

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 533
3140001

BETWEEN GOLD STAR TRAINING
 LIMITED
 Applicant

AND SHODA TUA
 Respondent

Member of Authority: Rachel Larmer

Representatives: David Watson, advocate for the Applicant
 Simon Greening and Kylie Hudson, counsel for the
 Respondent

Investigation Meeting: 15 June 2022 at Auckland

Submissions and Further 29 June 2022 from the Applicant
Information Received: 6 July 2022 from the Respondent
 6 July 2022 from the Applicant
 13 July 2022 from the Applicant
 28 September 2022 from the Respondent

Date of Determination: 14 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Gold Star Training Limited (Gold Star) is a New Zealand Qualification Authority (NZQA) approved sub-contractor to Front-line Training Consultancy Limited (Front-line). Front-line is a NZQA registered and accredited training organisation that offers NZQA qualifications to students.

[2] Gold Star is the organisation that provides the training and assessments that enable secondary school students to obtain NZQA unit standards towards a NZQA qualification.

[3] Mrs Ingrid Sa'ena-Brown is the sole director and shareholder of Gold Star. She owns and manages the business and provides Gold Star's service in the Northland region. Gold Star also operates in the Auckland region, and the applicant, Mrs Shoda Tua, was responsible for providing those services.

[4] Gold Star employed Mrs Tua in the position of Auckland Regional Retail Workplace Course Manager from December 2019 to 18 November 2020.¹ Mrs Tua's role required her to provide on the job workplace training and assessments for students who were undertaking the Gateway Workplace course programme at secondary schools in Auckland.

[5] This work involved Mrs Tua arranging and undertaking student training and assessment activities at schools and workplaces across the Auckland region. Mrs Tua was responsible for managing the workplace placements, as well as the learning and completion of the assessments for all of the students enrolled in her care.

[6] Student assessments had to be completed using Gold Star's approved Assessment Booklets that had been created by Front-line, in order for the assessments to be NZQA compliant.

[7] Before becoming an employee of Gold Star's, Mrs Tua did the same work, but as an independent contractor, for Gold Star from July 2016 to November 2019. One of the terms of Front-line's sub-contracting relationship with Gold Star was that it was not permitted to engage independent contractors. Mrs Tua's status therefore changed from an independent contractor to an employee in December 2019, in order to meet Front-line's contractual requirements.

[8] Gold Star also employed Mrs Tua's husband and son (on a casual basis) to help Mrs Tua by doing student assessments during the school holidays. Mrs Tua was still responsible for co-ordinating, managing and overseeing the work her husband and son did, so she was paid for it, but at a lower rate per student than she was paid for the students who she assessed.

[9] Mrs Tua, her husband and son were all paid on a 'piece work rate' that (as per her employment agreement) was based on a "*completion per student*" criteria. "*Completion of a student*" was determined after the submission by the Assessor of a completed student

¹ Mrs Tua was unjustifiably dismissed for serious misconduct; see *Tua v Gold Star Training Ltd* [2022] NZERA 531.

Assessment Booklet which was the record of learning, along with the prescribed assessment documentation.²

[10] As an independent contractor Mrs Tua had been paid (up front) when a student enrolled. When she became an employee, her employment agreement provided that she would be paid after the student had completed the course.

[11] Mrs Tua found it difficult waiting to be paid until after the student had completed the course. She wanted the regular income associated with payments being linked to student enrolments.

[12] The parties therefore verbally agreed that Gold Star would pay Mrs Tua when a student enrolled. Gold Star also extended that advance payment arrangement payment to Mrs Tua's husband and son, who were both paid for assessments they did before the student had completed the course.³

[13] This new payment arrangement was not documented. Mrs Sa'ena-Brown told the Authority she agreed to this in good faith, to help Mrs Tua out, because she believed Mrs Tua would complete the work she had been paid in advance for. Gold Star expected and required that all of the assessment work done by the Tua family would be completed in accordance with accepted educational practices and standards. Unfortunately that did not occur.

[14] To assist Mrs Tua, Gold Star advanced her \$38,050 gross wages over the period March to November 2020.⁴ This represented her piece rate of \$250 per student for 134 student completions in which she was the Assessor and \$130 for the 35 co-ordinated student completions (meaning the assessments that had been done by her husband or son).

[15] Mrs Tua had 169 students enrolled in Gold Star Gateway courses between March and October 2020. Of those 169 students, Gold Star said Mrs Tua submitted assessment work for 114 students that did not meet the standards for NZQA credits to be awarded to those students,

² This referred to the assessment documentation required by NZQA, as well as the documents identified in Mrs Tua's employment agreement and job description.

³ Gold Star did not seek to recover those advance payments, which amounted to \$2,640 in total, even though they failed to complete the work they had been paid to do.

⁴ Mrs Tua based her calculations on having been paid \$38,030.19 gross, which was the information she received from Gold Star on 20 May 2020. However, that figure had been updated to \$30,050, as per Tab 36 in the Joint Bundle filed for the Authority's investigation meeting.

without requiring significant remedial actions. Gold Star had to undertake that remedial action after Mrs Tua's employment ended.

[16] Gold Star said 114 student assessments Mrs Tua submitted failed to meet the "*completion of student*" criteria because they were "*largely incomplete or non-compliant*" for a range of issues (this is discussed in more detail later).

[17] Gold Star therefore said Mrs Tua was not entitled to be paid the contractual 'piece rate' for these 114 students, because her work had not met the required contractual payment criteria of "*completion of a student*".

[18] Gold Star accepted Mrs Tua was entitled to be paid \$4,698 gross, consisting of:

- (a) \$4,250 gross for the 17 assessments at the piece rate of \$250 per student that had met the "*completion of a student*" contractual payment criteria; and
- (b) \$100 gross, paid at the rate of \$50 per student for the two students who were withdrawn from courses by the school;
- (c) \$348 gross, being 8% holiday pay on the total earnings of \$4,350 (\$4,250 + \$100).

[19] Gold Star therefore claimed Mrs Tua had been overpaid by \$28,352 (being \$33,050 gross advanced as 'piece rate' wages paid less the \$4,698 gross wages (inclusive of holiday pay) that she was contractually entitled to). Gold Star sought to recover that overpayment from Mrs Tua.

[20] Mrs Tua did not agree that he had been overpaid, but further said that even if she had been overpaid then Gold Star should not be permitted to recover any money from her.

[21] Mrs Tua said she was not liable to repay any wages she had received during the course of her employment. Mrs Tua claimed she had not been unjustifiably enriched and had materially changed her position as a result of the wages she had been paid, so an order to repay would be inequitable.

[22] Mrs Tua denied that she had failed to complete all of the work she had been paid in advance for. She also pointed out that she was entitled to be paid at least the minimum wage for the hours she had worked, which Gold Star had not allowed for in its recovery of wages claim.

[23] Mrs Tua said she was entitled to be paid at least \$22,765.70 for the hours she worked during her employment, pursuant to the minimum wage that had applied at that time.

[24] Mrs Tua therefore said the maximum possible amount recoverable by Gold Star was \$15,264.49 gross, being the difference between what she was paid (\$38,030.19 gross) and what her minimum entitlements were (\$22,765.70 gross).⁵ However, she still disagreed that any repayment should be made at all.

Penalty claim

[25] Mrs Tua's Statement in Reply sought that a penalty be imposed on Gold Star for its breaches of its obligations under s 4B of the Employment Relations Act 2000 (the Act) to keep records relating to minimum entitlement provisions and s 130 of the Act regarding the failure to keep wage and time records that recorded her hours of work and what she had been paid for those hours.

[26] That claim had not been recorded in the Authority's Minute dated 29 September 2021 as an issue to be determined.⁶ The parties did not raise the penalty claim during the investigation meeting. Witnesses were not questioned about penalties and neither party addressed penalties in their evidence or submissions.

Authority's investigation

[27] The Authority held an investigation meeting in Auckland on 15 June 2022. Mrs Sa'ena-Brown and Lesley Paton (who was employed by Gold Star as an Administrator) filed witness statements and gave evidence in person on behalf of the Applicant during the investigation meeting. Mrs Tua filed a witness statement and gave evidence in person during the investigation meeting.

[28] Both parties filed additional evidence after the investigation meeting. This new evidence focused on providing more detailed information about the deficiencies in the student assessments, in terms of the "*completed course per student*" payment criteria.

⁵ Mrs Tua's figure was incorrect as she was paid \$30,050, see above n4.

⁶ Issued by another Member, who conducted the Case Management Conference with the parties.

[29] Mrs Sa'ena-Brown and Mrs Tua both filed affidavits that addressed the assessment documentation that had been provided to the Authority. The parties also filed written submissions after all of the new evidence had been lodged with the Authority.

Issues

[30] The following issues are to be determined:

- (a) Did Gold Star breach s 4B and/or s 130(1)(g) of the Act?
- (b) If so, should a penalty be imposed on it?
- (c) How many students completed their course?
- (d) How many hours did Mrs Tua work while employed by Gold Star?
- (e) What minimum wage should Mrs Tua have been paid?
- (f) Has Mrs Tua been overpaid?
- (g) If so, can Gold Star recover any overpayment of wages from Mrs Tua?
- (h) What, if any, costs and disbursements should the successful party be awarded?

Background facts

Requirements of the role

[31] Mrs Tua's work involved three main activities; contacting schools to secure student placements, contacting business operators to secure suitable workplaces for the students to work/train in, and scheduling and carrying out the training of students that was required for their assessments.

[32] The outcome of these activities was the completion by students of assessments, to NZQA unit standards. The students' assessment records were submitted by Gold Star for moderation and subsequent awarding of qualifications Front-line, which was the approved Training Organisation (TO).

[33] Gold Star contracted to, and was moderated by, Front-line to ensure students' assessment work was up to NZQA standards. Deficient assessments meant students would not be able to complete their course.

The “completed course per student” criteria was critical

[34] The Authority finds that course completion by students factor was a key requirement of the role, because it was the outcome Mrs Tua had been employed to achieve. Gold Star was funded based on each student who enrolled and completed their course, so it was not surprising that Mrs Tua would only be paid the piece rate “*for each completed course per student.*”

[35] Mrs Tua could not reasonably have expected to have been paid the piece work rate for students who did not meet the “*completed course*” criteria. Instead her employment agreement provided that she would be paid the minimum wage rate for the hours she had actually worked.

[36] The payment of wages clause in Mrs Tua’s employment agreement made it clear that “*each completed course*” included completion and receipt of marked assessments (along with completed observation notes, marking schedules and all supporting assessment (evidence).

[37] This was also reflected in the job description dated 14 September 2020 that had a section called “*Assessment*”. That recorded that a key criteria of the role was to ensure that assessments were valid, consistent and reliable and of the workplace standards.

[38] It also stated that all assessment evidence had to be gathered, printed, clearly labelled and attached to the student’s assessment. Photographic evidence was to be printed or clearly labelled in digital format and submitted via USB flashdrive.

[39] Mrs Tua was therefore on notice that properly completed (meaning compliant) assessment documentation was required for a student to be able to complete their course. Mrs Tua should have already known that because:

- (a) She had a NZQA Unit Standard 4098 qualification, that is the recognised qualification for a Workplace Assessor;
- (b) She had four years’ previous experience working as an Assessor for Gold Star, albeit on an independent contractor basis.

Employment agreement

[40] Although the updated employment agreement dated 30 August 2020 had not been signed by Mrs Tua, it reflected some changes she had asked for, she did in fact work in accordance with the terms of the variation and she did not object to any of the terms in the updated employment agreement while she was still employed.

[41] The Authority therefore finds that the updated 30 August 2020 employment agreement set out the terms and conditions the parties had agreed and the updated job description dated 14 September 2020 set out the key requirements and accountabilities of Mrs Tau's role.

Remuneration clause

[42] The "*Remuneration and Benefits*" clause in the employment agreement contained a "*payment of wages*" clause that stated:

The employee will be paid on a 'piece work basis' at a rate of:

\$250 (gross) for each completed course per student, where the employee is the Assessor, per course.

\$130 (gross) for any completed course per student, where the employee has completed the administration, liaised, and confirmed the student placement with schools and organised a Gold Star Training Workplace Assessor to assess. This must be approved by the Managing Director.

This includes travel to and from workplace/student visits, assessing, marking, completion of marking schedules, observation notes, providing supportive evidence and any other documentation required as per the job description.

The employee will be paid upon the completion and receipt of marked assessments (along with completed observation notes, marking schedules and all supporting assessment evidence) into the employee's nominated NZ bank account, provided this is **not** less than the applicable minimum wage rate under the Minimum Wage Act 1983. Payment will be made the 1st of the following month, after all assessments have been received and moderated.

The employee will be paid monthly into the employee's nominated NZ bank account, provided this is not less than the applicable minimum wages rate under the Minimum Wage Act 1983.

The employer may change how often the employee is paid and will give notice in writing.

Warnings to Mrs Tua that she had to complete the work she had been paid in advance for

[43] On 3 September 2020, Mrs Sa'ena-Brown emailed Mrs Tua and said (among other things) that she (Mrs Sa'ena-Brown) expected Mrs Tua "*to complete the students that you have been paid for, I will send through a table of all the students I have paid you for to date [...]*".

[44] Mrs Sa'ena-Brown reiterated in a letter to Mrs Tua dated 11 September 2020 that:

You will be expected to fully complete all students that you have currently been paid in full for, to which I have paid you 'in good faith' to complete (see attached list of students that you have received full payment for).

[45] A further letter was sent from Gold Star's advocate to Mrs Tua on 17 September 2020 that stated (among other things):

A reconciliation of claims and payments for services made between December 2019 and September 2020 is required to properly determine wage entitlements. As a matter of urgency, the status of all complete and incomplete work is to be agreed, and actions for completion of contract or payment recoveries made to the satisfaction of the employer. Essentially you have been paid for work that is incomplete and will be required to either complete the work or refund payment.

[46] Among the responses required from Mrs Tua was her work plan to complete outstanding work for all registered students.

[47] Mrs Tua replied in an email dated 17 September 2020 that she was completing all students out on placement.

[48] Gold Star also reminded Mrs Tua in the dismissal letter she received on 21 October 2020 of the need for her to complete the student assessments, for which she had already received payment, during her four week notice period.

Change to timing of payments

[49] The advance piece rate payments were made because Mrs Tua expressed concern to Gold Star about the relatively long time between enrolling students and the completion of their assessments, particularly during Covid which had caused disruptions for the students in completing their courses.

[50] Gold Star understood Mrs Tua's concerns and wanted to assist her with living expenses, while student access to completing assessments was restricted due to Covid alert levels.

[51] Gold Star's agreement to make advance payments of the 'piece rate' was initiated by Mrs Tua and was for her sole benefit. Mrs Sa'ena-Brown told the Authority she had agreed to pay Mrs Tua in advance (to help her out) because she trusted that Mrs Tua would support the students through to proper completion of their qualifications.

[52] That was a reasonable assumption to have made in light of the parties' previous almost four years long relationship. Mrs Tua should have known she was not entitled to retain piece rate payments if she did not meet the contractual criteria for the piece rate payments to be made to her.

Feedback on the student Assessment Booklets

[53] On 30 August 2020 Mrs Sa'ena-Brown asked Mrs Tua for copies of the students' completed Assessment Booklets. She needed these to pre-moderate the student's work in order to identify any issues that needed addressing by the student before they could complete their course.

[54] On 4 September 2020, Mrs Sa'ena-Brown received the first 11 student assessment booklets from Mrs Tua. A review found they were below standard due to a lack of photographic evidence and other deficiencies, so they were returned to Mrs Tua for remediation. A second quantity of assessment booklets was received and also found to contain issues.

[55] On 18 September 2020, Mrs Sa'ena-Brown emailed Mrs Tua that said (among other things) she had set up a meeting on 23 September 2020 to discuss performance issues with the work that had been submitted (which was not to standard), wages that had been paid to date, and to get an update on current outstanding incomplete work/spreadsheets, and other matters.

[56] Mrs Tua was asked to bring any completed workbooks to the meeting with Mrs Sa'ena-Brown so these could be discussed. Mrs Tua said she was not available on 23 September, so the meeting was rescheduled to 22 September instead. Mrs Tua failed to attend the meeting. She said she forgot and went to a physio appointment instead.

[57] Mrs Sa'ena-Brown handed Mrs Tua back the Assessment Booklets that needed to be corrected with the non-compliant issues tagged. Mrs Tua never discussed these with Mrs Sa'ena-Brown.

[58] Mrs Sa'ena-Brown tried to set up another meeting with Mrs Tua on 13 October 2020 to go through the Assessment Booklets. However, Mrs Tua said she was not available.

[59] Gold Star told the Authority that Mrs Tua withheld delivery of all other assessment documents that were in her possession until 16 October 2020. Mrs Sa'ena-Brown was able to

retrieve the remainder of the assessment booklets on 16 October 2020.⁷ After reviewing them Mrs Sa'ena-Brown determined that a large number of the assessments were incomplete.⁸

[60] Issues ranged from a lack of photographic evidence to a lack of workplace manager signoff. Mrs Sa'ena-Brown said it was evident that the documents contained attestations that “*were not authentic*” and some students had reported activities that had not actually been undertaken.

[61] In many cases students had completed the sections of the assessments where the supervisory or Assessor's comments were required.

[62] On 19 October 2020 (at the conclusion of the disciplinary meeting) Mrs Sa'ena-Brown passed Mrs Tua a stack of moderated Assessment Booklets, that required remediation by her. However, Mrs Tua refused to take these with her.

Deficiencies in the Assessment Booklets Mrs Tua submitted

[63] Mrs Tua's denial that the student assessments she submitted were incomplete or unsatisfactory was not credible.

[64] The Authority preferred the evidence from Mrs Sa'ena-Brown and Ms Paton, that assessments Mrs Tua submitted were deficient, because they did not meet the required NZQA assessment standards, because this evidence was supported by the remedial action they had to take and was also corroborated by the documentation provided.

[65] Ms Paton appeared to be a credible witness. Her evidence was moderate and she was able to refer to specific examples in the documentation to back up what she had said.⁹ Although she is employed by Gold Star, unlike Mrs Tua and Mrs Sa'ena-Brown she had no personal financial interest in the outcome of this matter.

[66] Ms Paton reviewed the assessments Mrs Tua had submitted and she (Ms Paton) was part of the remedial action that had to occur. Ms Paton's evidence was that Mrs Tua had marked answers correct when they were not, she had not obtained proper signatures for the

⁷ The Authority considered that the manner in which Mrs Tua provided Gold Star with these Assessment Booklets was unsatisfactory.

⁸ At the 22 September 2020 meeting Mrs Sa'ena-Brown had intended to discuss issues about the quality of assessments Mrs Tua had submitted. Instead she had to hand back the assessment booklets with the problems she had identified tagged, for Mrs Tua to remedy.

⁹ As did Mrs Sa'ena-Brown.

student books, and had neglected to complete all observations and marking schedules. The Authority accepted that these were all examples of deficiencies in the assessment documentation Mrs Tua supplied.

[67] Ms Paton confirmed to the Authority that the assessor had to provide photo evidence for every assessment a student had completed. Photos of students showing their proficiency in all unit standards had to be submitted with student assessment books, as per the subcontracting agreement between Gold Star and Front-line. That fundamentally undermined Mrs Tua's claim that photos were not required.

[68] Ms Paton told the Authority that nearly all of Mrs Tua's books were missing the required photos.

[69] Mrs Tua's evidence that Mrs Sa'ena-Brown told her photos were not required was not credible. Mrs Sa'ena-Brown had included the 'lack of photos with assessments Mrs Tua had submitted' as a performance issue she had wanted to discuss at the 22 September 2020 meeting (that Mrs Tua failed to attend).

[70] Ms Paton also explained to the Authority that students were not permitted to write their own observations. Ms Paton pointed out observer comments in Mrs Tua's books that appeared to have been written by the students themselves. These comments had been signed by Mrs Tua as if the comments had been written by her. This evidence appeared to be correct based on a review of the handwriting involved.

[71] Ms Paton informed the Authority that the Assessor was responsible for ensuring all supervisor and observer signatures and comments were obtained for all relevant assessments. Ms Paton had observed that in many of Mrs Tua's books these were missing the supervisor/observer signatures and comments.

[72] The Authority accepted that it was Mrs Tua's responsibility to ensure all of the required supervisor/observer signatures and associated comments had been obtained prior to the student completing their work placement. However, the evidence established that Mrs Tua had failed to do that.

[73] Ms Paton supported Mrs Sa'ena-Brown's evidence that it was not acceptable for students to be copying each other's work. Ms Paton explained how she had observed identical,

clearly copied answers in many of Mrs Tua's student Assessment Booklets. The Authority could also see that.

[74] Ms Paton also explained that it was the responsibility of the Assessor to ensure they had signed all relevant places in the assessments where the Assessor's signature was required. Ms Paton explained to the Authority that she had observed many missing Assessor signatures in the student Assessment Booklets Mrs Tua had submitted. Examples of that were provided.

[75] Ms Paton assisted Mrs Sa'ena-Brown in completing the students' assessments, which had been Mrs Tua's responsibility to complete and for which Mrs Tua had already been fully paid. Ms Paton worked alongside Mrs Sa'ena-Brown for at least a month trying to help students complete their assessments correctly so they could complete the course.

[76] Ms Paton explained how that was a difficult process because the students had all left school, so it took a great deal of time and effort to arrange meetings with the students. There would have been no need for her to have done that if the assessments had been compliant with NZQA requirements.

[77] The Authority's review of the Assessment Booklets also bore out the complaints Gold Star had made. The Authority was satisfied that Gold Star provided evidence that supported its claim that 114 of the assessments Mrs Tua submitted were non-compliant to the extent that the student could not have completed their course without remedial action being taken to address the deficiencies in their assessments.

Did Gold Star breach s 4B and/or 130(g) of the Act?

[78] Section 4B of the Act relates to an employer's general obligation to keep records relating to minimum entitlement provisions. It states:

- (1) An employer must keep records in sufficient detail to demonstrate that the employer has complied with minimum entitlement provisions.
- (2) The obligation in subsection (1) is in addition to the requirements in the other provisions of this Act or any other enactment relating to the keeping of records.

[79] Section 130 of the Act deals with the obligations on an employer regarding wage and time records. Section 130(1) of the Act lists the specific information that must be kept in the wage and time record by an employer for every employee.

[80] Section 130(1A) of the Act requires the employee’s wage and time record to be written or in a form or manner that enables the information to be easily assessed and converted into written form.

[81] Section 130(1)(g) of the Act requires the wage and time record to show the number of hours worked each day in a pay period and the pay for those hours. Gold Star failed to keep that information for Mrs Tua, so it breached its obligations under s 130(1) of the Act.

Should a penalty be imposed on Gold Star for its breaches of the Act?

[82] Although Gold Star did not meet its obligations in terms of s 130(1)(g) of the Act, the breach was a minor one. Mrs Sa’ena-Brown had asked Mrs Tua to provide details of her work hours and arrangements, but Mrs Tua had not been forthcoming with that.

[83] Gold Star was reliant on Mrs Tua to keep an accurate record of her time, and to pass it on to Mrs Sa’ena-Brown because Mrs Tua worked autonomously, so she was the only person who knew exactly what hours she had worked on a particular day.

[84] The piece rate had been calculated based on the expectation that Mrs Tua would be paid well in excess of the minimum wage for each hour she worked. Mrs Tua’s employment agreement also set out her regular hours of work.

[85] The parties did not address the Authority on penalties. The Authority did not consider that a penalty needed to be imposed on Gold Star for punishment or deterrence purposes. Nor was a penalty required to meet the overall public interest in compliance with record keeping obligations.

[86] This appeared to be a one-off situation, that had occurred in unique circumstances and which was unlikely to be repeated. Gold Star had already faced significant adverse financial repercussions, so has likely learnt its lesson about wage and time record keeping.

How many students completed their course?

Contractual requirements

[87] Under the payment of wages clause, Mrs Tua would only be paid for “*each completed course per student*” where she was the assessor. Mrs Tua was to be paid “*upon the completion and receipt of marked assessments (along with the completed observation notes, marking schedules and all supporting assessment evidence)*”.

[88] A letter dated 10 June 2021 signed by Front-line’s CEO stated “*To maintain quality provision Front Line and Gold Star implement very rigid processes and will not accept any deviation from our practices.*”

[89] Providing appropriate assessment documentation was therefore a part of the assessment process Mrs Tua was responsible for. That was reflected in the updated job description.

14 September 2020 job description

[90] The job description that was provided to Mrs Tua on 14 September 2020 had a section that was headed up “*Key accountabilities*” and which dealt with “*learning and assessments*”.

[91] Among the duties specified were the requirements that all marking schedules had to be completed immediately after completion of the course and that an up-to-date record of the student’s progress and status was recorded on Google spreadsheets. It also stated that “*accurate records of student/client learning outcomes are kept*”.

[92] The assessment section under the “*Key accountabilities*” recorded in bold “*Ensures that assessments are valid, consistent and reliable and of the workplace standards*”. The bullet points under that bold heading included (but were not limited to):

- Ensures that practical assessments are based on actual observations of skills, demonstrated by way of ‘real-life’ observations of serving customers and/or role plays.
- Reverse the marking schedule ‘judgement’ criteria to ensure all objectives have been met.
- Ensures all workplace assessments are signed off by the workplace manager or supervisor responsible for the student/client in training.
- All assessment evidence is gathered, printed, labelled and attached to the student’s assessment.
- Photographic evidence may be printed or clearly labelled in digital form and submitted via USB flash drive.

[93] Under the “*Student management and support*” section under the Key accountabilities part of the job description, the heading was “*Ensures that all written documentation is clear and accurate*”. This included:

- Maintains detailed records of student/client progress and visits to the workplace which are signed by the student/client and tutor.

[94] Gold Star said that none of the student assessments that Mrs Tua’s husband and/or son had been responsible for (which Mrs Tua had coordinated) had been properly completed. The

deficiencies Gold Star identified were inconsistent with the assessment requirements that were set out in the applicable employment documentation.

Evidence of non-compliance of Assessment Booklets with required standards

[95] Gold Star provided the Authority with a lot of very detailed information about why 114 of the assessments Mrs Tua submitted were not compliant with NZQA requirements. In addition to providing the documents that established that the student assessments had not been completed to the required standard, Mrs Sa'ena-Brown and Ms Paton both gave evidence about the deficiencies they had identified.¹⁰

[96] The deficiencies were serious enough that Gold Star had to report them to Front-line. That caused Mrs Sa'ena-Brown considerable worry about whether that would undermine the contractual relationship between Gold Star and its TO.

[97] Gold Star discovered that some student-reported activities had not actually been undertaken and in most cases the students had themselves completed the sections of the assessments where supervisory or assessors' comments were required. That appeared to have occurred at Mrs Tua's direction.

[98] Assessment documents were incomplete, observer notes were missing, or students had written the observer notes themselves (not the Assessor), photographic evidence had not been provided, the workplace manager had not signed off the work placement, the documents contained attestations that were not authentic and required signatures were missing from the assessments.

[99] Gold Star discovered that Mrs Tua had told the students what to write, students had copied off each other, students had written answers that were contained in the Assessor's Sample Answer Book, and had reported events that did not occur in the workplace they had been working in. Identical Assessor comments had been written by students (when the Assessor should have been writing the Assessor's comments) and signed off by Mrs Tua.

[100] Four students gave written accounts of improper conduct by Mrs Tua regarding how she had carried out her role as the Assessor. Three of them claimed Mrs Tua had told students

¹⁰ There is too much detail to include in a determination.

what to write so they could get the assessment finished. One student alleged that Mrs Tua had told them to copy from another level 3 Gateway student's workbook.¹¹

[101] Another student claimed Mrs Tua had told students what to put in their workbook for their practical observations, even though that information was not true and had not actually happened. There was an allegation that Mrs Tua had signed off students' Assessment Booklets without looking at their work.

[102] The Authority was given a copy of the verifier's checklist and attestation that had been completed by the student in their handwriting and signed by Mrs Tua.

[103] A student who had poor English language skills wrote about the Consumer Guarantees Act (CGA) in her Assessment Booklet, despite (later) admitting to Mrs Sa'ena-Brown that she did not know what the CGA was. That evidence lent credibility to claims that the Assessors (Mrs Tua, her husband and son) had told students what to write into their Assessment Booklets, instead of properly assessing them.

[104] Although Mrs Tua denied these allegations (or that the assessments she submitted were non-compliant) the Authority found her evidence about that to be unsatisfactory. The Authority concluded that Gold Star's evidence was more credible, as it was backed up by supporting documents.

[105] The Authority therefore accepted Gold Star's evidence that only 17 out of all of the student assessments Mrs Tua submitted resulted in a "*completed course*", for the student, as per the required contractual piece rate payment criteria.

How many hours did Mrs Tua work while employed by Gold Star?

Relevant legislation

[106] Section 132 of the Act deals with an employer's failure to keep or produce wage and time records.

[107] Section 132(1) of the Act provides that where an employee is seeking to recover wages or other moneys payable under s 131 of the Act, the employee may call evidence to show that

¹¹ Mrs Tua denied that.

the employer breached its obligations to keep wage and time records and that the failure prejudiced the employee's ability to bring an accurate wage arrears claim.

[108] Section 132(2) of the Act provides that where an employee gives the evidence referred to in s 132(1) of the Act then the Authority may, unless the defendant proved that the evidence was incorrect, accept as proved all claims made by the employee in respect of the wages they were paid and the hours, days and times the employee worked.

Consequences of failure to keep wage and time records

[109] Mrs Tua pointed out that Gold Star did not retain wage and time records of the number of hours she worked each day in the pay period or the pay she received for those hours. That failure of Gold Star to comply with ss 4B and 130(1)(g) of the Act prejudiced Mrs Tua's ability to accurately calculate her minimum entitlements.

[110] Gold Star's failure to keep accurate wage and time records for Mrs Tua, means that the Authority was able to accept her evidence about the days and hours she worked for each month that she was employed, because Gold Star had not proved that evidence was incorrect.

Mrs Tua's evidence about the hours she worked

[111] Mrs Tua estimated, based on her recollection and email activities, that she had worked at least 1,127.5 hours during her employment with Gold Star.

[112] Mrs Tua said she worked 192 hours over the period December 2019 to 31 March 2020 and 935.5 hours over the period 1 April to 18 November 2020.

Authority's finding about the number of hours Mrs Tua worked

[113] The Authority accepted Mrs Tua's unchallenged evidence about the hours she worked.

What minimum wage should Mrs Tua received?

[114] The piece rate in Mrs Tua's employment agreement was calculated on the basis that the average number of hours required per student "*completion of course*" would not exceed 14.1 hours prior to April 2020 or 13.2 hours per student after April 2020.

[115] Pursuant to s 6 of the Minimum Wage Act 1983 (MWA) and s 4(a) of the Minimum Wage Order 2019 Mrs Tua was entitled to be paid not less than:

- (a) \$17.70 gross per hour for the 192 hours she worked from 1 April 2019 to 31 March 2020; and
- (b) \$18.90 gross per hour for 935.5 hours she worked from 1 April 2020 to 31 March 2021.

MWA finding

[116] Mrs Tua's employment agreement also recognised that she would not be paid less than the applicable minimum wage. Mrs Tua should therefore have been paid at least \$21,079.35 gross wages over the course of her employment, consisting of:

- (a) \$3,398.40 (being \$17.70 gross per hour) for the 192 hours she worked over the period December 2019 to 31 March 2020; and
- (b) \$17,680.95 (being \$18.90 gross per hour) for the 935.5 hours she worked over the period 1 April to 18 November 2020.

[117] Mrs Tua should also have been paid \$1,686.35 gross annual holiday pay in addition to the minimum wage, which was 8% of her \$21,079.35 gross minimum wage.

[118] Mrs Tua's total gross earnings should therefore have been \$22,765.70, as per her employment agreement and in accordance with her minimum entitlements under the MWA and Holidays Act 2003.

[119] Because Mrs Tua's total contractual earnings of \$4,350 (being \$4,250 for work she had completed plus \$100 for two student withdrawals) were considerably less than the minimum wage she had to be paid for each hour she worked, this amount had to be 'topped up, in order for Gold Star to comply with its obligations under the Minimum Wage Act 1983 (the MWA).

What should Mrs Tua have been paid during her employment?

Students withdrawn from the course

[120] Mrs Tua was entitled to \$100 for the two students that the school had withdrawn from the course (paid at the rate of \$50 per student, as per her employment agreement).

Students she had assessed who completed their course

[121] Mrs Tua was only contractually entitled, under the payment of wages clause in her employment agreement, to have been paid a total of \$4,250 (being \$250 for 17 students she had assessed) for each “*course completed per student.*”

Minimum wage ‘top up’

[122] Mrs Tua was entitled to be paid an extra \$16,729.35 under the minimum wage provision in her employment agreement to ensure compliance with the MWA.

[123] The recovery of wages claim needed to reflect that statutory and contractual adjustment, which Gold Star had failed to account for.

KiwiSaver contributions

[124] Although Mrs Tua claimed she should have been paid 3% of her gross earnings as the Compulsory Employer Contribution (CEC) to KiwiSaver, her employment agreement provided for a total remuneration approach to the CEC. Employer contributions were to be deducted from her base wages, so were not paid in addition to it.

Amount Mrs Tua should have been paid

[125] Mrs Tua was paid \$38,030.19 gross wages when she was only entitled to be paid total gross wages of \$22,765.70 (being \$21,079.35 for hours worked plus \$1,686.35 holiday pay).

Has Mrs Tua been overpaid?

[126] Gold Star over paid Mrs Tua’s wages by \$15,264.84 gross, which included her holiday pay entitlements.

Can Gold Star recover the overpayment of wages it made to Mrs Tua?

Adverse impact on Gold Star

[127] The repercussions for Gold Star have been serious, beyond just the wages overpayment. Gold Star suffered the following adverse consequences:

- (a) Advance payment of wages of \$2,640 to Mrs Tua’s husband and son for assessment work that was not completed by them, so had to be remediated by Gold Star;

- (b) Payment of wages to Auckland staff to re-do assessments Mrs Tua had been responsible for;
- (c) Travelling and accommodation costs for Mrs Sa'ena-Brown to re-do or complete Mrs Tua's non-compliant assessments in Auckland;
- (d) Loss of business in Northland due to Mrs Sa'ena-Brown being occupied remedying student assessment problems in Auckland;
- (e) Costs and credibility issues with Front-line, the training organisation responsible for moderating and approving Gold Star's student assessments;
- (f) Loss of Auckland clients through non-performance;
- (g) Damage to Gold Star Training's reputation.

Impact on Mrs Tua

[128] Mrs Tua said that the advance wages payments were received by her in good faith and she materially changed her position as a result of being paid by Gold Star. Mrs Tua said she would suffer an injustice if she was required to repay the money in question, which would outweigh the injustice to Gold Star if its repayment request was denied. The Authority did not agree with that.

Unjust enrichment

[129] Mrs Tua was unjustifiably enriched by receiving the benefit of advance payments for piece work that she did not complete. Some of the deficiencies and compliance issues were so blatant that Mrs Tua, as an experienced and qualified Assessor, should have known the assessments she submitted were non-compliant with NZQA requirements.

[130] Gold Star has suffered financially and in other non-financial ways as a result of Mrs Tua's wrongdoing. It paid Mrs Tua for work she had not completed to the required standard, as well as having to pay others to remedy the non-compliant and defective assessments, so that students could complete their courses.

Equities of the situation

[131] The Authority considered that Mrs Tua was personally responsible for the assessment deficiencies that occurred. Mrs Tua knew she was not entitled to be paid if students did not

complete their course. The scale of the problems has been large, involving 114 out of 169 students. It would unjustly enrich Mrs Tua to allow her to retain the fruits of her wrongdoing.

[132] There were so many assessment deficiencies, many of which were so obvious, that it tended to suggest Mrs Tua had not come to the Authority with ‘clean hands’. That weighed against allowing Mrs Tua to remain unjustly enriched by an over payment of wages she had received.

[133] That was made clear to her by Gold Star in a number of communications (including the 3 September 2020 email, the 11 September email, the 11 September letter from Gold Star’s advocate, the email acknowledgement of 17 September 2020 and 18 September 2020 email, the 22 September 2020 meeting agenda and the 21 October 2020 dismissal letter.

[134] Mrs Tua’s argument that she had acted to her detriment by using the wages she had received did not succeed. She knew she would have to complete the work or return the payment. It was also a situation that Mrs Tua created and was in control of.

[135] Mrs Tua had been put on notice that Gold Star would seek to recover overpaid wages from her if she did not complete the work she had already been paid to do. She was given opportunities to address these deficiencies, and time to complete the work before her employment ended but failed to do so.

[136] The Authority considered that the circumstances of the over payment (which was a good faith gesture made at Mrs Tua’s request, and that solely benefited her) made it inequitable and unjust for her to retain that money. Gold Star’s repayment of wages claim succeeds.

Outcome

[137] Within 28 days of the date of this determination Mrs Tua is ordered to repay Gold Star \$15,264.84, being the overpayment of the ‘piece work’ wages she received for work she did not complete, so was not contractually entitled to be paid.

What, if any, costs should be awarded to the successful party?

[138] Gold Star as the successful party is entitled to an award of costs in its favour.

[139] The parties are encouraged to resolve costs by agreement. If that is not possible, then Gold Star has 14 days from the date of this determination to file a costs application and Mrs Tua has 14 days within which to respond.

[140] Costs will not be considered outside of this timetable, without the prior authorisation of the Authority.

[141] Costs are likely to be assessed in accordance with the Authority's notional daily tariff-based approach to costs. This matter involved a half-day investigation meeting, so the notional starting tariff for assessing costs will be \$2,250.

[142] The parties are invited to identify any factors they say should result in adjustments being made to the notional starting tariff, to reflect the particular circumstances of this case.

Rachel Larmer
Member of the Employment Relations Authority