

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 453
3319140

BETWEEN HAI ZHENG
 Applicant

AND JCD NZ LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: May Moncur, advocate for the Applicant
 George Zhang for the Respondent

Investigation Meeting: 4 April 2025 in Auckland

Submissions: From the Applicant on 7 April 2025 and from the
 Respondent on 29 April 2025

Determination: 28 July 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Hai Zheng applied to the Authority for a finding he had been unjustifiably dismissed from his employment as a sales assistant in a furniture store operated by JCD NZ Limited (JCD). Recently arrived in New Zealand, and working under an accredited employer work visa, Mr Zheng said JCD managers unfairly criticised his proficiency in English, failed to pay him properly and failed to provide him with ongoing work.

[2] Mr Zheng claimed JCD mistakenly thought he had resigned after he turned down an alternative role as a delivery driver. However, if he was taken to have resigned, Mr Zheng said this was caused by breaches of his terms of employment so was really a constructive dismissal, resulting from actions initiated by JCD.

[3] He sought remedies of lost wages, compensation for distress and penalties against the company for not paying him properly.

[4] JCD denied treating Mr Zheng unfairly. It said Mr Zheng attended a performance review meeting on 11 April 2024 where he was offered and accepted ongoing work as a sales assistant in three stores. It said Mr Zheng did not turn up for his next workday, instead sending a message that he had decided he needed to leave. It said the company accepted this message as Mr Zheng's resignation from his employment, which he later attempted to change.

[5] The company also said it had paid for 96 hours of work, based on timesheets from him. It later paid his wage arrears claim for a further 135 hours of work. It said this payment was only delayed because he had not provided necessary information earlier.

The Authority's investigation

[6] JCD director George Zhang attended an Authority case management conference on 26 November 2024 which set timetable directions for both parties to lodge witness statements and relevant documents. In the company's case the Authority called for witness statements from Mr Zhang and JCD's sales manager Francis Abreo. All witnesses were expected to attend an investigation meeting which was notified for 4 April 2025.

[7] Mr Zheng lodged his witness statement by the set date but did not provide some additional documents he referred to in that statement, until a follow up request from the Authority. He also lodged a document said to be a transcript of a recording of a phone conversation in September 2024 between him and a former manager of one of the JCD stores he had worked in. No audio file of the supposed recording was provided and no arrangements for that manager to give evidence were made. This meant the integrity of the supposed transcript, and the motivation for comments said to have been made in the conversation, could not be tested. I directed it be excluded from the investigation.

[8] Mr Zhang did not provide witness statements or documents by the directed dates. A week before the investigation meeting he sought its postponement so the company could seek representation and have more time to prepare documents. His request was declined as JCD had four months since the case management conference to make those arrangements.

[9] In the early hours of 4 April Mr Zhang provided some additional documents by attachment to an email. Those documents comprised WeChat messages about Mr Zheng that Mr Zhang had exchanged with two store managers. He asked to be told “the time and way for today’s meeting” and said he would attend on time. The notice of investigation meeting, with those details, had been sent to JCD some months earlier but an Authority officer rang him and confirmed the meeting time and location. Mr Zhang said he would be there by the appointed time of 10am but Mr Abreo would not attend. Mr Zhang arrived at 10.50am.

[10] During the investigation meeting which followed Mr Zheng and Mr Zhang answered questions from me and the parties had the opportunity to ask additional questions. Both men were assisted, where needed, by an interpreter of Mandarin arranged by the Authority.

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

The issues

[12] The issues for determination were:

- (a) Did JCD breach Mr Zheng’s terms of employment, including by failure to pay him the agreed hourly rate and by failing to pay all his holiday pay at the end of the employment?
- (b) Did Mr Zheng resign on 13 April 2024 and, if so, was this resignation caused by those breaches so that his employment ended by a constructive dismissal?
- (c) If JCD did act unjustifiably in its dealings with Mr Zheng, what remedies are available and should be awarded, considering:
 - Lost wages; and/or
 - Compensation under s123(1)(c)(i) of the Act?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Zheng that contributed to the situation giving rise to his grievance?
- (e) Is Mr Zheng owed any arrears of wages and holiday pay?

- (f) If JCD did breach the terms of the employment agreement (by not paying the agreed hourly rate) and the Holidays Act 2003 s 23 (by failure to pay all holiday pay at the end of the employment) should penalties be imposed and, if so, of what amount?
- (g) Should either party contribute to the costs of representation of the other party?

[13] In closing submissions Mr Zheng also sought a finding that Mr Zhang was a person involved in breaches of employment standards and, if that finding was made, a grant of leave under s 142Y(2) of the Act to recover any arrears ordered from Mr Zhang if JCD was unable to pay those amounts. This claim was not raised in Mr Zheng's statement of problem or at the investigation meeting so was not considered in the Authority's investigation. In light of the conclusions reached in this determination there were, however, no amounts of arrears to which the grant of leave sought could apply.

How Mr Zheng's employment relationship problem arose

[14] Travelling from his home province of Sichuan in southwest China, Mr Zheng arrived in New Zealand on 5 March 2024. He said he had paid an immigration agent in China 75,000 yuan (around NZD 17,500) to arrange his visa and employment with JCD.

[15] Mr Zheng was previously a college teacher and had most recently managed an information technology business, in which he was a shareholder. In his oral evidence Mr Zheng said he sought a job in New Zealand to experience business management in the western world and to explore prospects for schooling for his children here.

[16] Although during his oral evidence Mr Zheng said he believed JCD had received a portion of the agent's fee he had paid to secure a visa and a job in New Zealand, this allegation of payment of an illegal premium was not raised in his statement of problem or pursued in his closing submissions.¹ There was no evidence of any payment of any part of that fee to JCD or Mr Zhang.

Terms of the employment agreement

[17] Mr Zheng's employment agreement with JCD described his position as "retail

¹ Wages Protection Act 1983 s 12A.

sales” with a location at an address in Mount Wellington, Auckland, working for an hourly pay rate of \$29.66. A term of the agreement headed “Remuneration” said “Your pay shall be paid fortnightly by direct transfer into your nominated bank account”. Another term, headed “Place of Employment”, referred to the Mount Wellington address and said he was “required to work at this location, and at any other reasonable location as directed from time to time by the Employer”. A further term said he could also be “required to travel as reasonably necessary” for the performance of his duties.

[18] The terms of the accredited employer work visa issued to Mr Zheng by Immigration New Zealand on 30 January 2024 said “the holder may only work as Retail sales in Auckland for JCD NZ Limited” and “must be paid at or above \$29.66 an hour”.

Directed to work in Hamilton

[19] On the day he arrived in New Zealand Mr Zheng was directed to travel to Hamilton to work at a JCD store there.

[20] At the time JCD’s business operated through eight stores and a distribution centre under the trading name of Jory Henley. Four stores were operated directly by the company while others were leased to separate businesses.

[21] Mr Zhang said Mr Zheng was sent to Hamilton on his arrival in Auckland because an arrangement for a separate business to operate a JCD store under a lease had fallen through. Mr Zheng was sent there to help a JCD manager, referred to in this determination as Mr M, set up that store.

[22] Mr Zhang said Mr Zheng had agreed to go to Hamilton but Mr Zheng, in his later evidence to the Authority, said he did not know at the time of his arrival that Hamilton was outside the Auckland region and working there breached one of the terms of his visa.

Arrangements made for work in Auckland

[23] After four days in Hamilton Mr Zheng received a WeChat message from Mr Zhang. Mr Zhang’s message said he had talked to Mr M who reported that Mr Zheng’s command of English was “currently insufficient for handling a sale position”. They agreed to talk about work arrangements the following day, 11 March.

[24] Unknown to Mr Zheng Mr M had sent messages to Mr Zhang on 9 and 10 March complaining that customers in the store could not understand what Mr Zheng was saying. Mr M wrote that he thought Mr Zheng “might not be suitable for an English-speaking sales role”. Mr M, a Mandarin speaker whose WeChat message exchanges with Mr Zhang was written in Chinese, complained that Mr Zheng had “that really bad kind of English accent from back in China”.

[25] Mr M also complained that he thought Mr Zheng spent a lot of work time on his own personal matters. He said Mr Zheng “had a team of more than ten people in China so he’s always in contact with them about his business over there” and “his phone was constantly ringing and he kept replying to messages”.

[26] In his evidence Mr Zheng said he was no longer directly involved by that time in management of the business in China as that had been handed over to other shareholders. He also said there was only one occasion he took a business call during work hours and did so with Mr M’s permission.

[27] He also considered the criticism of his spoken English was unfair. Mr Zhang and JCD’s sales manager Francis Abreo had both spoken to Mr Zheng by telephone or video call before he came to New Zealand so had an opportunity to check his spoken English.

[28] Mr M had also heard some voice recordings which Mr Zheng was requested to send in late February, before his arrival in New Zealand. Mr M then sent him a message saying that “after listening to your introduction, the vocabulary is there”. On Mr Zheng’s pronunciation, Mr M’s message told him “we might need to adjust it later, especially for things like ChinEnglish” but said “overall, it’s ok”.

[29] Mr Zhang and Mr Zheng discussed Mr M’s criticisms on 11 March. Mr Zheng did not accept his English was not good enough for sales work but suggested he needed training to do a better sales job. They agreed Mr Zheng would return to Auckland. Mr Zhang sent Mr Zheng to work at the Wairau Park store, on Auckland’s north shore. The manager of that store is referred to in this determination as Ms A.

[30] From 13 March to 26 March Mr Zheng worked at JCD’s stores at Wairau Park and Albany. Shortly after starting at the Wairau Park store Ms A had Mr Zheng sign a training form, written in English. The form said he would not be considered an

employee of the business during that time, would not be paid and “may or may not be offered employment” at the end of the training.

[31] In his evidence Mr Zhang said Ms A’s actions in asking Mr Zheng to sign that particular form was a misunderstanding. He said that form was intended only for use with new job applicants who spent two or three hours in the store as part of an interview process. Mr Zhang said Ms A had mentioned asking Mr Zheng to sign a training agreement but he had left those arrangements up to her. He said he sent Mr Zheng to work at Ms A’s store as she was a top salesperson and he had told her to “train him good”.

[32] Unknown to Mr Zheng, Ms A sent Mr Zhang a message on 25 March asking about his plans for Mr Zheng. She said Mr Zheng’s English was “not good” and Mr Zhang should “let him go tomorrow, he doesn’t need to be in my store anymore”.

Communication about ongoing work arrangements

[33] On 26 March Mr Zheng contacted Mr Zhang by WeChat message. Mr Zheng said Ms A told him his training period had ended and he wanted to discuss the company’s arrangements for his future work. Mr Zhang responded with the query: “What position do you prefer for yourself?”. Mr Zheng replied he was “very eager to work in a sales position” and described sales he had recently made at the Wairau store. He also said Ms A had mentioned his “strong Sichuan accent when speaking English” and he was “paying special attention to it and making improvements every day”.

[34] Mr Zhang arranged for Mr Zheng to visit his office the following day, on 27 March. In that meeting, according to Mr Zheng’s evidence, Mr Zhang had talked about the prospects that Mr Zheng might want to invest in one of the company’s stores, or to look for a job with another employer, or to become a delivery driver in JCD’s central warehouse. According to Mr Zheng, Mr Zhang told him that he would not tell Immigration New Zealand about the end of his employment with JCD for three months if he looked for employment elsewhere.

[35] Mr Zhang denied that account. He said he told Mr Zheng about the negative feedback from his store managers but also told Mr Zheng he had not given up on him. He said Mr Zheng asked if there were other opportunities for him, which was how the subject of a delivery job came up, and it was Mr Zheng, not him, who raised the topic

of investing in a store. Mr Zhang accepted he had mentioned that Mr Zheng could apply for a job with another employer and, if he got one, his new employer could apply to have his visa transferred.

[36] On either account, no firm plans were agreed in that meeting. Discussion about Mr Zheng's future work continued by WeChat messages over the following days.

[37] On 28 March Mr Zheng asked Mr Zhang to arrange payment for his days worked in Hamilton. When Mr Zhang asked him to confirm the days and hours worked Mr Zheng replied he would "calculate it for you" and said his "bank card" had been activated on 27 March.

[38] WeChat messages show Mr Zhang asked the company's accountant on 1 April to proceed with payments to Mr Zheng and sent Mr Zheng's bank account number to the accountant. By that time Mr Zheng had been working for the company for more than three weeks and had not been paid.

[39] By 5 April no arrangement had been made for ongoing work for Mr Zheng. On that day Mr Zhang sent Mr Zheng a copy of a payment record, for \$845.75, and asked: "Why don't you try delivering goods as a truck assistant?"

[40] In messages then exchanged Mr Zheng asked if the 'truck assistant' position had a probation period, Mr Zhang replied it would have a three month probation period and Mr Zheng asked whether "the salary calculation" would be based on an hourly rate of \$29.66.

[41] Three days later, on 8 April, Mr Zhang asked Mr Zheng: "What is your decision about truck assistant?"

[42] Mr Zheng replied saying his response was delayed because he had been "looking for a house these past few days". He outlined three concerns. Firstly, he said his employment agreement with JCD made no reference to a three-month probation period. Secondly, he asked if the truck assistant role was temporary and he would be "let go" at the end of three months or whether it was "just a temporary transition period". Thirdly, he said the position had to be paid at the median wage in order for him to achieve his "main goal" of sponsoring his children to come to school in New Zealand.

He concluded by saying that if the job was not paid at that level “this position doesn’t make sense for me”.

[43] Mr Zhang did not answer Mr Zheng’s query about the pay rate for a delivery role. Instead he arranged for Mr Abreo to meet with Mr Zheng to talk about an ongoing sales role with JCD.

Agreement about future work in stores

[44] Mr Abreo met with Mr Zheng at JCD’s Wairau Park store on 11 April. A note Mr Abreo wrote of the meeting was headed “Performance Review – Minutes”.

[45] His note said Mr Zheng “had a few queries about his employment details etc”. Mr Zheng said that short sentence did not accurately record concerns he expressed to Mr Abreo about not being paid, by that time, all the wages he was owed and about how he had been treated by the company so far.

[46] Mr Zheng did, however, accept that the following passage of the Minutes accurately recorded what he and Mr Abreo had then agreed about ongoing work. The name “Ede” used in the note is the English first name used by Mr Zheng.

Ede has agreed as offered by Francis [Abreo] to work in 3 different stores (New Lynn, + Manukau + Wairau). This will be highly beneficial to Ede as he will get an exposure to work with customers from different demographics and also a great opportunity to learn from three different store managers and staff of three different stores.

Ede has agreed this is a performance-based role with responsibilities of minimal scale of achievements. He has been explained a definite sales target figure has not been given him but an average minimal achievement is expected.

Ede has also been conveyed Jory Henley has high regard for his capabilities and expect him to progress with a successful achievement.

...

Ede has also been given a sales code hence forward to be used to record his personal sale as well as a complete exposure to our POS system.

[47] The note ended: “Next performance meeting: on or around 3 May 2024”.

[48] On 12 April Mr Abreo sent WeChat messages to Mr Zheng giving him the address of the New Lynn store, contact details for the manager, a starting time of 9.30am for the next day, and a copy of his personal sales code so any sales he made would be recorded as made by Mr Zheng.

[49] Mr Zheng responded to those messages with an 'ok' emoji.

[50] An hour later Mr Zheng sent Mr Zhang a WeChat message. It thanked Mr Zhang for asking Mr Abreo to talk to him "about the company's arrangements" but then asked: "If I go to the New Lynn store, is it going to be paid?"

Email accepted as a resignation

[51] Mr Zhang did not reply to that message. Mr Zheng did not go to work at the New Lynn store the next day. Instead, Mr Zheng sent Mr Abreo the following message in the early morning of 13 April, written in English:

Hi Francis,
I'm so appreciate for your understanding. Although I want to work with you constantly, I have to make this decision that I need to leave Jory. I have only received one week's salary after I joined the Jory, and it will be very cruel for me if this is still a temporary arrangement without salary. Unfortunately the boss has not given me a clear reply so far. I wasn't sure how long the arrangement would last, so I have to make this decision. Please tell [name of New Lynn store manager] I'll not come to his store, thanks. Best wishes.

[52] Mr Abreo replied around half an hour later, again in English:

Hi Ede

We confirm receipt of your email.

This is to confirm we have accepted your resignation.

However and without prejudice we regret you leaving Jory Henley at an early stage of your employment with Jory Henley.

As far as your wages are concerned, please fill up the attached time sheet for the Days and Hours you worked and send it across to myself. Once received the same will be authorised and forward to our Accounts department for a final settlement.

We wish you the best in all your future endeavours.

Debate over resignation and pay issues

[53] Two days later Mr Zheng responded to that message, this time written in Chinese:

Dear Francis

Thank you for your detailed email. As English is not my native language, I am replying in Chinese to avoid any misunderstandings. I appreciate your understanding.

I would like to confirm whether this is the company's termination letter for me.

In my communication with my employer, I have clearly expressed that I do not agree with the company's decisions and arrangements. I do not accept being reassigned to a stock-related role with minimum wage and my employment includes a three-month probation period.

My intention has always been to work diligently in the company, contribute to its success, and become an outstanding furniture sales person. Therefore, I have been very willing to cooperate with the company arrangements. However I regret to say that I have repeatedly been treated unfairly under various pretexts.

Thus, I hereby made the following statements:

1. My working hours should not be determined by me.
2. The company should provide me with my payslips so that I can verify and correct my working hours and wages.
3. The company should pay me the wages that are due but have not yet been issued.
4. The company should compensate me for the rent expenses I incurred due to cooperating with its arrangements.
5. Until the above issues are resolved, I will not accept any other arrangements that treat me as free labour, nor will I report to work.

Additionally, I reserve all my legal rights as an employee.

[54] The following day, on 16 April, Mr Zhang sent this message to Mr Zheng, responding to his 12 April query about being paid if he went to the New Lynn store:

Hello, we would definitely pay your wages if you were working, but why did you refuse to reply to our email rejecting the roster we gave you? And did you say you resigned?

[55] Later that day Mr Zhang sent Mr Zheng a further message:

I understand that coming here hasn't been easy for you, and I also believe you can work hard to achieve the life you hope. I can help, communicate with me. With the roster we have scheduled you, if not coming, you need to let me know. However if there is nothing to align with your availability and plans, the roster will be adjusted. You didn't accept the arrangement we gave you. Let's confirm things tomorrow when we have a phone call.

[56] On 17 April the following messages were exchanged:

Mr Zheng: Mr Zhang, thank you for your response. I have explained everything clearly in the email. Out of trust in you and the company, and with the attitude of treating this job as my career ... At this point I can only first ensure my rights as an employee and recover the wages I am owed before discussing the company's future arrangements for me. Currently ... I only have enough money to pay rent, with no extra funds for transportation to various stores. Yesterday I wasn't feeling well and had a severe headache.

Mr Zhang: What do you think the company's salary should be? I asked Francis to arrange roster but why didn't you come to work. First you need to confirm and reply to us about your working hours. If there are no objections, the company will process your payment as soon as possible.

Mr Zheng: I've already replied to your email with the exact reasons.

Mr Zhang: Send me your working hours. Your email response stated that you initiated the resignation, and we have accepted it. Now, it's just a matter of final pay, correct?

Mr Zheng: Hello Mr Zhang, I was worried about any misunderstandings so I replied to the email in Chinese. You can check the email – I did not use the word 'resignation' so I was very surprised to receive a reply agreeing to my resignation. My requests are clearly stated in the Chinese letter. Please follow up on this. Thank you.

[57] Mr Zhang responded the following day that he was in communication with the company's lawyer and would get back to Mr Zheng as soon as possible.

[58] The next communication between them was an email from Mr Zheng, in English and sent on 30 April, after he got advice at a Community Advice Bureau. Mr Zheng said he wished to clarify his position and continued:

I did not resign from the company. I only wanted to say that I expect to be paid for the hours I have worked at the rate stated in my employment contract. I wish to continue to work at the company under the terms of my contract. Any suggestion that I am leaving the company voluntarily would be considered constructive dismissal.

I started work on March 6 2024 and have worked a total of 140 hours. Payment for those hours at my hourly rate of \$29.66 is \$4,152.4 gross. I have only received payment of \$845.74 to date.

[59] He ended the letter by saying he want to use the employment problem resolution provision in clause 25 of his employment agreement and asked for an urgent meeting with Mr Zhang.

[60] Mr Zheng and Mr Zhang met on 1 May but were unable to resolve their differences. In an exchange of messages following that meeting Mr Zheng said Mr Zhang knew he did not "mean to express resignation" so paying his outstanding wages "should not be considered as final pay". Mr Zhang responded: "The fact is that you did resign, and we accepted it". He said he would arrange Mr Zheng's final pay.

[61] Mr Zheng raised a personal grievance on 17 May 2024. The final payment of his outstanding wages, totally \$2,446.29, was not made until 26 June 2025, almost two full months after Mr Zhang had said, on 1 May, that he would arrange it.

Did the employment end by constructive dismissal?

[62] An extended account of the communication about work arrangements has been set out in this determination for the purpose, initially, of assessing Mr Zheng's claim that his employment with JCD ended through a constructive dismissal.

[63] In that scenario, his email on 13 April is taken as a resignation, accepted in Mr Abreo's reply that same day, and was not able to be retracted by the email Mr Zheng sent on 15 April.

[64] There is a second scenario. If the messages exchanged did not amount to a resignation and an acceptance, the employment relationship remained on foot, as Mr Zheng subsequently argued he had intended. On that argument, he had indicated he would not work until he was paid properly for work done to date but had not gone as far as saying that he would not work at all for the company.

[65] The scenario of constructive dismissal is considered first.

Principles of constructive dismissal

[66] The concept of constructive dismissal concerns circumstances where the employer's behaviour or other actions compels the employee to leave the employment. Such conduct, resulting in a resignation, is held in employment law to be as much a dismissal as if an employer had actually dismissed the employee. In each case the facts need to be examined to see if the employer's conduct clearly crossed the line from being inconsiderate and causing some unhappiness or resentment for the employee to becoming dismissive or repudiatory conduct that could reasonably be seen as enough to justify ending the employment relationship. If the employer's behaviour or other actions really caused the employee to take step by resigning, then the case is one of constructive dismissal.²

[67] If a breach of duty by the employer is said to have caused the resignation, all the circumstances of what happened have to be examined, not only the terms of notice

² *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cases 95 at 104.

given or whatever else the employee communicated in tendering her or his resignation. If the answer to the question about causation is yes, the next question is whether the employer's breach of duty was sufficiently serious to make a substantial risk of resignation reasonably foreseeable. This considers whether an employee would reasonably be prepared to keep working under such conditions.³

[68] In some cases the employer may say it did not intend the employment relationship to end and point to evidence it said so to the employee or to some other actions indicating they intended the employment relationship to continue. However if the employer's actions continued to breach fundamental terms of the employment agreement, or showed they did not intend to be bound by those terms, an employee may have grounds to treat the situation as a constructive dismissal even though what the employer has said or done does not look like an actual dismissal.⁴

[69] The evaluation of the breach, and its seriousness, is an assessment of fact and degree.⁵ The breach of duty must be, in some blameworthy or unreasonable way, destructive of trust and confidence in the employment relationship.⁶

Breaches of duty established

[70] The evidence established JCD had breached duties owed to Mr Zheng.

[71] It acted illegally by directing him to work in Hamilton, outside the region he was permitted to work under the terms of his visa.

[72] It failed to pay him any wages during the 20-day period from 6 to 26 March while he was working in JCD stores. By the end of the first fortnight, this failure was a breach of an express term of his employment agreement.

[73] It criticised his performance in relation to spoken English when Mr Zhang, Mr Abreo and Mr M each had opportunities to assess his communication capabilities before he started work and had not put in place any measures to assist him in improving his use of English. Having failed to adequately address those performance concerns, it

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415 (CA) at 419.

⁴ *Hwang v Boyne Company Ltd t/a Goodday Newspaper* [2004] 2 ERNZ 412 at [23].

⁵ *Spotless Facility Services NZ Limited v Mackay* [2016] NZEmpC 153 at [71].

⁶ See *Spotless*, above n 5, at [72].

pressed Mr Zheng to accept an alternative job in deliveries rather than sales, on terms which were unknown or different from those in his employment agreement and his visa.

No risk of resignation reasonably foreseeable

[74] On their own, those breaches of duty would be sufficiently serious to make the risk of resignation reasonably foreseeable. Up until 11 April it appeared JCD did not intend to be bound by the terms of the employment agreement to provide ongoing employment in a sales role at the agreed rate of pay.

[75] The circumstances had, however, changed by 11 April. JCD had not pursued the truck assistant options and, instead, confirmed an on-going sales role for Mr Zheng. Importantly, his own evidence confirmed he had agreed to that arrangement.

[76] There was an outstanding issue, of getting paid for the days he had already worked but the evidence did not support a conclusion that JCD did not intend to honour that obligation. What was holding up payments, which were overdue according to the terms of Mr Zheng's employment agreement, was details of the hours worked. Arguably, that was a responsibility of the company to clarify with store managers rather than require Mr Zheng to report but it did not show an intention to breach the fundamental obligation to pay him.

[77] On that reckoning Mr Zheng had a legitimate residual concern about getting paid but, given JCD had confirmed his ongoing sales role and Mr Zheng had accepted that arrangement by 11 April, it was not reasonably foreseeable he would resign, as it appeared to the company that he had done through his message to Mr Abreo in the early hours of 13 April.

JCD's actions did disadvantage Mr Zheng

[78] On the second scenario, that Mr Zheng had not in fact resigned on 13 April, the question then arose about how his employment came to end. The last day he had worked in a JCD store was on 26 March. Following the 11 April agreement on his ongoing work arrangements, he did not attend work as expected on 13 April.

[79] While there was an outstanding issue of pay due by that date, the failure to pay him was not, in the circumstances, a dismissal as the terms on which his employment would continue had been agreed. Rather, as Mr Zheng, said in his 15 April email he

had chosen not to “report to work” until his pay issues were resolved. His 30 April letter then said he wished to continue to work at the company, but he took no steps to do so. Ultimately the employment relationship ended at his volition. He did not have a personal grievance of unjustified dismissal.

[80] There were, however, prior breaches of duties owed to him. In all the circumstances, those breaches were unjustified disadvantages. A fair employer, acting reasonably, could not have:

- (i) failed to pay Mr Zheng’s wages at the end of his first fortnight of work, in breach of an express term of his employment agreement;
- (ii) failed to put in place measures to meaningfully address performance concerns from what company managers considered were shortcomings in his command and use of English; and
- (iii) compromised compliance with the terms of his visa by directing him to travel to work outside the permitted region, given Mr Zheng was new to the country and, as he said, did not know Hamilton was not part of the Auckland region.

[81] Mr Zheng’s evidence established that he was distressed and upset by each of those unjustified disadvantages. He was confused and fearful in a new job and new country in which he had lacked familiarity with his rights and had limited access to support. In light of that evidence, and considering the range of awards in similar cases, the sum of \$10,000 was an appropriate award of compensation for the humiliation, loss of dignity and injury caused to Mr Zheng’s feelings by JCD’s unjustified actions. JCD must pay him that amount within 28 days of the date of this determination.

Penalties

[82] By the time of the investigation meeting no arrears were due to Mr Zheng. On 26 June JCD had paid the outstanding amount due to him.

[83] On JCD’s own evidence, that it regarded its employment relationship with Mr Zheng had ended with his resignation on 13 April, there was therefore a delay of more than two months in paying wages and holiday pay due to Mr Zheng from that date. On 1 May Mr Zhang told him by email that he had arranged payment of Mr Zheng’s “final pay”. The amount due still took a further eight weeks to be paid.

[84] In those circumstances JCD was liable to a penalty for two breaches. Firstly, under s 134 of the Act, it had breached its employment agreement by not paying wages due to him each fortnight. Secondly, it breached s 23 and s 27 of the Holidays Act 2003 by not paying holiday pay at the time that Mr Zheng's final pay was due. On JCD's account of events, those payments were due from 13 April.

[85] Mr Zhang, in answer to questions at the Authority investigation, accepted JCD was liable to a penalty for those breaches.

[86] Having regard to the relevant matters in determining an appropriate penalty, JCD must pay a penalty of \$2,500 under s 134 of the Act for its breach of Mr Zheng's employment agreement and a further \$2,500 for its breaches of the Holidays Act.⁷

[87] The total of \$5,000 is an appropriate penalty for the following reasons.

[88] Firstly, JCD's actions were contrary to the objects of the Act to build productive employment relationships and for effective enforcement of employment standards.

[89] Secondly, the breaches arose from how JCD ran its business, and decisions it made about how to deal with Mr Zheng, not mere inadvertence or careless actions.

[90] Thirdly, JCD only took steps to resolve the outstanding payments after Mr Zheng raised a grievance, and even then delayed payment, so had not taken reasonable steps to mitigate the adverse effects on him.

[91] Fourthly, those effects were intensified by Mr Zheng's status in the country as a newly-arrived migrant worker, with limited knowledge and access to support.

[92] A higher penalty was not warranted given there was no information that JCD had been engaged in similar conduct in relation to other workers and considering, as a matter of proportionality, the period of time and amounts involved in the breaches.

[93] The penalty is a sufficient deterrent to both this particular employer, and employers generally, from breaching their contractual and statutory duties to employees.

⁷ Employment Relations Act 2000, s 133A.

[94] As part of this penalty relates to a breach of Mr Zheng's agreement, the sum of \$2,000 is appropriately directed to him from the \$5,000 which is to be recovered from JCD.

[95] Accordingly, JCD must pay a penalty of \$5,000 to the Authority by no later than 28 days from the date of this determination. On recovery, the sum of \$2,000 is to be paid to Mr Zheng. The remainder of \$3,000 is to be paid by the Authority to a Crown Bank Account.⁸

Summary and orders

[96] JCD breached duties owed to Mr Zheng. His purported resignation did not amount to a constructive dismissal because JCD had already taken steps to address his concerns and his resignation, in those circumstances, was not reasonably foreseeable.

[97] JCD's actions did however disadvantage Mr Zheng. For the personal grievance of unjustified disadvantage, JCD must pay Mr Zheng \$10,000 as compensation under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

[98] JCD must also pay a penalty of \$5,000 for breaches under s 134 of the Act and s 23 and s 27 of the Holidays Act 2003. The penalty must be paid to the Authority within 28 days of the date of this determination.

[99] On recovery of the penalty, the sum of \$2,000 is to be paid to Mr Zheng. The remainder of \$3,000 is to be transferred by the Authority to a Crown Bank Account.

Costs

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

[101] If they are unable to do so, and an Authority determination on costs is needed, Mr Zheng may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, JCD would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

⁸ Employment Relations Act 2000, s 136.

[102] The parties could expect the Authority to determine costs, if asked to do so, on its usual daily rate of \$4,500 for this one-day investigation meeting, unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹

Robin Arthur
Member of the Employment Relations Authority

⁹ See www.era.govt.nz/determinations/awarding-costs-remedies.