

NOTE: This determination contains an order at paragraph [1] prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 264
3173762

BETWEEN JASMINE CATERING LIMITED
Applicant

AND ZHENG WANG
Respondent

Member of Authority: Rachel Larmer

Representatives: Martin Lyttelton advocate for the Applicant
David Kim advocate for the Respondent

Investigation Meeting: 17, 18 and 19 January 2023 at Auckland

Submissions and Other Information Received: 31 January 2023 from Applicant
1 February 2023 from Applicant
28 February 2023 from the Respondent
30 March 2023 from the Applicant

Date of Determination: 25 May 2023

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] The Authority has issued a non-publication order in accordance with clause 10(1) of Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting the publication of Jasmine Catering Limited's (Jasmine Catering's) financial information that was filed in support of this counterclaim. This is subject to the conditions that it does not apply to:

- (a) The content of this determination;
- (b) The employment institutions; or

- (c) Jasmine Catering Limited.

Undertaking

[2] Mr Kim provided a written undertaking dated 16 January 2023 that said he would only use the financial information provided by Jasmine Catering for the purposes of the Authority's investigation and not for any other reason.

[3] Mr Kim also undertook that he would not provide Mr Wang with his own copy of Jasmine Catering's financial information, but would instead show it to him in his (Mr Kim's) presence, for the purposes of taking instructions.

Employment relationship problem

The parties

[4] Jessie Bo is the sole director of Jasmine Catering. She runs the business and therefore ultimately in charge of the restaurants which Jasmine Catering runs. The Head Chefs report to her.

[5] Jasmine Catering owns and operates two restaurants;

- (a) Paradish in Karangahape Road ("*K-Road*"), Newton Auckland; and
- (b) Chong Qing Cuisine in Lorne Street, Auckland City.

[6] Jasmine Catering employed the Respondent, Mr Zheng Wang as a chef from 7 September 2015 until he resigned on 16 January 2017.

[7] Mr Wang initially worked at Paradish restaurant in K-Road while the Chong Qing restaurant was being renovated. Around mid-February 2016, he was transferred by Ms Bo to work full time at Chong Qing Cuisine restaurant in Lorne Street, Auckland.

[8] Although Mr Wang was qualified and employed as a chef, he worked at the Lorne Street restaurant chopping vegetables and doing other activities. Ms Bo told the Authority that she had intended to start having Mr Wang doing the stir frying work as a chef at the Lorne Street restaurant when he returned from leave on 16 January 2017. However, she had not told him that before his resignation.

Mr Wang's annual leave

[9] On 18 December 2016, Mr Wang told Ms Bo that he had a family issue to deal with (his father was unwell) so he wanted return to China at short notice from 20 December 2016 to 15 January 2017.

[10] Mr Wang had accrued annual holiday that he had not used. Ms Bo reluctantly agreed he could have that time off, but she got him to promise he would be back to start work on 16 January 2017.

[11] Mr Wang agreed to that. However, he did not tell Ms Bo that he had obtained a visa to start another job in early February 2017.

Mr Wang's resignation

[12] Instead of returning to work on 16 January 2017, as promised, Mr Wang unexpectedly resigned without notice via WeChat in the very early hours of the morning.

[13] Ms Bo and Mr Wang are both Mandarin speakers, with English as their second language. The WeChat messages the Authority has quoted from were English translations of the messages that were exchanged in Mandarin between Ms Bo and Mr Wang.

[14] Mr Wang's first WeChat message said that he would not be returning to work because he had family issues in China to attend to. He again failed to mention his new job.

[15] Mr Wang sent his resignation to Ms Bo at 1.54 am NZT on 16 January 2017. Ms Bo was up with a sick child so she saw his WeChat message soon after.

[16] Mr Wang's WeChat resignation said: "*Sister, I'm sorry to bother you, something has happened in my family now that I don't want to happen, so I can't continue to work now, I'm really sorry!*"

[17] Next message: "*My father is recovering from his illness. After I come back, my wife and I often quarrelled, which led to the divorce now.*" A further message he sent at 2:02 am on 16 January 2017 said, "*The children are in my care, and the mother at home cannot take care of them*".

[18] Ms Bo replied: "*In your situation, why did you go abroad in the first place?*"

[19] She then sent a second message at 2.05 am on 16 January 2017 that said: “*When you left work, the work was not handed over, and now you suddenly tell me. How can I solve it?*”

[20] Mr Wang did not reply to Ms Bo’s messages. Ms Bo also tried to call Mr Wang twice. However he did not answer and Ms Bo said he blocked her on WeChat while he claimed he did not see her response.

Did Mr Wang block Ms Bo from communicating with him?

[21] Ms Bo said that she was blocked on WeChat by Mr Wang. Although he denied that, the Authority accepted it was more likely than not that she had been blocked.

[22] Ms Bo had been attempting to communicate with Mr Wang about his failure to return to New Zealand, without success. It is likely that Mr Wang wanted to move on and not have any interaction with her. He had a new job to go to as soon as he got back to New Zealand, so he was not interested in working for Jasmine Catering.

[23] The Authority therefore accepted Ms Bo’s evidence that she got a popup box that said she had been blocked, when she attempted to follow up with Mr Wang after he did not reply to her messages.

Mr Wang’s new job

[24] In October 2016 Mr Wang obtained a new job with another restaurant in Auckland. On 20 October 2016 he applied for a variation to his work visa, to enable him to work for this new employer. Immigration New Zealand (“INZ”) had issued him with his new work visa on 28 November 2016 however, Mr Wang did not tell Ms Bo anything about this development.

[25] Mr Wang returned to New Zealand on 7 February 2017 and he started his new job on either 8, 9 or 10 February 2017. He did not tell Ms Bo that he was back in Auckland.

Chong Qing restaurant was closed

[26] The Lorne Street restaurant was closed over from 2 to 15 January 2017 for a New Year break.

[27] Jasmine Catering said that it was expecting Mr Wang to return to work on 16 January 2017 as it was relying on him to run the kitchen at the Chong Qing Cuisine restaurant in Lorne Street.

[28] Jasmine Catering claimed that Mr Wang's unexpected resignation without notice, caused it to have to close the restaurant from 16 January to 7 February 2017 because it had no chefs available to prepare food for customers.

Mr Wang's wage arrears claim

[29] On 4 April 2022 Mr Wang lodged a wage arrears claim against Jasmine Catering. On 30 May 2022 Jasmine Catering lodged this counterclaim against Mr Wang.

Jasmine Catering's counterclaim

[30] Jasmine Catering said it had to close the restaurant and its counterclaim Statement of Problem sought to recover lost profits of \$2,000 per day from Mr Wang, for 29 days which it said amounted to recoverable damages of \$58,000. The Authority noted the restaurant was not closed for 29 days after Mr Wang resigned.

[31] Jasmine Catering sought that interest be paid on that amount and it wanted a penalty imposed on Mr Wang for his breach of the employment agreement. It also sought that Mr Wang pay the costs of an expert's fees associated with calculating these losses.

[32] Jasmine Catering's Statement of Problem said that it had to close down "*Paradish BBQ restaurant*" as a result of Mr Wang's failure to give contractual notice.

Mr Wang's response to counterclaim

[33] In his Statement in Reply to the counterclaim Mr Wang pointed out that he had never worked for the Paradish BBQ Restaurant in Lorne Street. The "*Paradish BBQ restaurant*" that Jasmine Catering previously owned and operated was run from the same address as the Chong Qing Cuisine restaurant.

[34] However, the Paradish BBQ restaurant had closed down before Mr Wang was employed by Jasmine Catering, so he had never worked there. It was replaced by Chong Qing Cuisine restaurant, which opened on 21 September 2015 on the same site.

Employment agreement

[35] Although Mr Wang worked at Chong Qing Cuisine in Lorne Street from early February 2016, his employment agreement was not updated to reflect that change of work location.

[36] Mr Wang said that he had been employed under an employment agreement that was signed by the parties on 13 July 2015 to work as a chef “*at the Paradish restaurant that was located at 582 Karangahape Road, Newton, Auckland*”.

[37] Mr Wang referred the Authority to the locality clause which was the second clause of the First Schedule of his employment agreement, which recorded the K-Rd restaurant location as the location of his employment.

Authority’s investigation

[38] The Authority held an in-person investigation on 17, 18 and 19 January 2023 in Auckland. Mr Wang’s original wage arrears claim and this counterclaim were investigated at the same time.

[39] During this investigation meeting, Mr Wang gave evidence and one of his witnesses, Daibo Duan (a former employee of Jasmine Catering who had also worked at the Lorne Street restaurant with Mr Wang), gave evidence by telephone, for health reasons.

[40] Ms Bo gave evidence and so did Fubin Liu, who was the former Head Chef at Chong Qing Cuisine restaurant in Lorne Street. Mr Liu had resigned from his role there in or around October 2016 and his employment apparently ended in November 2016.

[41] After the investigation meeting, the Authority asked Jasmine Catering’s accountant Xinyue (Fiona) Zhang to provide further financial information about the counterclaim. She filed an affidavit on 31 January 2023. Mr Wang was given an opportunity to respond to the accountant’s information, but did not do so.

[42] Both parties filed written submissions after the investigation meeting.

[43] The Authority issued its determination on the wage arrears claim the same day as this counterclaim determination.¹

Issues

[44] The following issues to be determined are:

- (a) Did Mr Wang breach the notice provisions in his employment agreement?

¹ *Wang v Jasmine Catering Limited* [2023] NZERA 263.

- (b) If so, did that breach cause Jasmine Catering to suffer loss?
- (c) If so, can Jasmine Catering recover some or all of that loss as damages from Mr Wang for the failure to give contractual notice?
- (d) If so, has the loss been appropriately quantified?
- (e) If so, what if any damages should Mr Wang be required to pay Jasmine Catering?
- (f) What if any costs and disbursements should be awarded?

Did Mr Wang breach the notice provisions in his employment agreement?

[45] Clause 7 of the First Schedule of Mr Wang's employment agreement required him to give one month's notice. That did not occur.

[46] If Mr Wang had given the required contractual notice, Jasmine Catering would have required him to work out his notice period. In which case, his last day of work would have been 16 February 2017.

[47] Mr Wang clearly breached the notice provisions in his employment agreement. Instead of giving the required one month's contractual notice, he resigned without notice. He likely did that because he wanted to start his new job in early February 2017.

Did Mr Wang's breach of his employment agreement cause Jasmine Catering to suffer loss?

Chong Qing closed

[48] Jasmine Catering says that it had to close the Lorne Street restaurant because Mr Wang did not return to work as expected on 16 January 2017.

[49] The Authority accepted that the Lorne Street restaurant was closed, but it was not prepared to find that the closure was due to Mr Wang's without notice resignation.

Offer of alternate chef

[50] Ms Bo said that when she found out that Mr Wang would not be returning to work, she contacted the recruitment agency who had referred Mr Wang to her in the first place. They offered to send her another chef, which she did not follow up on. Ms Bo said she did not pursue that offer because she was very angry.

Other chefs employed by Jasmine Catering

[51] Jasmine Catering normally had four chefs working at the Lorne St restaurant. It also normally had five chefs working at its Paradish restaurant in K-Rd. Each restaurant offered different Chinese cuisine. The K-Rd restaurant had Cantonese food and the Lorne St restaurant had Sichuan and Northeast China Dongbei dishes.

[52] When Mr Wang went on annual leave on 20 December 2016, Jasmine Catering only employed Wingde Wu, Mr Duan and Mr Wang as chef's at the Lorne St restaurant. Mr Wu was on approved leave from 12 January 2017 until 7 February 2017. Mr Wu was on approved leave from 2 January to 7 February 2017, being overseas and therefore unable to return to cover Mr Wang's absence.

[53] Because the Head Chef, Fubin Liu, had resigned in October 2016, he was not an employee in January 2017, so he was not available to cover Mr Wang's absence. Another female part time chef had finished her employment in December 2016

Mr Wang's role

[54] Mr Wang worked at the Lorne Street restaurant from around mid-February 2016. Although he was employed as a chef, the evidence the Authority heard was that he did not actually cook food but would instead just do vegetable chopping and getting produce ready and other preparation type work, as well as cleaning duties.

[55] Ms Bo said that she intended to promote Mr Wang to being a chef that cooked the food when he got back in January 2017, but the Authority noted she had not advised him of that before he went on his annual leave in December 2016.

Causal link not established

[56] The Authority was not satisfied that Jasmine Catering had proved, to the required standard, the necessary causal link between Mr Wang's breach of his employment agreement (the failure to give contractual notice) and the closing of the Lorne Street restaurant.

[57] It appeared to the Authority that Jasmine Catering had not sufficiently staffed the restaurant. The former Head Chef, Fubin Liu, had left in November 2016, and another female part time chef left in December 2016. Chef Mr Duan was available to work in January and February 2017. Mr Duan disputed that the restaurant had to close because Mr Wang had not returned from his annual leave.

[58] That was a decision that Jasmine Catering made. However, it obviously affected the number of chefs who were available to work from 16 January to 7 February 2022.

[59] Mr Wu, who had taken over as Head Chef after Mr Lui left, had been given one month's leave. So it was that, combined with failure to employ a sufficient number of chefs after Mr Liu left, that created the situation where Jasmine Catering believed it was unable to open the Lorne Street restaurant in Mr Wang's absence.

[60] Jasmine Catering also ran the Paradish restaurant in K-Road. Although Ms Bo said that she was unable to move chefs from that restaurant to Lorne Street in order to be able to open it, particularly because of the busy Chinese New Year period, the Authority did not accept that evidence. There were four or five chefs at K-Rd, so one could have worked at Lorne St from 16 January 2017 to 7 February 2017.

[61] The Authority considered that if Jasmine Catering had wanted to open between 16 January and 7 February 2017, then it would have been able to, by either moving a chef from the Paradish K-Road restaurant to work at the Lorne Street restaurant, by hiring a temporary chef, or by accepting the recruitment agency's offer of a replacement chef to work at the Lorne Street restaurant.

[62] Even if the causal link had been established (and it was not), these factors would have created a situation where Jasmine Catering was unlikely to have been able to establish it had taken appropriate or necessary steps to mitigate any loss it was claiming.

[63] Another problem with establishing the required evidential causal link between the breach and alleged loss was that Mr Wang's employment agreement recorded his location of work as being at the K-Road restaurant. Although he actually worked at the Lorne Street restaurant, his employment agreement had not been updated to reflect that.

[64] The Authority does not consider Mr Wang can be held in breach of contract for not attending work at the Lorne Street restaurant from 16 January 2017 to 7 February 2017, when that was not an express term or condition of his employment.

[65] Employers are required under s 65(2)(a)(iii) of the Act to provide an indication of where the employee is to perform the work in the written employment agreement that the employee must be provided with, in accordance with ss 63, 64 and 65 of the Act.

[66] Jasmine Catering did not discharge its responsibility in this regard, because it failed to ensure Mr Wang's employment agreement contained accurate information about his work location.

[67] Accordingly, Jasmine Catering's counterclaim against Mr Wang does not succeed.

What if any costs should be awarded?

[68] Mr Wang as the successful party is entitled to a contribution towards his actual legal costs. The parties are encouraged to resolve costs by agreement. However, if that was not possible, then the Authority will determine costs for this counterclaim matter at the same time it determines costs on Mr Wang's originating wage arrears claim under AEA3169302.²

[69] A timetable has been set for the filing of costs in Mr Wang's wage arrears matter, so that same timetable applies to the assessment of costs for this counterclaim. The parties should therefore file one costs submission, that addresses costs on both matters.

[70] Costs will be determined as a whole for both matters because it would be artificial to split the costs between two separate costs determinations, because the same parties and witnesses were involved in the three day investigation meeting and Mr Wang was the successful party in both matters.

[71] The Authority therefore intends to issue one costs determination, that assesses costs in favour of Mr Wang, based on a three day investigation meeting. The notional starting point for assessing costs is therefore \$11,500 (being \$4,500 for first day, then \$3,500 for subsequent days).

[72] The parties should identify any factors that should result in adjustments being made to that notional starting point, in order to reflect the particular circumstances of these two matters. Mr Huang's costs submissions are due by 8 June 2023 and Jasmine Catering's submissions are due by 22 June 2023. No costs submissions will be considered outside this timetable, except with the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority

² Above n1.