and the decision to deduct PAYE all support that.

[66] Mr Nie accepts the ad indicates it was an employment relationship but that applicants had to prove they were qualified. He understood Mr Zhang wanted to be an employee, particularly when Mr Zhang messaged through his IRD number and bank account details. Mr Nie was willing to go along with this.

[67] The intention was that if the trial was successful an employment agreement would be offered. The real nature of the relationship was an employment one.

[68] So, moving on to who was Mr Zhang's employer?

[69] The identity of the employer is assessed by who an independent but knowledgeable observer would say the true employer was.¹ The usual approach for assessing the identity of the employer is at the outset of employment.

[70] Mr Zhang told the Authority he thought he was employed by Mr Nie from the start as Mr Nie was the only one who communicated with him. However, with any company there will be an individual, director or staff member, who communicates on behalf of the company. From Mr Zhang's evidence, during initial discussion and messaging he was uninterested in the identity of the employer, focusing instead on the work and location.

¹ *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451.

[71] The practice was that NYF would employ staff or hire contractors in its name rather than Mr Nie doing so personally. The ad refers to NYF. It does not say “Limited” or “Ltd” but the Skykiwi format recorded “Company name” before this reference. There is no employment agreement but the payslip shows NYF paying Mr Zhang.

[72] By a fine margin I find Mr Zhang was employed by NYF rather than Mr Nie.

90 day question

[73] NYC’s argument is that Mr Zhang’s dismissal grievance was not raised with the company within the 90 day period required in s 114 of the Act. There is no argument that Mr Nie did not receive the grievance. He did but is that enough?

[74] Some initial communication from Mr Zhang’s representative to Mr Nie was without prejudice.

[75] The representative then proceeded straight to lodging Mr Zhang’s grievance in the Authority. The service of a statement of problem outlining a grievance on the employer can be sufficient to raise a grievance with the employer.² The statement of problem was served on Mr Nie as the respondent within 90 days of the events said to amount to dismissal. This is accepted on Mr Nie’s behalf.

[76] The difficulty here is the statement of problem did not name NYF as a respondent. It did however contain mixed messages:

- my employer Mr Yunfai NIE with English name Ivan who is a director of NYF LIMITED
- my employer did not provide me any information about our company

[77] The statement in reply lodged 23 July 2023 indicated that NYF was to be Mr Zhang’s employer on completion of his work trial. No application was made to join NYC as a party. The Authority raised the issue.

[78] Mr Nie is the sole director of NYF. He became aware of the grievance on receipt of the statement of problem. There was a detailed response to Mr Zhang’s concerns in the

² *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79.

statement in reply including extensive points being made from the company's perspective. No issue was taken about any failure to raise the grievance at that point.

[79] I conclude receipt of the statement of problem by Mr Nie was sufficient to raise the grievance with NYF.³ Mr Zhang is able to pursue his grievance.

Trial arrangement

[80] Mr Nie intended to offer a written employment agreement if the trial was satisfactory. Usually these trials lasted for a week or two allowing both parties to see if the arrangement worked for them. Mr Nie would pay them and then discuss about the terms of any on-going arrangement.

[81] Dismissal grievances may be restricted by trial periods in certain circumstances.⁴ Under s 67A of the Act a trial period is defined as a written provision. Here there was no written employment agreement and no other written documentation incorporating the trial period.

[82] The fact the work for Mr Zhang was set up as trial does not impact on his ability to bring a personal grievance claim.

Type of employment

[83] Mr Nie and NYF argue that Mr Zhang was employed on a casual basis involving full time work when there was a customer with work available. They provide a casual employment agreement which Mr Nie says was intended to be provided to Mr Zhang had his trial been successfully completed. That agreement specifies that there will be no continuity of service at the end of one assignment.

[84] It is not suggested that Mr Zhang saw this agreement when working. Rather NYF's practice was to have the worker undertake a trial, then if satisfactory, offer them an employment agreement.

³ *Wilkinson v ISL Computer Systems Ltd* [1993] 1 ERNZ 512.

⁴ The Act, ss 67A and 67B.

[85] NYF and Mr Nie argue the ad's reference to the full time "work style" should be seen conditional upon the empty "work hours" line, so that sometimes there would be no work but when there was work it would be full time.

[86] I accept NYF and Mr Nie may well have operated as a labour hire company with some staff and some contractors. But would an objective observer have known it was a labour hire company which only offered non-continuous work?

[87] Mr Nie describes discussing with applicants whether they want to be employees or contractors, understanding which one they prefer. He says it does not matter to him as long as they can give him an invoice (if they want to be contractors presumably).

[88] There was little basis for such an observer to understand this was a labour hire company which only offered work when it had some available. That is not specified in the ad. I do not accept it was conveyed by Mr Nie in his phone discussion with Mr Zhang nor in their WeChat exchanges before work began. Questioning of Mr Zhang at the investigation meeting did not successfully establish a basis why he should have known that was the case.

[89] An objective observer would have seen the reference to "Full Time" without condition as meaning employment involving regular work of at least 30 hours a week, likely more. The absence of a reference to what the work hours were would be explainable on the basis of it being a full time job.

[90] In conclusion, the observer would have seen Mr Zhang as being offered full time work without the proposed condition of availability. The arrangement was not for casual work.

Unjustified dismissal grievance

[91] Was Mr Zhang actually or constructively dismissed? Did he abandon his employment? Or is there another scenario?

[92] Actual dismissal would involve a sending away by the employer. A constructive dismissal involves resignation at the impetus of the employer - a threat to sack if there was no resignation, a deliberate plan to get the employee to leave or a breach of duty by the employer leading the employee to resign. Abandonment usually involves the employee giving up on or giving away the job without an explicit resignation.

[93] There was a flurry of communications on 28 June 2023. Mr Zhang described to the Authority feeling like things were getting lost in translation between him and Mr Nie. He had not refused to go south but Mr Nie suggested he had. He had been told there was work available Tuesday/Wednesday, then there was not.

[94] Mr Nie's description is of the whole thing getting taken out of proportion from what it was all about. He saw Mr Zhang's email reactions as abnormal – Mr Zhang saying he would go to the end with him, in the context of that being a very angry or threatening term in Chinese.

[95] Mr Nie describes feeling bombarded by Mr Zhang's anger and being blamed for lying to (supposedly) Mr Zhang. He did not think Mr Zhang was willing to work for him anymore.

[96] Mr Zhang considers that as there was no reply to his message about payslips or pay records he had been dismissed without notice. Mr Nie did not arrange any more work for him although he accepts he did not request any more work either.

[97] Mr Zhang's position does not fit comfortably with the fact that on 2 July 2023 Mr Zhang only gave Mr Nie 19 minutes without a response to the pay slip request, before getting back on the WeChat - it seems that the only way to solve it is through legal channels.

[98] Of significance is that Mr Zhang did not seek any further work from Mr Nie and/or NYF after 28 June, either personally or through his representative who was involved shortly thereafter. This includes contacting Mr Nie and trying to resolve the situation.

[99] Examining the message exchange carefully the best interpretation is of mutual termination with the parties both considering that the employment should not continue – Mr Zhang did not trust Mr Nie, preferring to take court action against him, with Mr Nie considering the working relationship was not tenable.

[100] In conclusion Mr Zhang was not dismissed by NYF.

Disadvantage grievance

[101] The Authority can find a type of grievance different from that alleged.⁵ Here the Authority has found Mr Zhang had an agreement providing him with full time work not on a casual basis.

[102] NYF failed to provide that to him. There was the first day at Takanini. On the evidence heard, I conclude the company did not adequately set up Mr Zhang and the other workers' commencement at the Takanini site. Mr Zhang's English was not the primary cause of the difficulties. Mr Zhang had not been told the name of the company which their labour was to be provided to, company Z. Seemingly the other two workers had not either. Bob, who was supposed to assist, was not present on site that day. These unjustified actions by NYF meant Mr Zhang was disadvantaged by being unable to work on 19 June.

[103] Having concluded that the agreement between the parties was for full time work, NYF also failed to provide Mr Zhang with work on Monday 26 to Wednesday 28 June 2023 or pay him for those days. There is a further unjustified action by NYF to his disadvantage. A grievance is established.

Remedies

Lost wages

[104] Mr Zhang is entitled to lost wages of four days. The work periods he undertook for NYF involved an average of 9.11 hours work a day. At \$23 an hour that gives a daily rate of \$209.53 gross. Mr Zhang lost a total of \$838.12 wages for four days' work.

Compensation

[105] A modest award of compensation under s 123(1)(c)(i) of the Act is justified. Mr Zhang was frustrated by having to head out to Takanini, go through an induction process, only to be unable to complete the process. He was further upset at not having work provided to him with an expectation he could find other work at short notice and then not being given work he saw as promised.

⁵ The Act, s 122.

[106] An order of \$1,000 is warranted.

Contribution and orders

[107] I have considered whether Mr Zhang's representation of his level of English was blameworthy and contributed to the situation leading to the grievance in a way that would justify a deduction from what he would otherwise be awarded. It was not.

[108] There was not strong emphasis in the early WeChat discussions of Mr Nie for NYF regarding Mr Zhang's English level as important. He had almost completed three months' training for his English certificate from a registered provider and did so very shortly after finishing with NYF. He passed on this certificate information to Mr Nie. On the evidence before me the difficulty at Takanini was primarily NYF's responsibility rather than that of Mr Zhang.

[109] NYF Limited is ordered to pay Bowen Zhang the following sums regarding his unjustified disadvantage, within 28 days of the date of this determination:

- (a) \$838.12 gross as lost wages; and
- (b) \$1,000.00 without deduction for compensation.

Costs

[110] Costs are reserved with the parties encouraged to resolve the matter themselves.

[111] If they are not able to do so Mr Zhang should lodge and serve a memorandum on costs within 28 days from the date of this determination. From the date of service of that memorandum Mr Nie and NYF would have 14 days to lodge any reply memorandum.

[112] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would be considered.⁶

Nicola Craig
Member of the Employment Relations Authority

⁶ See www.era.govt.nz/determinations/awarding-costs-remedies.