

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 631
3273579

BETWEEN CHENGUANG CAO
Applicant

AND REALMAX CONSTRUCTION
LIMITED
Respondent

Member of Authority: Jeremy Lynch

Representatives: Applicant in person
Sasha Han, counsel for the Respondents

Investigation Meeting: 30 September 2025 by audio-visual link

Submissions and Other
Material Received: 12 September 2024, 13 January 2025, and 17 July 2025
for the Applicant
26 September 2024, and at the investigation meeting for
the Respondent

Determination: 08 October 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Realmax Construction Limited (Realmax) carries on business as a builder of residential dwellings in the Auckland area.

[2] Chenguang Cao accepted an offer of employment with Realmax in May 2023, for the position of Construction Worker. The offer and acceptance of the employment was concluded while Mr Cao was still living in China, and was conditional upon Mr Cao obtaining the appropriate visa, and being legally entitled to work in New Zealand.

[3] Although Mr Cao's statement of problem alleges that he made payments to various parties to secure his employment, he does not bring any claims relating to

unlawful premiums against Realmax.

[4] Mr Cao says he worked for (and was paid by) Realmax from 13 to 23 June 2023, after which he was told that there was no more work for him. He says that after 23 June 2023, Realmax did not provide him with the hours of work under his employment agreement, and therefore he was unjustifiably dismissed.

[5] Realmax says that after Mr Cao signed his employment agreement, it received no further contact from him. Realmax says it was not aware that Mr Cao had arrived in New Zealand. Realmax says Mr Cao did not perform any work for it, and as such, it did not pay Mr Cao any wages.

[6] This determination deals only with the preliminary jurisdictional issue of whether Mr Cao has raised personal grievances for unjustified disadvantage, and/or unjustified dismissal within the statutory 90-day timeframe.

The Authority's investigation

[7] By consent this preliminary jurisdictional issue is determined on the papers.

[8] The Authority has received information, including submissions, and supporting affidavit evidence from the parties, lodged in accordance with timetable directions.

[9] An affirmed affidavit was lodged by Mr Cao. For Realmax, an affidavit affirmed by its director Jinwei Liang was lodged.

[10] Both parties lodged written submissions.

[11] When Mr Cao lodged his statement of problem, affidavit and submissions, he was represented by an employment advocate.

[12] Having received the evidence and the parties' submissions, the Authority scheduled an investigation meeting for January 2025, for the parties to present their submissions.

[13] However, a week prior to the scheduled investigation meeting, Mr Cao's advocate wrote to the Authority advising that he no longer represented Mr Cao and would not be attending the investigation meeting. Mr Cao's advocate had used his own contact details on the statement of problem, meaning the Authority had no direct way of contacting Mr Cao.

[14] The January 2025 investigation meeting was adjourned, and the Authority made repeated requests of the advocate, to be provided with Mr Cao's contact details.

[15] The former advocate advised that Mr Cao had returned to live in China, and the only means available mode of communication was via WeChat (but further said that Mr Cao had stopped responding to his WeChat messages). The former advocate provided the Authority with a WeChat handle for Mr Cao, but WeChat is not a mode of communication the Authority is able to use.

[16] The Authority continued to request that the advocate contact his former client via WeChat, and obtain his current contact information, as well as confirmation as to whether he wished to self-represent, would be instructing a new representative, or whether he wished to withdraw his proceeding before the Authority.

[17] No such information was provided by the advocate.

[18] An email address was obtained from reviewing Mr Cao's Immigration New Zealand file. Although the username comprises solely a string of ten digits, this email address is consistent with an email address referred to in a document lodged in the Authority by Mr Cao. I am satisfied that this email address is one used or controlled by Mr Cao.

[19] The Authority wrote to the parties offering a new date for the submissions only investigation meeting. Realmax (through its representative) confirmed its availability to attend. No response was received from Mr Cao.

[20] Being satisfied that Mr Cao had been advised of the proposed date for the investigation, and that he had been provided with adequate time within which to respond, the Authority set the matter down for investigation on the proposed date.

[21] The parties were sent a notice of investigation, containing the time and date of the meeting, as well as a link to join the AVL meeting remotely.

[22] Mr Cao had not joined the meeting at the scheduled start time. The investigation meeting start time was delayed while the Authority attempted to contact Mr Cao by email, advising that the meeting start time had been delayed in order for Mr Cao to attend, or advise of any reason for his non-attendance.

[23] Mr Cao did not attend the meeting, or advise of any reason for his non-attendance.

[24] Being satisfied that Mr Cao was aware of the date and time of the meeting, and with no good cause provided for his non-attendance, the Authority proceeded with its investigation in Mr Cao's absence, relying on the written material he had lodged.

[25] 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 of fact and law, expressed conclusions and specified orders made as a result.

[26] The Authority has carefully considered all the material provided.

The issues

[27] The issues requiring investigation and determination are:

- (a) whether Mr Cao raised personal grievances for unjustified disadvantage and/or unjustified dismissal within the statutory 90-day time period: and
- (b) whether either party should be required to contribute to the other's costs?

Relevant Law

[28] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins with the date on which the action alleged to amount to the personal grievance occurred, or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised outside of the statutory 90-day timeframe.

[29] A grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.¹

[30] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, Her Honour Judge Holden summarised the applicable principles for raising a personal grievance:²

[36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no

¹ Employment Relations Act 2000, s 114(2).

² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36]-[38].

particular formula of words that must be used. Where there have been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act, and if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[31] Section 114(2) of the Act, and the issue of how a grievance is raised with an employer, was considered by the Employment Court in *Creedy v Commissioner of Police*:³

It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of personal grievance as, for example, unjustified disadvantage in employment... As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[32] In *Shaw v Bay of Plenty District Health Board*, the Court of Appeal observed that "... not every criticism of an employer or the culture within a workplace, will obviously constitute a personal grievance".⁴

[33] Under s 114(4) of the Act, the Authority has a discretion (after giving the employer an opportunity to be heard) to grant an employee leave to raise a personal

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

⁴ *Shaw v Bay of Plenty District Health Board* [2022] NZCA 241 at [19].

grievance out of time, if it is satisfied that the delay in raising the grievance was occasioned by an exceptional circumstance, and considers it just to do so.

[34] Realmax disputes all of Mr Cao's claims, and says that his personal grievances were not raised within the statutory 90-day timeframe. Realmax does not consent to Mr Cao's grievances being raised out of time.

[35] Mr Cao has not filed an application seeking leave to bring a grievance out of time under s 114(3) of the Act. Rather, Mr Cao's position is that his grievances were raised within the statutory 90-day timeframe.

Background

[36] The following key events are relevant to the determination of this preliminary issue.

Mr Cao's recruitment

[37] Realmax's evidence is that in April 2023, through its Chinese agent Li Tao, it advertised its intention to recruit a construction worker from China, via the Accredited Employer Work Visa scheme.

[38] Realmax says that Mr Tao recommended Mr Cao for the position, and Realmax then had an online interview with Mr Cao. Realmax subsequently offered Mr Cao employment. The terms of the employment (other than remuneration) were recorded in a written employment agreement, signed by Mr Cao on 3 May 2023. The employment agreement records the legal name and physical address of Realmax.

[39] The employment agreement sets out that the employment is conditional upon Mr Cao obtaining the necessary visa approval to legally work in New Zealand, and that the employment is to commence from the next working day after Mr Cao arrives in New Zealand.

[40] The employment agreement also contains a plain language employment relationship problem resolution clause which (inter alia) provides "If it is a personal grievance, the employee has 90 days ...to raise the grievance with the employer".

[41] Realmax's evidence is that after Mr Cao signed the employment agreement, it did not hear from him again until December 2023. Realmax says that it requested Mr Cao's contact information via Mr Tao, but

...Li Tao ceased responding, and despite our efforts, we were unable to establish contact with either Cao or Li Tao. We took this lack of communication as an indication that Cao had abandoned his employment agreement...

[42] Having been offered and accepted work as an employee, Mr Cao was a person intending to work.⁵ A person intending to work falls within the definition of an employee.⁶ I am satisfied that Mr Cao was in an employment relationship with Realmax,⁷ and as such is not prevented from bringing a grievance (subject to the requirements of s 114 of the Act).

Mr Cao performs work

[43] Mr Cao's evidence is that he paid CNY ¥100,000 (approximately NZD \$25,000) "job application fee" prior to starting work. He says he paid CNY ¥94,000 to a person named Xiajian Yin in China, and then when he arrived in New Zealand, he was asked by a person named Zhenguan Cai to pay him CNY ¥6,000. Mr Cao has provided WeChat and/or Alipay payment records in support of this.

[44] Mr Cao does not say how he became acquainted with Mr Yin or Mr Cai, however he says that Mr Cai was the "foreman of the employer".

[45] Mr Cao says that for eight days commencing on 13 June 2023, Mr Cai gave him paid work, and that he was paid for some (but not all) of the hours he worked. He further says that "\$220 rent was deducted from my wage every week".

Mr Cao's personal grievances

[46] Mr Cao says that he did not consent to the sum of \$220 being deducted, and that this unjustifiably disadvantaged his employment.

[47] Mr Cao's evidence was that on 23 June 2023, Mr Cai told him there was no more work, and was not provided with any further work (or pay). Mr Cao says this constitutes an unjustified dismissal. Mr Cao says he raised personal grievances for unjustified disadvantage and unjustified dismissal within the statutory 90-day timeframe.

⁵ Section 5.

⁶ Section 6(1)(b)(ii).

⁷ Section 4(2)(a).

[48] He says he "...called Zhenguan Cai many times to ask for compensation. All my requests were ignored". Mr Cao says he then contacted his agent in China to ask for compensation.

[49] Mr Cao says that because of the language barrier, he contacted Rachel Huang of the CNSST Foundation (formerly the Chinese New Settlers Services Trust). He says that he asked Ms Huang to make a complaint against Realmax. Mr Cao's evidence is that "The complaint was sent to Ministry of Business, Innovation and Employment [MBIE]", and that on 6 July 2023, he received a letter from MBIE confirming that "exploitation had happened to me".

[50] Mr Cao provided a copy of the response letter he received from MBIE. This letter does not confirm he had been exploited by Realmax. The letter appears to have been written prior to any investigation being undertaken. It simply acknowledges receipt of Mr Cao's complaint, advises that based on the information he provided it is credible that exploitation *may* have occurred, and advises that he is eligible to apply for a Migrant Exploitation Protection Visa.

[51] Mr Cao further says that on 6 July 2023, he received advice from Ms Huang that he could sue his agent in China, and take legal action against the licensed immigration adviser (the LIA) involved in securing his employment. There is no evidence that Mr Cao commenced legal proceedings against either of these parties. However, the Authority notes that even if Mr Cao had brought proceedings against either his Chinese agent or the LIA, the requirements of s 114(2) would not have been met, as Mr Cao was not in an employment relationship with either of these parties.

[52] He says that "From the time frame and my action... my complaints and the asking for compensation (personal grievance) was raised within 90 days period".

Realmax's response

[53] Realmax's director Mr Liang says he does not know the person named Xiajian Yin, and has never met him.

[54] I accept this evidence. Mr Cao says "I contacted my agent Xiajian Yin in China to ask for compensation...". I am satisfied that Mr Yin was the agent of Mr Cao, and not the agent of Realmax.

[55] Mr Liang's evidence is that Realmax does not have a foreman named Zhenguan Cai, and nor is he acquainted with Mr Cai. He says he does not dispute that Mr Cao paid Mr Yin or Mr Cai money, but says that this was nothing to do with Realmax, and Realmax did not receive any portion of Mr Cao's payments.

[56] Realmax has provided the Authority with a complete list of all PAYE remittances filed with IRD for the months of February, March, April, May, June, July and August 2023. Of the approximately 25 employees listed in the records, there is no employee named Zhenguan Cai, or named Chenguang Cao.

[57] Mr Cao's evidence was that he worked (and received payment for) a period of eight days from 13 June 2023. If Mr Cao had been working for Realmax, he would have been paid by Realmax. The IRD filing information provided does not show that Mr Cao was on its payroll during the period in which he says he was employed.

[58] Mr Cao may well have performed work for Mr Cai, but there is no evidence to suggest the work was performed for Realmax, or that Mr Cai was an employee of (or associated with) Realmax. There is no evidence that Mr Cao was paid by Realmax for this work, and Realmax denies that it provided accommodation to Mr Cao.

[59] I accept Mr Liang's evidence that Zhenguan Cai is not employed by or associated with Realmax.

[60] Realmax's evidence was that it was completely unaware of Mr Cao's personal grievances until 8 December 2023, when Mr Cao's former advocate hand delivered a personal grievance letter to Mr Liang's home address. Mr Cao's 8 December 2023 personal grievance letter refers to events which occurred in June 2023, approximately 160 days prior, and therefore well outside of the statutory 90-day timeframe.

Has Mr Cao raised a personal grievance for unjustified disadvantage or unjustified dismissal within the statutory 90-day timeframe?

[61] Mr Liang's evidence is that he has no knowledge of Ms Huang, or any complaint Mr Cao may have discussed with her.

[62] Mr Cao did not provide any details of his complaint, he simply said he made a complaint via Ms Huang on 5 July 2023. As such the Authority has been unable to assess whether the requirements of s 114(2) of the Act have been met.

[63] As in *Shaw* above, not every criticism of an employer constitutes a personal grievance. More significantly, there is no evidence of Mr Cao's complaint (as discussed with Ms Huang) ever being provided to Realmax.

[64] Mr Cao's own evidence was that the complaint he discussed with Ms Huang was sent to MBIE. The letter from MBIE provided by Mr Cao confirms this.

[65] As noted above, the employment agreement sets out the full legal name of Mr Cao's employer, together with its physical address (which is in Auckland). There is no evidence of Mr Cao or Ms Huang making any attempt to attend Realmax's premises or otherwise communicate with it.

[66] Mr Cao also submitted that in late July 2023 he raised a complaint with Immigration New Zealand (INZ). He did not provide any details as to the contents of his complaint, and nor is there any evidence that INZ relayed Mr Cao's complaint to Realmax. As such the Authority has been unable to assess whether the requirements of s 114(2) of the Act have been met.

[67] A personal grievance must be raised with the employee's employer.⁸ As set out above, Mr Cao's employment agreement contains a plain language description of this requirement.

[68] Neither INZ nor MBIE were Mr Cao's employer. A complaint to, or discussion with INZ or MBIE about a personal grievance does not raise the grievance with Realmax.

[69] In any event, there is no evidence that either INZ or MBIE communicated Mr Cao's personal grievances to Realmax within the statutory 90-day timeframe.

[70] In addition, any complaint made by Mr Cao to his agent Mr Yin, does not meet the requirements of s 114(2) of the Act, and therefore does not raise a grievance with Realmax. Mr Yin was not Mr Cao's employer.

[71] Similarly, a complaint to Mr Cai does not raise a personal grievance with Realmax, as Mr Cai was not Mr Cao's employer, and there is no evidence that he was in any way associated with Realmax.

⁸ Section 114(1).

Outcome

[72] Mr Cao's application is unsuccessful. He has not established that he raised with Realmax, a personal grievance for unjustified disadvantage, or for unjustified dismissal, within the statutory 90-day timeframe.

[73] There is no application before the Authority for leave to raise either of the grievances out of time.

Costs

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

[75] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Realmax 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 Mr Cao 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.

[76] 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.⁹

Jeremy Lynch
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1