New Zealand Employment Relations Authority Decisions

GE v Y & S Holdings Limited (Christchurch) [2017] NZERA 1191; [2017] NZERA Christchurch 191 (9 November 2017)

Last Updated: 21 November 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 191
5638155

BETWEEN XIANGYUE (JOE) GE Applicant

AND Y & S HOLDINGS LIMITED Respondent

Member of Authority: Christine Hickey

Representatives: Robert Thompson, advocate for the applicant

Philippa Tucker, counsel for the respondent

Investigation meeting: 3 & 4 May 2017

Submissions and further evidence received:

8 May, 22 May, 31 May, 2 June 2017, and 20 October 2017

Determination: 9 November 2017

DETERMINATION OF THE AUTHORITY

A. Y & S Holdings Limited unjustifiably dismissed Xiangyue (Joe) Ge.

B. Y & S Holdings Limited must pay Xiangyue (Joe) Ge: (i) $6,272.61 gross in unpaid wages and holiday pay;

(ii) $6,217.30 gross in lost remuneration; and

(iii) interest at 5% from 9 May 2016 until the amounts payable in (i)

and (ii) are paid in full; and

(iv) $8,400.00 in compensation.

C. Within 28 days of the date of this determination Y & S Holdings Limited must pay a penalty of $2,000.00 to the Employment Relations Authority for payment to a Crown Bank Account.

D. Costs are reserved.

Employment relationship problem

[1] Xiangyue Ge, also known as Joe Ge, worked for Y & S Holdings Limited (Y

& S) in two different motels from late 2015, or early 2016, until Y & S dismissed him in March 2016. He was engaged as a live-in administrator/trainee manager.

[2] After Y & S dismissed Mr Ge, he undertook further work for Y & S and remained living in the accommodation supplied by it during March, April and until

9 May 2016.

[3] Mr Ge says that Y & S:

• unjustifiably dismissed him;

• did not pay him the minimum wage for all the hours that he worked;

• breached the Minimum Wage Act 1983 and the Wages Protection Act

1983 by requiring him to do work and rewarding him for that by the provision of accommodation alone, rather than paying him money.

[4] Mr Ge claims that Y & S should pay him the minimum wage for each hour he worked, holiday pay of 8% on these amounts and interest at 5% on those amounts until they are paid in full.

[5] By way of remedy for the dismissal, Mr Ge seeks lost remuneration for the period after Y & S dismissed him until he got a new job (up until 28 August 2016), and compensation for humiliation, loss of dignity and injury to his feelings.

[6] Mr Ge also claims that Y & S failed to supply his time and wages records, and that was because it failed to keep such records. He claims the Authority should impose a penalty on Y & S.

Y & S's view

[7] Y & S says that it had a 90-day trial period provision in Mr Ge's individual employment agreement (IEA), although it acknowledges that the 90-day clause may not be effective. However, it says Mr Ge knew he was on trial. In any event, Y & S says Mr Ge's dismissal was justified because of his poor performance and his inability

or refusal to follow instructions. Y & S says that it carried out a fair process leading to its decision to dismiss Mr Ge.

[8] Y & S disagrees with Mr Ge about the number of hours he worked, and says he worked far fewer hours than he claims.

[9] Y & S counter-claims that Mr Ge owes it money for the accommodation he lived in while training with and working for it.

Decision issued outside of three-month period

[10] I have issued this determination later than the three-month period allowed after the conclusion of the investigation meeting. The Chief of the Authority has decided under s 174C(4) of the Employment Relations Act 2000 (the Act) that exceptional circumstances existed for providing this written determination later than the latest date specified in s 174C(3)(b) of the Act. The parties were notified in advance that this determination would be issued late.

The investigation meeting

[11] The investigation meeting was held over two days, with written submissions and further evidence as well as an in-person case management conference with the parties' representatives held after the investigation meeting to arrange for further written evidence to be provided and to set dates for further submissions.

[12] I am grateful for the services of a very good interpreter who assisted me to conduct the investigation meeting.

Issues

[13] To determine the claims I need to answer the following questions:

(i) Was Mr Ge an employee between 21 December 2015 and 4 January

2016?

(ii) Was there an effective 90-day trial period provision in Mr Ge's individual employment agreement precluding him from bringing an unjustified dismissal personal grievance?

(iii) What hours did Mr Ge work from 5 January until 27 March 2016, and was he paid appropriately over that period?

(iv) If not, does Y & S owe Mr Ge further wages and holiday pay? (v) Did Y & S unjustifiably dismiss Mr Ge?

(vi) If so, what remedies are due to Mr Ge, bearing in mind any contribution by him?

(vii) Is Mr Ge owed any wages after 27 March until 9 May 2016, the last day Mr Ge lived in the motel accommodation?

(viii) If so, should any deduction be made for supplying accommodation?

(ix) Should Y & S pay a penalty for not supplying time and wages records to Mr Ge when he asked for them?

(x) If so, how much should that penalty be?

(xi) Should it be paid to the Crown and/or to Mr Ge?

The beginning of the employment relationship

[14] In November 2015, Mr Ge answered an ad seeking a motel manager. James

Butler, the group manager for Y & S replied to him. Mr Butler met Mr Ge on

8 December. Mr Butler sent Mr Ge a follow-up email stating the required position had changed. Y & S needed a professional administrator, who could live-in, and help him with administrative duties.

[15] The role was to be for 40-45 hours per week, with two days a week off. Mr Butler listed the duties that were included in the role. However, he also said there would be other duties. Mr Ge responded that he would like to take the job.

[16] Mr Butler then offered him 4-5 sessions of training/observation with Jing Xian Luo, the in-house manager at 136 On Bealey (136), one of three motels run by Y & S. The purpose of that was to assess whether Mr Ge thought he could do the job and to assess his suitability for the role. Mr Ge observed four shifts starting on 12 December

2015. Mr Ge had a copy of the IEA that Y & S proposed he enter into which said the start date was to be 21 December 2015.

[17] After the observations, Mr Ge accepted the job offer and said that he could start work on 21 December. He let Mr Butler know that his tenancy agreement was to end on 22 December 2015. He asked to move in on Monday, 21 December, the day he could start work. Mr Ge asked for some clarification of three terms of the individual employment agreement that Mr Butler had supplied.

[18] Mr Butler answered Mr Ge's questions by telling him the trial period would be for 90 days, that he would not usually be required to work on public holidays and that annual salaries were usually reviewed after 12 months of service.

[19] Mr Butler also replied that Mr Ge could move into the accommodation on

20 December 2015. Mr Butler asked that Mr Ge undertake "an observation and skilling up period to offset the accommodation between moving in and the "official start date" of 5 January 2016.

Was there an effective 90-day trial provision?

[20] Mr Ge moved in and began the observation and skilling-up period. Both parties signed the IEA on 11 January 2016; it stated the start date had been 5 January

2016.

[21] The fact that the parties entered into the IEA in writing after Mr Ge had started working for Y & S negates an effective 90-day trial period under ss 67A and

67B of the Act. Such provisions can only apply to new employees and Mr Ge was not a new employee as at 11 January 2016.

[22] Therefore, the 90-day trial period provision does not protect Y & S from

Mr Ge's personal grievance claim of unjustified dismissal.

When did Mr Ge start working as an employee for Y & S?

[23] Mr Ge claims that as at 21 December 2015, after he had moved into the accommodation at 136, he undertook "actual work" and was no longer merely observing. He says he was an employee from then, not from 5 January 2016 when the IEA says his employment began.

[24] Mr Ge says he was alternating shifts with Jing Xian Luo most of the time. He also says he worked about 50 hours each week, including working on public holidays, apart from on Christmas Day. He is not sure whether he worked on New Year's Day.

[25] Y & S disagrees. Mr Butler's evidence is that he did not want Mr Ge to begin his employment before Mr Butler came back to work from his Christmas/New Year holiday. Mr Butler says that is why he asked for that time to be "an observation and skilling up period". He also wrote:

This period will assist the seamless transition for all staff without the pressure of expectations and over commitment.

[26] There are no rosters or time records for the period 21 December 2015 to

5 January 2016. Even if there were, Mr Ge would not have been on them as Y & S

considered he was not working as an employee.

[27] Ms Luo's evidence was that in that period Mr Ge did not have any jobs assigned to him. She says she "conducted the jobs" and he was "observing and learning".

[28] If Mr Ge was not an employee then, was he a "volunteer"? Section 6 of the Act defines the terms "employee" and "volunteer". A volunteer is not an employee. A volunteer is someone who:

does not expect any reward for work to be performed as a volunteer;

and ... receives no reward for work performed as a volunteer ...

[29] Mr Butler says he intended Mr Ge to simply observe and thereby be "upskilled". He differentiates between training and upskilling, and says Ms Luo was not training Mr Ge. However, Mr Butler offered Mr Ge a reward for those days between 21 December 2015 and 5 January 2016. He offered him accommodation.

[30] Mr Butler says that Mr Ge was pushy about moving into the accommodation. Even if that were so, Mr Butler could have let Mr Ge move in out of the kindness of his heart, but not expected anything from Mr Ge until 5 January. Alternatively, Mr Butler could have refused him permission to move in until the adjusted start date of 5 January 2016.

[31] However, Mr Butler allowed Mr Ge to move in and made it clear that Mr Ge was expected to offset the provision of accommodation. That implies an exchange of benefits. Mr Ge got the benefit of accommodation and Y & S got the benefit of his skills having been increased by 5 January, and a smoother transition. That is not conclusive of the issue of whether Mr Ge was an employee, and so entitled to be paid the minimum wage for every hour worked.

[32] The respondent submits that Mr Ge must not have considered himself an employee, because he did not ask to be paid for that period while he remained

employed. I do not consider that to be definitive. The employment law minimum code standards, including the Holidays Act 2003, the Wages Protection Act 1983 and the Minimum Wage Act 1983 apply whether or not an employee knew that they applied to their situation at the time. It is a legal question whether or not Mr Ge was an employee.

[33] The upskilling period was of benefit to Y & S, as well as to Mr Ge, because Y

& S considered that Mr Ge, having participated in the upskilling, would be a better employee when he began being paid on 5 January 2016. I consider it artificial to differentiate between training and upskilling. I also find that Mr Ge was at times doing basic tasks on reception, although he may have been doing so under Ms Luo's guidance and supervision, most of the time.

[34] Mr Butler's text of 22 December 2015 to Mr Ge, in which he asked why he could not get through on the phone and tells Mr Ge that Ms Luo would be there soon, is evidence that Mr Ge had more responsibility at 136 than an observer or volunteer would have.

[35] This case is similar to the Employment Court case of *Salad Bowl Limited v Howe-Thornley1,* in which the Court decided that Ms Howe-Thornley was an employee during a work trial. I conclude that Mr Ge was an employee from

21 December 2015 until 4 January 2016, and not a volunteer.

Should Mr Ge be paid for work during that period?

[36] Section 7 of the Wages Protection Act 1983 provides that, subject to limited exceptions that do not apply to Mr Ge's situation, an employer shall pay the wages of every worker in money only. That means that Mr Ge was entitled to be paid in money for the two weeks he worked during the period immediately before 5 January 2016.

[37] I do not have any wages and time records available to me because none were kept. The rosters and pay slips do not fulfil the function of adequate wages and time records.2 All Mr Ge's pay slips record a regular 40 hours per week, every week, even though the IEA states that he would work 40-45 hours per week. He was only ever

paid for 40 hours per week.

1 [2013] NZEmpC 152; [2013] ERNZ 326.

2 Section 130 of the Act details the requirements of wages and time records.

[38] In the absence of time and wages records, s 132 of Employment Relations Act

2000 (the Act) provides that once an employee has proved that an employer failed to keep a wages and time record, and that the failure prejudiced the employee's ability to bring an accurate claim for wages arrears, the Authority may accept an employee's claims as proved.

[39] Y & S does not dispute that Mr Ge was observing and upskilling for at least 40 hours in the weeks until 4 January, the day before Y & S says his employment started. Mr Ge has made estimates of the hours worked as being 60 hours per week. However, I do not accept, given Mr Butler and Ms Luo's evidence, that Mr Ge worked for

60 hours in each of the two weeks.

[40] Mr Butler's evidence of the regular hours Mr Ge was expected to work was that he was to work from 8 am until 2 pm, and then again to be available from 6 or

6.30 pm until 9 pm. Even if Mr Ge worked no more hours than that, it is a total of either 8.5 or 9 hours a day, or 42.5 or 45 hours a week. Over this period, I consider it more likely that Mr Ge worked 9 hours a day, or 45 hours per week.

[41] I accept that Mr Ge also had two days per week off. I am not able to assess whether Mr Ge's days off fell on the public holidays during the period and I consider it safer to assume that they did so. The most reasonable assessment of what Mr Ge should have been paid for those weeks is the minimum wage of $14.75 per hour x 9 hours x 11 days = $1,460.25 gross.

[42] Y & S must pay Mr Ge $1,460.25 gross in wages for 21 December 2015 to

4 January 2016 inclusive. Holiday pay of $116.82 gross (8% of $1,460.25) is also due on that amount.

What hours did Mr Ge work from 5 January until 27 March 2016? Was he paid appropriately over that period?

[43] Mr Ge worked at 136 from 5 January until the week of 19 January 2016 when Mr Butler requested him to move to the Abbey Motor Lodge (the Abbey), which Y & S also manages. Mr Ge says this was a promotion. However, I accept Mr Butler and Ms Luo's evidence that the Abbey is a quieter and smaller operation than that at 136. Y & S moved Mr Ge to the Abbey because they expected him to be independently

undertaking certain booking and other reception tasks at 136, but he was struggling to do so.

[44] Mr Ge says that at the Abbey he worked the whole day by himself and did not work split shifts. His hours were from 8 am until 9 pm, at least. He says in the first, second and third weeks respectively he worked 70, 71 and 89 hours. He realised he was significantly underpaid but felt he had no option but to stay. Mr Ge has not kept any records of his hours worked.

[45] At the Abbey, Mr Ge lived in alongside Charmain Tauariki, apart from a period in the middle of his employment when Ms Tauariki moved out. Ms Tauariki was a trainee motel manager. She also undertook some housekeeping duties. It was her evidence that at the Abbey, as at 136, trainee motel managers were expected to work at reception from 8 am until 2 pm, and then, again, to be available from 6 or

6.30 pm until 9 pm, when reception hours ended. I note that if one employee only did those hours they would amount to 8.5 or 9 hours a day.

[46] At the investigation meeting, Ms Tauariki said that during the afternoon break period she would be able to be in her own quarters at the motel mostly just relaxing. However, she says she would be called on if a guest arrived. That was infrequent in the afternoons. She understood that even though she had down time she had to stay on-site and be available. She understood she could not leave unless she asked for cover so she could do so.

[47] Y & S disputes that Ms Tauariki's view is correct. Mr Butler's evidence was that no motel manager/administrator or trainee manager worked from the 8 am opening of the office until 9 pm when the office closed. Instead, he said they worked split shifts. He agreed that in the afternoons they could be relaxing in their quarters. He says that there were no requirements on them to work during those hours.

[48] Mr Butler says that between shifts Mr Ge and Ms Tauariki did not need permission to go offsite if they wished to do so. However, they would need to ask for cover to be provided either by Mr Butler or someone from 136, for example.

[49] Ms Luo gave evidence that when she worked with Mr Ge at times he went off site between the shifts and would be late coming back for his late shift. I understand

that mainly relates to the time Mr Ge worked at 136, although there are some other rosters showing Ms Luo and Mr Ge shared motel manager/administrator duties on some days.

[50] Mr Butler provided some rosters for the period. However, they do not include the hours of the shifts the named employees were expected to work or the hours they did actually work.

[51] At times, the rosters show two names on one day for one property, with one person opening and one person closing. At other times, there is only one name for the whole day. Mr Butler says in those circumstances another person could be available to provide cover, and that might be a member of the housekeeping staff or someone from the other motel. That arrangement appears to have been more fluid and make- shift than on the days when two names are on the roster.

[52] The evidence establishes that all staff, including Mr Butler, Ms Luo, Mr Ge, Ms Tauariki and housekeeping staff were often expected to provide cover for one another and sometimes would move between motels to do so. However, after Mr Ge moved to the Abbey he only worked at the Abbey.

[53] There are no wages and time records for Mr Ge, or for any other employee in a similar position to him. Again, I consider that the lack of these records has prejudiced Mr Ge's ability to bring an accurate claim for wage arrears.

[54] Section 132 of the Act allows me to accept Mr Ge's claims as proved unless Y

& S proves his claims are incorrect. Proving that Mr Ge's claims are incorrect is difficult for Y & S in the absence of such records. However, Y & S has provided some evidence to challenge Mr Ge's claims. In order to make any calculation of whether Mr Ge was paid properly, or is owed for more hours at the minimum wage I need to assess all the evidence.

[55] I have heard evidence from Mr Ge and from Y & S's witnesses that raises the question for me of whether Mr Ge was actually working in the afternoons, between shifts.

[56] Y & S paid Mr Ge the same amount every week because it considered he was on a salary and it could divide his annual salary by 52 to reach a regular weekly pay

amount. However, the law provides that every employee is entitled to be paid the minimum wage for every hour worked. Mr Ge's salary of $30,000 gross per annum divided by 52 weeks = $576.92 gross. That is what he was paid.

[57] However, if 40 hours are multiplied by the then applicable minimum wage of

$14.75 per hour = $590.00 gross.

[58] If Mr Ge only ever worked 40 hours per week at the applicable minimum wage rate he should have been paid an annual salary of $30,680 gross. For 45 hours per week, he should have received a salary of $34, 515 gross.

[59] It is important to decide whether Mr Ge should have been paid for the hours between shifts in line with s 6 of the Minimum Wage Act, which provides that every worker entitled to be paid a minimum wage, as Mr Ge was, should be paid for every hour of work at no less than the minimum wage.

[60] I note too that an employer is not entitled to average out the hours worked, so that if more hours are worked in one pay period, and the employee is not paid for those hours in that pay period, that shortfall can be made in for in a future pay period.

What does the IEA say?

[61] First, I consider the wording of the IEA about place and hours of work, and rest and meal breaks:

6. PLACE OF WORK

6.1 Due to the nature of the work this is a live in position. The parties agree that the Employee shall perform their duties at either of the following locations [136 or Abbey] as directed

from time to time by the Employer.

7. HOURS OF WORK

7.1 40-45 hours administration over 5 days, for live in

arrangements and training a minimum of 3 evenings and 4 overnight duties.

7.2 2 full days off per week. This is to be pre organised with staff

and management ideally same day per week.

8. **REST & MEAL BREAKS**

8.1 Due to the nature of this agreement and the nature of work common sense applies when to have meal breaks.

[62] Mr Butler emphasised that living-in was a requirement for the position. He also says that is standard in the industry. He was unable to explain why that was so unless employees are expected to be available to be called on to work in their non-

rostered hours. If Mr Ge was truly expected to work only from 8 am until about 2 pm and then again from 6 pm until 9 pm there is no reason for him to live at his workplace. However, if he was required to be available to be called upon during his non-rostered hours, and required to let his employer know that he was not going to be there so it could arrange cover, living-in makes sense.

[63] The IEA is silent on how the 40-45 hours per week it envisages Mr Ge would work are to be worked. There is no mention of split shifts, or any other kind of shift work, or of the necessity to remain on site between such shifts.

Applying tests to decide if between-shift hours were work hours

[64] The factors to be considered when assessing what constitutes "work" were stated by the Employment Court in *Idea Services Limited v Dickson3* and confirmed by the Court of Appeal in *Idea Services Ltd v Philip William Dickson.4*

[65] The three factors are:

(a) The constraints placed on the freedom the employee would otherwise have to do as she or he pleases;

(b) The nature and extent of the responsibilities placed on the employee; and

(c) The benefit to the employer of having the employee perform the role. [66] The Court of Appeal stated:

The greater the degree or extent to which each factor applied (i.e. the greater the constraints, the greater the responsibility, the greater the benefit to the employer), the more likely it was that the activity in question ought to be regarded as work ...5

[67] I need to apply the three tests to Mr Ge's situation, at least for the days that no

other employee had been rostered or arranged to be working in the office or near enough to hear any work demands from the office.

3 (2009) 6 NZELR 666.

4 [2011] NZCA 14 at [7]

5 At [8]

How was Mr Ge's freedom constrained in the afternoons between shifts?

[68] Mr Ge has proved he was expected to stay on-site and be available to be called on if a client arrived at the office or a call came in. He was not expected to leave the site unless he let Y & S know so it could arrange alternative cover.

[69] When on-site he needed to be able to hear the bell/buzzer from the office and the telephone. Therefore, he was unable to, for example, sleep deeply or listen to loud music.

What responsibility did Mr Ge have in the afternoons between shifts?

[70] His responsibility was to remain able to deal with any client enquiries or demands that arose. That kind of responsibility does not compare to the kind of responsibility Mr Dickson had in the overnight shifts he undertook, or the kind of responsibility the house matrons had in the school boarding house cases. However, Mr Ge continued to have some responsibility, including to let Y & S know if he wanted to leave the site.

What benefit was there to Y & S of Mr Ge remaining on-site in the afternoons between shifts?

[71] Y & S was able to rely on Mr Ge dealing with any client enquiries, new client arrivals and solving any client problems without having to pay either him or another employee for those hours.

[72] There was also continuity of management for those clients who were already staying at the Abbey.

[73] Mr Ge's case is factually very different from the case of *Hellier v Cedar Motor Lodge Limited6* because Mr Ge makes no claim for pay for his overnight hours. However, I note the similarity in the times worked during the day and the requirement Ms Hellier needed to make herself available to deal with any issues which arose during the afternoons.

[74] Y & S questions whether Mr Ge reasonably believed he was required to work such long hours. However, I consider Mr Ge did raise his concerns about the long

6 [2013] NZERA Christchurch 259

hours he was working. I note that in the review meeting between Mr Butler and

Mr Ge on 9 March 2016 Mr Butler's notes record:

Joe said he is concerned about the nature of the work and the ability to be able to commit *due to the amount of commitment required. Joe asked about his contract guidelines and hours*, I replied saying his position was a salaried position and to consult his contract which has the information required.

[75] I have already examined the IEA. Mr Butler was incorrect about the IEA. There is nothing in it that covers Y & S and Mr Ge agreeing that he would work split shifts or stating that he was not required to work between 2 and 6 pm. I accept Mr Ge's evidence that he raised the issue of the long hours he was working and whether he was being paid correctly. When he did so, as noted above, Mr Butler missed the point. He did not ask Mr Ge what he meant about the amount of commitment required and why he was asking about his hours of work. Just calling a position a salaried one does not remove the obligation that an employee must be paid at least the minimum wage for each hour worked.

[76] Y & S provided a few rosters. They do not allow me to accurately calculate on how many days Mr Ge was required to work because they do not cover all the relevant weeks.

[77] Y & S has not proved that at least on the days that Mr Ge is the only name on the roster that he was not required to remain at the Abbey to respond to client demand in the afternoons. I conclude that Mr Ge was working in the afternoons on the days that he remained on-site between shifts, when no other employee had been rostered or arranged to be present to attend to work demands. That means that he must be paid for 13 hours each day on those days.

[78] However, I am not satisfied that Mr Ge was working 13 hours every day for

5 days of each week he was working at the Abbey, or at 136. I have taken into account the few rosters that exist and based on all the evidence I have heard, on balance I consider that Y & S should pay Mr Ge further wages over the period to

27 March 2016, when his notice period ran out and the termination of his employment took effect.

[79] Mr Ge needs to be paid for 640 hours from 5 January to 27 March at $14.75 per hour = $9,440.00 gross less the amount he was paid of $6,923.04 = $2,516.96 gross. I note that this includes the shortfall in Mr Ge's wages, even had he only worked 40 hours per week. Y & S needs to bear in mind that I have not been able to be precise in my calculations because of its failure to keep adequate time and wages records.

[80] Y & S also needs to pay Mr Ge 8% holiday pay on that amount, which is

$755.20 less the $553.84 holiday pay already paid = $201.36 gross.

Is Mr Ge owed wages for the shifts he worked from 28 March until 7 May?

[81] After Y & S gave Mr Ge notice terminating his employment, and while he was working out his two-week notice period, Mr Butler asked him how he was getting on finding alternative employment and alternative accommodation. Mr Ge told him he had found neither, and asked if he could stay on in the accommodation while he continued to look for other work.

[82] Mr Butler did not want to see Mr Ge homeless so proposed an arrangement whereby Mr Ge could stay in the accommodation in return for working a number of shifts.

[83] I note that Y & S was critical of Mr Ge working out his two-week notice period although its written notice of termination stated that he was not required to do so. It says that if he had not worked during those two weeks he would have had more chance to find alternative employment and accommodation.

[84] Mr Ge's evidence is that he was very upset and worried to have lost his job. His understanding was that if he did not work during the two-week notice period he would not be paid for those two weeks.

[85] I accept during the time Mr Ge worked during this period, that some restrictions on what he could do had been put in place, for example, Ms Luo now dealt with all the bookings for the Abbey remotely from 136. Mr Ge's tasks were limited from those he had been expected to undertake prior to his dismissal.

[86] Y & S also withheld Mr Ge's holiday pay for the whole of his employment until he had finished working shifts and moved out of the accommodation. If Mr Ge's employment had finished it was obliged to pay him his holiday pay with his final pay. I consider Mr Butler withheld the holiday pay as some kind of insurance that Mr Ge would continue to act in Y & S's best interests while on his reception shifts. Given the reason for Mr Ge's dismissal it is puzzling that Mr Butler entrusted him to do further work for Y & S. I accept that Mr Ge's level of responsibility was limited during this period.

[87] I consider that Y & S re-employed Mr Ge when it made the arrangement that he would undertake further work for it in the expectation of a "reward". Mr Ge was not a volunteer, because:

• he did work that had economic value for the business,

• he worked under the control and guidance of Y & S,

• he expected and received the reward of accommodation,

• he worked to a roster set by Y & S.

[88] Therefore, despite the provision of accommodation, I consider Mr Ge was also entitled to be paid the minimum wage for each hour that he worked. My reasoning from earlier in this determination remains valid, despite no discussions about a new written contract taking place.

[89] The parties' calculations of hours worked over this period differ. I have made my own assessment from the evidence of hours worked set out in emails between the parties and submissions from both represetatives. I consider that Mr Ge worked a total of 19 hours until 31 March 2016, and was entitled to be paid for those hours at

$14.75 per hour = $280.25 gross.

[90] He also worked 107.5 hours from 1 April 2016 until 7 May 2016 and is entitled to be paid for those hours at $15.25 per hour = $1,639.38 gross.

[91] He is also entitled to 8% holiday pay on the combined amount of $1,919.63 =

$153.57 gross.

Does Mr Ge owe Y & S anything for the provision of accommodation?

[92] Section 7(1) of the Minimum Wage Act states a:

... employer shall not exceed such amount as will reduce the worker's wages ... by more than 15% for board or by more than 5% for lodging.

[93] I reject Y & S's counter-claim that Mr Ge owes it anything for 'lodging' or accommodation prior to the initial termination of his employment. In pre-contractual negotiations, Y & S called it free accommodation. The IEA required him to live-in. There was no contractual agreement about the worth of the accommodation. Y & S never intended to charge anything for accommodation and is only making its claim now because Mr Ge has proceeded with his claims based on minimum code entitlements.

[94] In the period after 28 March 2016, I see things differently. At that point, the IEA, as the contract between the parties, had come to an end. As part of his negotiation with Mr Butler about being able to stay in the accommodation, Mr Ge specifically asked what the value of the accommodation had been, or was. I am satisfied that Mr Ge had an awareness that the accommodation had a stand-alone value. Mr Butler did not directly answer the question, but asked Mr Ge to do work to offset the provision of the accommodation.

[95] I have already calculated the amount Y & S should have paid Mr Ge under the provisions of the Wages Protection and Minimum Wage Acts 1983. I consider it reasonable that Y & S should have been entitled to withhold 5% of Mr Ge's wages towards the provision of his lodging/accommodation.

[96] Therefore, Mr Ge must be paid $1,919.63 less 5% = $1,823.65 gross.

[97] Ms Tucker made what must be an alternative submission about Mr Ge's status during this period. She submitted that he was a volunteer, and not an employee. However, Y & S still wished to claim the value of the accommodation at $550 per week. That is a no win position for Y & S. If Mr Ge was a volunteer, which I am satisfied he was not, I would have no jurisdiction and could not even hear Y & S's claim.

The process leading up to the dismissal

[98] Y & S based its decision to dismiss Mr Ge on reports Mr Butler had from other staff and complaints from customers about Mr Ge's work. Mr Butler held what he called review meetings with Mr Ge to discuss his work performance on 11 January,

5 February, and 9 March 2016.

[99] Mr Butler made contemporaneous notes or reports of what happened at the meetings. Mr Ge questions their reliability. However, I prefer Mr Butler's view of what was said at the meetings, because of his contemporaneous notes and the consistency of his evidence.

The first review meeting

[100] At the 11 January meeting, Mr Butler and Mr Ge signed the IEA. Mr Butler then raised:

... some concerns which need to be clarified with the communication issues with guests and staff, not following staff procedures and unable to follow reception guidelines, procedures.

Joe concerned about how busy it is and unable to operate reception confidently and communicate with guests which (sic) get confused, more training given by myself7 but I witnessed immediately the incorrect procedure.

Evaluation: Joe unable to retain basic procedural details.

[101] When Mr Ge moved to the Abbey, he was expected to work collegially alongside Ms Tauariki, who had equivalent status to him as an employee but considerably more experience, including experience as a sole charge trainee motel manager. The Abbey and 136 used the same procedures for booking, checking in and checking out guests.

The second review meeting

[102] Mr Butler's notes of the review meeting on 5 February reflect the same concerns about communication with staff and guests - "still a huge concern." Mr Ge's ability to use the software and technology provided was also a problem. Mr Butler noted that Mr Ge's difficulties with communication were "upsetting staffing work

ethic and work performance."

7 Mr Butler took Mr Ge through role-plays.

[103] By then Mr Butler was well aware of Ms Tauariki's complaints about working with Mr Ge.

[104] Mr Butler gave Mr Ge a chance to have his say and Mr Ge said that respect was a big issue because he was not getting respect from the other staff. Mr Butler noted that Mr Ge needed to earn the respect of the staff first.

[105] Mr Ge also said that people were not relaxed enough:

No smooth flow with these areas and frustrated with the lack of understanding technology used onsite.

[106] In response to Mr Butler's question of what Mr Ge had achieved in his first month of work Mr Ge replied:

Creating mistakes, payment issues, paperwork issues but alerting issues, have helped housekeeping staff.

[107] He said he understood his role to be in-house management. His major concern was:

Communication between work staff, culture between people quick to get angry at me.

[108] Mr Ge said his best asset was:

My work/duty, people have no trouble.

[109] Mr Butler's evaluation was that Mr Ge:

• was finding staff/guest interaction very difficult;

• was struggling with positive communication.

[110] Mr Butler also wrote that he had received some guest complaints about

Mr Ge's:

attitude and assistance. Joe's administration duties are very poor and lack any sustenance (sic), ongoing training has been provided with some notes and re-confirming his role and need to upskill and complete set tasks.

[111] However, he did not give Mr Ge any details of the complaints.

[112] Mr Butler says that he spoke informally to Mr Ge between the review meetings to assess how his progress was going and helped him at times when Mr Ge needed assistance. He says he went through further role-playing scenarios with Mr Ge to help him understand exactly what was expected of him in terms of customer service.

[113] I reject Mr Ge's evidence that Mr Butler staged a racist phone call to him or instructed regular guests to test out Mr Ge and report back to Mr Butler.

The third review meeting

[114] After a further review meeting on 8 or 9 March, Mr Butler noted that Mr Ge was gaining some confidence in managing staff but there remained areas of concern:

• there were ongoing communication issues;

- Mr Ge was still having trouble understanding and applying the standard operating procedures;

• Mr Ge lacked understanding of the industry;

• Mr Ge either did not carry out or did not complete administration tasks;

• Mr Ge continues mumbling on the phone.

[115] He also wrote:

I talked with Joe during the month regarding guest feedback and clear communication but seem to have forgotten. Joe's administration efforts have been almost nil, purely because of the day to day issues which he seems to be presented with.

[116] That meeting ended when Mr Ge pulled out his phone and Mr Butler asked him if he was recording the meeting. Mr Ge denied that he was. Mr Ge says that Mr Butler became angry with him at that point but that he had only been looking at his phone to see what the time was. Mr Butler suggested the meeting end then, but be rescheduled. He denies he became angry with Mr Ge.

[117] I accept Mr Butler's evidence that during the second and third review meetings, a number of times when he told Mr Ge that he was not performing tasks required of him Mr Ge denied that they were his responsibility and said they were either Ms Tauariki's job or someone else's job. He persisted in this attitude despite

Mr Butler correcting him. At the investigation meeting, Mr Ge also denied that certain specified tasks should have been completed by him.

[118] Mr Butler says by that point Mr Ge's tasks had been reduced to the most simple and straightforward duties. Mr Butler says that Ms Tauariki was working the same shifts to supervise Mr Ge, which was not financially sustainable.

Invitation to a disciplinary meeting

[119] On 9 March, Mr Butler sent Mr Ge an email:

Pursuant to your 90-day trial we have had two monthly performance meetings. Serious issues were raised in the first monthly meeting about your work performance ... We provided further support to you to assist you to reach this. We agreed to review it in one month.

At the second monthly meeting to evaluate your ongoing work performance we are concerned that no progress has been made .... It is (sic) progressed for a significant period and in our view constitutes serious misconduct given the impact on the business and the responsibilities and sole charge nature of the position.

We have considered the information and discussion we had yesterday and decided to hold a further disciplinary meeting with you to discuss your ongoing poor performance.

One of the possible outcomes of the process may be a decision to terminate your employment under the 90 day trial with the agreed

2 weeks' notice.

[120] Mr Butler advised Mr Ge he was welcome to bring a support person or representative to the meeting. The meeting took place on 12 March. Mr Ge was accompanied by a senior Chinese man he had worked with in an earlier job.

The disciplinary meeting

[121] Mr Butler and Mr Ge view what happened at the meeting differently. I prefer Mr Butler's view of the meeting as a formal one. I do not accept that Mr Butler swore at Mr Ge or was rude to him. However, I accept that Mr Butler was direct about the work performance criticisms he had of Mr Ge. Mr Ge found hearing that criticism, especially in front of his friend, very uncomfortable.

[122] I accept that Mr Butler put Y & S's concerns to Mr Ge and wanted to hear Mr Ge's responses. The concerns were the same concerns that had been raised in the review meetings.

[123] Mr Ge's support person largely spoke for him at the meeting. He said Mr Ge could improve as time went on and admitted that Mr Ge did not understand the

procedures. Mr Ge said he was too tired to work and asked for his job description to be emailed to him. He said he felt under too much pressure to work and that ongoing work interruptions affected his work.

The dismissal

[124] Mr Butler says that he made the decision to dismiss Mr Ge based on his performance and on complaints made to him by Ms Tauariki, other staff, and guests. Therefore, on 13 March 2016 he wrote Mr Ge a dismissal letter that stated:

We have decided that your performance is damaging to the reputation of the business being insufficient customer care standards and with poor staff interaction over a period of time.

It is (sic) in our view this is serious misconduct. We wish to terminate your employment pursuant to the 90 day trial.

You will be given 2 weeks' notice from today.

[125] Mr Ge was entitled to stay in the accommodation during those two weeks so long as he did:

> ... not in any way undermine the business reputation with customers

and staff or fail to act in good faith during the notice period.

Did Y & S unjustifiably dismiss Mr Ge?

The law on dismissals

[126] An employer who has dismissed an employee needs to prove that the decision it made, and the way it made its decision, was something a fair and reasonable employer could have done in all the circumstances. Y & S dismissed Mr Ge because his performance was so poor it amounted to serious misconduct.

[127] The reason/s for dismissal must have been serious enough to amount to the decision that the employee was to be dismissed. In addition, there are basic procedural rules that must be satisfied for a dismissal to be justified. These rules are found in s 103A(3) of the Act. They require that Y & S:

(a) investigated each of its concerns; (b) raised those concerns with Mr Ge;

(c) gave Mr Ge a reasonable opportunity to respond to those concerns; and

(d) considered his explanations when considering whether to dismiss him.

[128] If Y & S complied with none of the four of these basic procedural requirements, then the dismissal would be an unjustified one.

[129] In assessing whether an employer's actions were justified I also need to take into account any other factors I consider appropriate. I must not determine a dismissal to be unjustified solely based on defects in the process if those defects were minor and did not result in Mr Ge being treated unfairly.

Was Mr Ge guilty of serious misconduct?

[130] Y & S has mixed two different types of reason for dismissal. An employee could be justifiably dismissed for serious misconduct in some circumstances. However, I do not agree with counsel's submissions that Mr Ge refused to carry out reasonable and lawful instructions. He either misunderstood his role or it was not made clear enough to him that he had been refusing to do parts of his role. He certainly did not knowingly ignore any direct instruction from Y & S. Therefore, if that was what Y & S considered amounted to serious misconduct, he did not commit serious misconduct.

[131] Y & S is on stronger ground substantively in dismissing him for his lack of adequate performance. Y & S believed it was entitled to dismiss him for that because it had an effective 90-day clause. Poor performance, an inability to get along with other staff and an inability to come up to speed with the role are the kinds of reasons a new employee could be dismissed under an effective 90-day trial period.

[132] However, there was not an effective 90-day trial clause. In dismissing Mr Ge for poor performance Y & S acted prematurely.

[133] I acknowledge that Mr Butler and other staff did try to help Mr Ge come up to speed. However, Y & S should have gone through a formal performance management process with Mr Ge making a plan and giving him targets to meet with deadlines. I accept that Mr Butler's email to all staff setting the standard of work required was in large part directed at Mr Ge. However, there was never a performance improvement plan put in place.

[134] Mr Ge may never have been able to improve his performance to the level of work and responsibility Y & S required of him, even if he was not so tired. However, in dismissing Mr Ge in the way that it did Y & S failed to undertake a fair process.

[135] For example, Mr Butler had received complaints from staff and guests about Mr Ge, it is unclear whether he investigated those complaints sufficiently or simply accepted them at face value. At the investigation meeting, Y & S produced

letters of complaint from two guests. However, the letters were written for the purpose of these proceedings. Written complaints did not exist when Y & S made its decision to dismiss Mr Ge. Therefore, I cannot take the written complaints into consideration in deciding whether Y & S acted as a fair and reasonable employer.

[136] While Mr Ge may have been told there had been complaints about him, he was not told the specific substance of those complaints, what date the events complained of occurred on or who the complainants were. The complaints were not raised with him as soon as they were received. That meant his ability to respond was severely compromised.

[137] The specific concerns Mr Butler discussed with Mr Ge and his friend at the disciplinary meeting on 11 March were not set out in the letter inviting Mr Ge to the meeting. Mr Butler says they were the same concerns already discussed with Mr Ge. However, they had not been put in writing at any time. I do not consider that Mr Ge was adequately informed of Y & S's concerns and, because of that, I do not consider he had a reasonable opportunity to give his explanations in any of the meetings, including the final meeting.

[138] Therefore, Mr Butler could not take those explanations into consideration in making his decision to dismiss Mr Ge.

[139] Y & S may have undertaken a more careful process if it understood that the

90-day trial period would be ineffective to protect it from a claim of unjustified dismissal. However, the defects in procedure were not minor and resulted in Mr Ge being treated unfairly. In all the circumstances, a fair and reasonable employer could not have acted in the way Y & S acted, and therefore, it unjustifiably dismissed Mr Ge.

Remedies

Lost remuneration

[140] Mr Ge started a new job on 28 August 2016. His last day at Y & S was 7 May

2016. However, he was dismissed from his full-time employment on 28 March 2016. Section 123(1)(b) of the Act allows me to provide for the reimbursement by Y & S of the whole or any part of wages Mr Ge lost as a result of his grievance. Mr Ge's successful grievance is the unjustified dismissal.

[141] Mr Ge claims lost wages until his new job began. That is a period of 22 weeks from the date of the termination of his full time employment.

[142] Section 128(2) of the Act provides that I must order Y & S to pay Mr Ge the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. Three months = 13 weeks.

[143] Under s 128(2) the lesser amount is his lost ordinary time remuneration over

13 weeks. I base what Mr Ge's remuneration should have been over those 13 weeks on what I have already estimated he would have earned over the time before he was dismissed. Mr Ge worked an average of 54 hours a week x $15.25 per hour over 13 weeks = $10,705.50 - $1,823.65 already ordered to be paid for the third period once lodging is deducted = $8,881.85 gross.

[144] In addition, s 128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s 128(2); that is, for more than three months.

[145] However, in exercising that discretion I need to consider what may have happened if Mr Ge had not been unjustifiably dismissed. In all the circumstances, including Y & S's unhappiness with Mr Ge's performance, Y & S may have gone on to conduct a fair performance management process. That process may have resulted in a justified dismissal. Ultimately, I consider it unlikely Mr Ge would have worked for Y & S for more than three months after his unjustified dismissal. I decline to exercise my discretion to award him more than three months lost remuneration.

Compensation

[146] Mr Ge claims $20,000 for his humiliation, loss of dignity and injury to his feelings upon being unjustifiably dismissed. He says he was very shocked and humiliated to be accused of serious misconduct without any evidence. He says his confidence was shaken and "I felt useless."

[147] Mr Ge says his dismissal was made worse by losing his accommodation as well as his job. He was worried about where he would live and feared he would become homeless.

[148] He says in his last two weeks of full-time work he could not sleep or eat properly.

[149] The negative effect of the unjustified dismissal on Mr Ge was relatively significant. In my view, compensation of $12,000 is reasonable in this case.

Contribution

[150] Section 124 of the Act requires me to consider what contribution Mr Ge made to the circumstances leading to his personal grievance in this case of unjustified dismissal. If I consider that his behaviour was blameworthy enough, the section requires me to reduce the amount of remedies for which he is eligible.

[151] Often in cases of unjustified dismissal based on procedural flaws the lack of investigation of complaints or concerns means that no contribution to the circumstances leading to unjustified dismissal can be proved.

[152] This case is somewhat different. There is evidence of Mr Ge's difficulties in communicating well with his colleagues, particularly Ms Tauariki. Mr Butler was clear that he did not mean that Mr Ge's English was not up to the task, but that Mr Ge either did not know how to or chose not to use good communication skills.

[153] There was also evidence of Mr Ge's refusal to do specific tasks that instead he would leave for Ms Tauariki or someone else to do on their next day of work, even if he had been asked to do the task by it being communicated to him in the diary kept at reception. I am thinking, for example, of his refusal to clean the office floor and his failure to distribute the Skywatch magazine. I consider that he did not do those tasks because he considered that a housekeeping task and not his role, despite having been told that part of his role was to assist the housekeeping staff.

[154] At the investigation meeting, Mr Ge's attitude and responses to questions exactly fit with the performance concerns that Y & S had about his work. He was evasive. At the investigation meeting, Mr Ge said that it was "impossible" that his performance, especially in relation to the technology and the procedures used was lacking in any way. He also denied that his attitude towards or way of communicating with his colleagues had been lacking in any way. His former colleagues' evidence was to the contrary. Mr Ge denied that Mr Butler had raised concerns about his performance with him and said that Mr Butler had fabricated his records of review meetings. I do not find that to be the case.

[155] Although Mr Ge may never have been capable of picking up and working with the procedures required of him it was not that alone that led to his dismissal. There was a specific problem with Mr Ge's attitude to taking instructions from and working with his colleagues.

[156] In all the circumstances, I find that Mr Ge's attitude while he worked for Y & S was blameworthy and contributed to the situation leading towards the unjustified dismissal. I consider that the remedies for the personal grievance should be reduced by 30%.

Interest on unpaid wages, lost remuneration and holiday pay

[157] Mr Ge has claimed that he should receive interest on the lost remuneration, unpaid wages and holiday pay he was short-paid.

[158] The Authority has the power to award interest pursuant to clause 11 of the

Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act

1908, which is currently 5% per annum (updated in 2011 by Judicature (Prescribed

Rate of Interest) Order 2011).

[159] Y & S has had the benefit of the money owed to Mr Ge, while he has not had the use of it. I consider it reasonable that 5% per annum interest is paid on the total amount of unpaid wages, lost remuneration and holiday pay from 9 May 2016 until it is paid in full.

Penalty claim

[160] Mr Ge requested access to his wages and time records on 1 June 2016. Y & S

did not respond to the request.

[161] When the matter came to the Authority, I requested the wages and time records. Y & S did not keep such records as required under s 130 of the Act. Instead, it supplied pay roll records.

[162] Mr Ge has requested that I impose a penalty on Y & S for its failure to supply him with the requested records. Section 135 of the Act provides that an employee may bring an action for breach of the Act, and that every company that is liable to a penalty under the Act is liable to a penalty not exceeding $20,000.

[163] Y & S concedes that it did not comply with its obligation to provide wages and time records to Mr Ge, because it did not keep them. It mistakenly believed it did not need to because he was paid a salary.

[164] In deciding whether to impose an penalty, and if I decide to, in deciding how much that penalty should be, I need to

consider the factors in s 133A of the Act, and the approach set out by the Employment Court in *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.8

[165] 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.

[166] One of the objects of the Act is to promote the effective enforcement of employment standards. The failure to keep and to supply wages and time records is a failure to keep minimum employment standards.

[167] The breach had a significant effect on Mr Ge because it prejudiced his ability to calculate the wages owed to him.

[168] A penalty is warranted for the failure to supply Mr Ge with his wages and time records.

Step One – identify the nature and number of statutory breaches

[169] There is one breach in this case, a failure to supply records to Mr Ge. There is also a breach of the duty to keep such records. However, there is no claim for a

penalty for that. Even if there had been, I would not treat them as two separate

8 [2016] NZEmpC 143

breaches because it is axiomatic that if the records are not kept they cannot be supplied. The maximum amount for a penalty is $20,000.

Step Two – assess the severity of the breach, considering aggravating and mitigating factors

[170] The aggravating factors include the fact that Mr Ge was vulnerable as a live-in employee. Y & S is not a new employer and has a number of employees making its failure to keep the records, and therefore, be able to supply them to its employees, a serious breach.

[171] Y & S says it is now aware of the shortcomings in its record keeping and it has amended its practice.

[172] The size of the penalty should be 50% of the maximum - $10,000.

Step Three – the respondent's financial circumstances

[173] The respondent's financial circumstances are not strong. I have viewed extracts from the 2017 accounts suggesting that revenue was significantly down for the tax year ended 31 March 2017, and that a greater deficit has been recorded.

[174] In the circumstances, the penalty amount should be reduced to $5,000.

Step Four - proportionality

[175] Ms Tucker's submissions about the level of the appropriate penalty rest on cases decided before the *Preet* decision. In considering the level of penalty in similar cases decided since the *Preet* decision and considering the amount of loss to the applicant, I consider the appropriate level of the penalty to be $2,000.

Should any part of the penalty be paid to Mr Ge?

[176] Mr Ge has been compensated for all his losses. The purpose of penalties is to punish and deter, not to compensate. Mr Ge's difficulty in making an accurate wages claim has been assisted by my application of s 132 of the Act, meaning that I have accepted as proved his claims, except where Y & S provided credible evidence to the contrary to prove his claims were incorrect.

[177] Under s 136 of the Act, I order that Y & S pay the full penalty of $2,000 to the

Authority for transfer to a Crown Bank Account.

Amounts payable

	Claim for unpaid wages	**Claim for holiday pay at 8%**	**Total**
First period - 21 December 2015 to 4	$1,460.25	$116.82	

January 2016			
Second period - 5 January until 27 March 2016	$2,516.96	$201.36	
Third period - 28 March to 7 May 2016	$1,919.63	$153.57	
Sub-total before lodging deducted	$5,896.84	$471.75	$6,368.59
Deduction for lodging of 5% off $1,919.63	$95.98	n/a	
Sub-total after lodging deducted	$5,800.86	$471.75	$6,272.61 gross
Plus 5% interest from 9 May 2016 until date of payment			
Compensation for hurt and humiliation, less 30% contribution	$8,400.00		$8,400.00
Lost wages, less 30% contribution plus interest from 9 May 2016 until date of payment	$6,217.30		$6,217.30 gross
Total: Plus interest as set out above			**$20,889.91**
Penalty claim – to be paid to the Crown			**$2,000.00**

Costs

[178] Costs are reserved. The unsuccessful party is usually expected to make a contribution to the successful party's costs. The Authority generally calculates costs on a daily tariff basis with a tariff of $4,500 for the first day and $3,500 for each day after that. The investigation meeting went for two days.

[179] The parties are encouraged to seek agreement on costs. If that is not possible, within 28 days of the date of this determination the party who wishes to be paid costs should apply to the Authority to award costs. The other party has a further 14 days in which to make submissions on the application for costs.

Christine Hickey

Member of the Employment Relations Authority