

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 474  
3194419

BETWEEN                      A LABOUR INSPECTOR  
Applicant

AND                              XIAN ZENG  
Respondent

Member of Authority:        Shane Kinley

Representatives:             Michelle Brown, Counsel for the Applicant  
No appearance for the Respondent

Investigation Meeting:      On the papers

Submissions and further     From the applicant up until 18 July 2024  
information:

Determination:                08 August 2024

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] LGF<sup>1</sup> was employed by New Zealand LJ Food Express Taupo Limited trading as No 1 China Restaurant - In Liquidation (the Restaurant) from March 2019 until May 2021. In November 2021 a complaint was raised on LGF's behalf that the Restaurant had failed to pay LGF annual holiday pay on the ending of his employment and public holiday entitlements had not been provided. A subsequent claim was made that LGF had not been paid the minimum wage for all hours worked.

---

<sup>1</sup> Four individuals are identified in this determination by randomly generated identifiers, which bear no resemblance to their actual names. The four individuals include the complainant, his daughter and two other workers at the Restaurant as identified at paragraph [5]. I do not consider there is public interest in disclosing the names of the four individuals.

[2] LGF's complaints were investigated by a Labour Inspector, Monica Wotherspoon, who raised claims with the Authority in October 2022 that the Restaurant had failed to pay minimum wages to LGF and had failed to provide entitlements under the Holidays Act 2003 to LGF. The Labour Inspector sought recovery of arrears due to LGF from the Restaurant and the imposition of penalties on the Restaurant.

[3] The Labour Inspector also raised claims that Xian Zeng, the sole director and shareholder of the Restaurant, was a person involved in breaches of employment standards by the Restaurant. To the extent the Restaurant was unable to pay the arrears claimed from it, the Labour Inspector sought to recover those arrears from Mr Zeng and the imposition of penalties on Mr Zeng.

[4] The Restaurant was placed in liquidation in November 2022 and the liquidators have not consented to allow the Labour Inspector's claims to be continued against the Restaurant. As a consequence the Labour Inspector lodged an amended Statement of Problem on 7 February 2023 in relation to the claims against Mr Zeng only. This determination addresses those claims.

### **The Authority's investigation**

[5] For the Authority's investigation written witness statements in the form of affidavits were lodged for the Labour Inspector by Ms Wotherspoon, the complainant LGF, his daughter MZB and NGW, another employee of the Restaurant. Submissions were also provided on behalf of the Labour Inspector. The Labour Inspector was unable to obtain an affidavit from GDL, another employee of the Restaurant, as they were not currently in New Zealand and relied on a written witness statement which had been filed for GDL.

[6] This matter first came before the Authority for an initial case management conference by telephone on 11 April 2023 with counsel for the Labour Inspector present. An Authority Officer attempted to call Mr Zeng on the contact phone number provided for him but he did not answer the call. As I was satisfied Mr Zeng had been advised of the time of the conference, it proceeded in his absence, as he had been advised it would. At the initial conference I timetabled for Mr Zeng to apply for leave to file a statement in reply as he had not engaged with this matter. I also made timetable directions for witness statements to be lodged and served, and an investigation meeting

was set down if required in August 2023. Mr Zeng did not respond to those directions and did not seek leave to file a statement in reply.

[7] Counsel for the Labour Inspector lodged witness statements as directed in May 2023. When those witness statements were unable to be served on Mr Zeng, the Labour Inspector filed an application for substituted service pursuant to r 16(1), 16(3)(a)(ii) and (iv) of the Employment Relations Authority Regulations 2000 on 17 November 2023. Following correspondence with counsel for the Labour Inspector, I approved the application for substituted service on 1 February 2024 and directed service be effected by email and to an alternate physical address.

[8] Counsel for the Labour Inspector advised on 22 February 2024 substituted service had occurred by way of an email Mr Zeng had previously used to correspond with the Labour Inspector, although there had been no reply or acknowledgement to that email. Substituted service in person at an address associated with Mr Zeng<sup>2</sup> had not been successful and there was no adult present at that address on three occasions when substituted service was attempted.

[9] I am satisfied substituted service has occurred and reasonable efforts have been made to ensure Mr Zeng is aware of these proceedings.

[10] A second case management conference was scheduled and occurred on 8 March 2024 by telephone with counsel for the Labour Inspector present. An Authority Officer again attempted to call Mr Zeng on the contact phone number previously provided for him but he did not answer the call and there was no apparent facility to leave a message. I am satisfied Mr Zeng had been advised of the time of the conference, so it proceeded in his absence, as he had been advised it would.

[11] At the second conference I timetabled for this matter to be investigated on the papers in the absence of an objection from Mr Zeng by 22 March 2024 and for affidavit evidence from the Labour Inspector and their witnesses, and submissions on behalf of the Labour Inspector to be lodged and served. As Mr Zeng has not engaged with this

---

<sup>2</sup> Mr Zeng appears to have a number of addresses for service in relation to companies he is a shareholder or director of listed on the Companies Register, however, he has not been able to be contacted at any of those addresses. I am satisfied the address selected for substituted service was appropriate and is connected to Mr Zeng.

matter I have determined it based on the evidence and submissions provided on behalf of the Labour Inspector, which were received on 24 April 2024.

[12] I requested on 4 July 2024 the Labour Inspector comment on two questions I had about the calculation of their claims for annual holiday pay and arrears of minimum wages due to LGF from the Restaurant. On 17 July 2024 comment was also requested about whether the issuing of an updated liquidator's report for the Restaurant impacted on the claims against Mr Zeng. At the same time Mr Zeng was advised he had one week to comment on any response for the Labour Inspector. Counsel for the Labour Inspector provided responses to my queries on 17 and 18 July 2024. Mr Zeng did not respond so this determination has been finalised, as he was advised it would be.

[13] 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**

[14] The issues requiring investigation and determination are:

- a. Does the Restaurant owe LGF unpaid annual holiday pay, public holiday entitlements and unpaid wages, which are breaches of employment standards as defined in s 5 of the Act?
- b. Is Mr Zeng a person involved in breaches of employment standards due to LGF under s 142W of the Act?
- c. If so, should:
  - (i) an order be made to recover unpaid annual holiday pay, public holiday entitlements and minimum wage arrears under s 142Y of the Act and for what amounts;
  - (ii) interest be awarded; and
  - (iii) a penalty be imposed under s 142X of the Act?
- d. Should either party contribute to the costs of representation of the other party?

### **Does the Restaurant owe LGF unpaid annual holiday pay, public holiday entitlements and unpaid wages?**

[15] I find based on submissions for the Labour Inspector and the evidence contained in affidavits and documents submitted by the Labour Inspector (as described in

paragraph [5]) the Restaurant owes LGF unpaid annual holiday pay, public holiday entitlements and unpaid wages. My reasons for this finding follow, including the amounts I consider are due to LGF.

[16] I am satisfied the Labour Inspector sufficiently investigated the complaint raised on behalf of LGF, including the following steps:

- a. The complaint was received in November 2021 with initial contact made by the Labour Inspector with MZB in December 2021 to clarify some details and seek supporting documentary evidence from LGF;
- b. On 26 January 2022 the Labour Inspector (with two colleagues) visited the Restaurant, its manager GDL and another employee<sup>3</sup> were interviewed, and some records were provided to the Labour Inspector by GDL;
- c. During their visit the Labour Inspector requested further records be provided by the Restaurant or Mr Zeng, with the request emailed to Mr Zeng on 28 January 2022;
- d. The Labour Inspector interviewed LGF on 14 February 2022 and NGW on 21 February 2022, and obtained records from LGF and NGW in February 2022;
- e. Between 8 February 2022 and 1 July 2022, the Labour Inspector attempted to engage with GDL, the Restaurant and Mr Zeng to obtain records and to arrange an interview with Mr Zeng. While Mr Zeng replied to emails in February and May 2022, he did not provide any records or respond to requests for an interview. Mr Zeng was in China for the whole of this period;
- f. The Labour Inspector provided their investigation report to the Restaurant and Mr Zeng on 1 July 2022 identifying breaches of employment standards by the Restaurant and advising they considered Mr Zeng was a person involved in breaches of employment standards. Comments and supporting evidence were requested by 15 July 2022;
- g. Mr Zeng was in email contact with the Labour Inspector in July and August 2022, and was interviewed by the Labour Inspector on 26 August 2022 after he had returned to New Zealand. GDL was also

---

<sup>3</sup> No evidence was provided from this employee, although notes were provided from their interview. As a witness statement was not provided from them, I have not relied on their interview notes.

interviewed again by the Labour Inspector on 15 August 2022. The Labour Inspector put comments from Mr Zeng to LGF for response on 19 September 2022; and

- h. The Labour Inspector issued an amended investigation report to the Restaurant and Mr Zeng on 22 September 2022, for response by 3 October 2022. No changes were made to the Labour Inspector's earlier findings in relation to breaches, arrears claimed or the finding Mr Zeng was a person involved in breaches of employment standards.

[17] The Labour Inspector's report found breaches and claimed arrears for the following reasons:

- a. Based on Mr Zeng's concession the Restaurant had not paid LGF annual holiday pay when LGF's employment ended, and LGF and GDL's initial evidence that LGF had taken no leave, the Labour Inspector found LGF was entitled to eight weeks' annual holiday pay plus 8% of gross earnings since LGF last became entitled to annual holidays. Mr Zeng said the Restaurant was willing to pay annual holiday pay due but that has not occurred. The Labour Inspector initially claimed \$12,664.36 for the Restaurant's failure to pay annual holiday pay under ss 24, 25 and 27 of the Holidays Act 2003 (HA2003). The calculation of annual holiday pay is discussed further at paragraphs [24] to [28] below;
- b. Based on LGF, GDL and Mr Zeng's evidence, and a review of customer reviews on ratings websites which supported the Restaurant being open on public holidays, the Labour Inspector found LGF had worked on 23 public holidays. No evidence was provided of extra pay to LGF for having done so and Mr Zeng was unaware of the obligation to provide alternative holidays. The Labour Inspector initially claimed \$1,379.98 for the Restaurant's failure to pay time and a half when LGF worked on public holidays in breach of s 50 of the HA2003 and \$2,875 for the Restaurant's failure to provide alternative holidays when LGF worked on public holidays in breach of ss 56 and 60 of the HA2003;
- c. Based on LGF's final date of employment, the Labour Inspector found LGF was entitled to be paid for one public holiday (Queen's Birthday 7 June 2021) which LGF had not worked. The Labour Inspector initially

claimed \$125 for the Restaurant's failure to pay for an unworked public holiday in breach of s 40 of the HA2003; and

- d. Based on LGF, GDL and NGW's evidence, supported by LGF's employment agreement with the Restaurant, the Labour Inspector found LGF had worked for the Restaurant for 52.5 hours per week, but had only been paid for 40 hours per week. The Labour Inspector initially claimed arrears of \$24,316.25 for the Restaurant's failure to pay minimum wages for those hours in breach of s 6 of the Minimum Wage Act 1983 (MWA). While Mr Zeng challenged the calculation of hours worked, he provided no evidence to support his challenge and his points were refuted by LGF and MZB. The calculation of minimum wage arrears is discussed further at paragraphs [31] to [36] below.

#### *Relevant law*

[18] The Labour Inspector's submissions said I should apply s 132 of the Act and s 83 of the HA2003 to accept as proved, in the absence of evidence to the contrary, claims made by LGF about wages paid to LGF, hours, days and times worked by LGF, holiday payments made to and holidays or leave taken by LGF, because Mr Zeng had advised the Restaurant did not keep formal records.

[19] Section 132 of the Act and s 83 of the HA2003 shift the burden of proof to the employer to show, on the balance of probabilities, the employee's claims as to hours, days and time worked, and holiday entitlements, are incorrect. Failure to keep records does not by itself provide proof of claims as to time worked and there is still a need for the claims to be made out.

[20] If the employer fails to discharge the burden shifted to it, the Authority is not compelled to accept all the claims made by an employee but 'may' accept them.<sup>4</sup> Any information or evidence contradicting the Labour Inspector's claims must be considered. The provisions of s 132 of the Act and s 83 of the HA2003, apply regardless of whether the claims have been brought by an employee or by a Labour Inspector.

#### *Analysis and findings*

[21] The Labour Inspector provided interview notes, which record Mr Zeng acknowledging the Restaurant did not keep formal records although Mr Zeng also said

---

<sup>4</sup> Section 132(2) of the Act and s 83(4) of the HA2003.

“Holiday records are kept in my diary book or [GDL] would have normally written down this and notice me later [sic]”. Despite opportunities to provide the Labour Inspector with copies of those holiday records, Mr Zeng did not do so and he has not presented any evidence in these proceedings to disprove LGF’s claims.

[22] I find the Restaurant failed to keep wages and time records as required under s 130 of the Act and holiday and leave records as required under s 81 of the HA2003, and those failures prejudiced the Labour Inspector’s ability to bring accurate claims in these proceedings. As a consequence, I accept as proved the claims made by LGF about wages paid to LGF, hours, days and times worked by LGF, holiday payments made to LGF, and holidays or leave taken by LGF under s 132(2) of the Act and s 83(4) of the HA2003.

[23] I requested the Labour Inspector comment on two questions I had related to the calculation of their claims for annual holiday pay and arrears of minimum wages due to LGF from the Restaurant, as I was not satisfied the Inspector had appropriately taken into account LGF’s, MZB’s and Mr Zeng’s evidence. These two questions related to very small points in the overall context and quantum of the Labour Inspector’s claims, however I considered it was necessary to test whether the Labour Inspector had appropriately accounted for them to ensure accuracy in my findings.

#### Claims in relation to annual holiday pay

[24] In LGF’s affidavit he says “I think I asked [Mr Zeng] for two days annual holidays ... I would have returned to work in the dinner shift if I returned on time. I received normal weekly pay ... for the time off.”

[25] The Labour Inspector’s notes from Mr Zeng’s interview record he said in relation to LGF “He had one day leave and this was not included in your calculations”.

[26] The Labour Inspector’s claims made no allowance for LGF having taken any annual leave with the amended investigation report saying “According to [LGF], there was no annual holiday taken during employment”. It was not clear to me from the Labour Inspector’s interview notes with LGF, the amended investigation report or the Labour Inspector’s affidavit how this had been considered, so I asked for any comment from the Labour Inspector on how LGF and Mr Zeng’s evidence should be taken into account in relation to the calculation of annual holiday pay.

[27] The Labour Inspector agreed an adjustment should be made to their calculations to account for two days of annual holidays taken, having clarified with LGF they had taken two days of annual holidays and the specific dates involved. The Labour Inspector's updated calculation was for 7.71 weeks of annual holidays due at the end of LGF's employment however a claim was also made for underpayment for the two days of annual holidays taken amounting to \$376.48 gross. The Labour Inspector provided calculations supporting their claims based on the greater amount for each day out of the required share of ordinary weekly pay or average weekly earnings under ss 21 and 22 of the HA2003. To avoid duplicated claims, the Labour Inspector reduced their claims for arrears of wages by the hours which would have been worked on the same days as she claimed for underpaid annual holidays.

[28] I accept the Labour Inspector's revised calculations and find their claim proved for annual holiday pay due to LGF at the end of their employment with the Restaurant totalling \$12,218.56 gross (including underpayment of annual holiday pay of \$376.48 gross).

#### Claims in relation to public holidays payments

[29] In addition to responding to my questions about their claims for annual holiday pay and arrears of minimum wages, the Labour Inspector updated their calculations in relation to time and a half payments, alternative holidays and public holiday payments. The updated calculations related to adjustments to LGF's hours of work, including on his last day of work, and ensuring there was not duplication of claims related to annual holidays taken.

[30] Based on all the evidence before me and applying the provisions of s 132 of the Act and s 83 of the HA2003, I find the Labour Inspector's claims proved in relation to:

- a. \$1,377.48 for the Restaurant's failure to pay time and a half when LGF worked on public holidays in breach of s 50 of the HA2003;
- b. \$2,731.25 for the Restaurant's failure to provide alternative holidays when LGF worked on public holidays in breach of ss 56 and 60 of the HA2003; and
- c. \$118.75 for the Restaurant's failure to pay LGF for an unworked public holiday in breach of s 40 of the HA2003.

Claims in relation to arrears of minimum wage

[31] In MZB's affidavit she discusses the dates and times of her study and says "On some days I would call my father to pick me up if it was raining". MZB's affidavit said she was studying from "February to July 2021", from "Tuesday to Friday" (emphasis added).

[32] The Labour Inspector's interview notes from Mr Zeng record he said in relation to LGF's hours of work "he needs to pick up his daughter and he starts from 5pm".

[33] LGF appeared to acknowledge he picked up his daughter during working hours in notes of his interview with the Labour Inspector, which recorded LGF said "My daughter goes to study from Tuesday and Friday and I picked her up around 5.00pm. The distance between the restaurant and bus stop was less than 10 minutes' drive. Me picking up my daughter did not affect the operation of the restaurant."

[34] LGF's comments were recorded in the amended investigation report and the Labour Inspector's affidavit, however it was not clear to me what finding the Labour Inspector had made on this point and it did not appear LGF's comments had been reflected in the Labour Inspector's calculation of unpaid hours and arrears of minimum wage. I asked for the Labour Inspector's comment on whether and, if so, how LGF's comments should be taken into account in relation to the calculation of arrears of minimum wage.

[35] The Labour Inspector accepted travel time for LGF's school pick-ups of his daughter should have been reflected in their calculations of unpaid hours and arrears of minimum wages for the period between February and May 2021. This claim was reduced by one hour per week for that time period, generously (for the Restaurant and Mr Zeng) allowing a reduction of 15 minutes per day for four days per week. The Labour Inspector's updated calculations for arrears of minimum wages also reduced the claim for underpaid annual holidays as discussed at paragraph [27] above. The revised claim for arrears of minimum wages totalled \$23,975.20 gross.

[36] I accept the Labour Inspector's revised calculations and find their claim proved for arrears of minimum wages due to LGF totalling \$23,975.20 gross.

## **Is Mr Zeng a person involved in breaches of employment standards under s 142W of the Act?**

### *Relevant law / sub-heading*

[37] The Labour Inspector claims Mr Zeng was a person involved in the Restaurant's breaches of employment standards as defined by s 142W of the Act and should be held liable under s 142Y of the Act to pay arrears, given the Restaurant is unable to pay them.

[38] Sections 142W and 142Y of the Act provide for when a person involved in a breach of employment standards can be liable for such a breach. This includes specifying what actions the person must have taken, which types of person can be liable including reference to a person who is a director of a company. Recovery is only possible from a person involved in a breach where there has been a qualifying default and the employer is unable to pay the arrears in wages or other money.

[39] In relation to s 142W the Court of Appeal held in *A Labour Inspector v Southern Taxis Ltd*:<sup>5</sup>

The level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Employment Relations Act 2000 is knowledge of the essential facts that establish the contravention by the employer.

### *Submissions of the parties*

[40] Submissions for the Labour Inspector said:

[Mr Zeng] was at all relevant times a person involved pursuant to s 142W of the ERA 2000 as he aided, abetted, counselled, or procured the breaches of employment standards by [the Restaurant], induced the breaches and/or was knowingly concerned in or party to them. [Mr Zeng] was the sole director and shareholder of [the Restaurant] and by his own admission he was "the key for everything". Even when he was out of the country for extended periods of time he directed the manager what to do. He was responsible for the management of [the Restaurant]. [citations omitted]

[41] These submissions invoke subsection 142W(1) (a) to (c).

[42] The Labour Inspector also submitted as the Restaurant had been in liquidation since November 2022 and the most recent liquidator's report showed the Restaurant had negative net assets, despite a potential claim against Mr Zeng for breach of

---

<sup>5</sup> *A Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705 at [62].

director's duties, the Restaurant "is unable to pay therefore liability should sit with [Mr Zeng] in accordance with s142Y of the [Act]".

[43] In response to a request from me for comment on the most recent liquidator's report for the Restaurant, counsel for the Labour Inspector advised it did not impact on the Labour Inspector's submission the Restaurant was unable to pay arrears and holiday entitlements.

### *Finding*

[44] Companies Office records for the Restaurant show Mr Zeng was the sole director and shareholder of the Restaurant. The Labour Inspector has also provided evidence from GDL that Mr Zeng was responsible for employing full-time employees, setting the pay rates for full-time employees and approving annual holidays. GDL said he communicated regularly with Mr Zeng about Restaurant issues over email and WeChat. GDL acknowledged he paid the Restaurant's employees, saying he did so based on Mr Zeng's directions using banking log-in details provided by Mr Zeng.

[45] The Labour Inspector's notes from their interview with Mr Zeng said he confirmed he hired LGF, he maintained leave records and he thought all employees should have received time and a half for work on public holidays, but he acknowledged being unaware of entitlements to alternative holidays. Mr Zeng said while he could check payments he didn't as he trusted GDL. Mr Zeng also said he thought all annual holiday entitlements at the end of employment had been paid in accordance with the HA2003.

[46] Evidence from GDL said on Mr Zeng's instruction he calculated holiday pay due to LGF at the end of LGF's employment and thought "approximately \$8,000 - \$9,000 was owed to [LGF]. [Mr Zeng] agreed to pay this amount". GDL said MZB and LGF's wife initially agreed to the calculated amount, but then came back the next day and claimed "the holiday pay amount was supposed to be \$16,000.00. We couldn't agree on the amount owed and I asked them to talk to [Mr Zeng] directly".

[47] I am satisfied based on the evidence before me that the Labour Inspector has established, and accordingly I find, Mr Zeng was a person involved in the Restaurant's breaches of employment standards related to LGF as defined by s 142W of the Act. Mr Zeng was a director of the Restaurant. I find, based on evidence from Mr Zeng's interview with the Labour Inspector which has not been challenged or responded to, Mr

Zeng had knowledge of the essential facts of those breaches and he “aided, abetted, counselled, or procured the breach” and was “knowingly concerned in, or party to, the breach”.

[48] I further find, based on the most recent liquidator’s report for the Restaurant, the Restaurant is unable to pay any of the amounts I have found are due to LGF at paragraphs [28], [30] and [36] above. All of these amounts are qualifying defaults under s 142Y(1) of the Act, totalling \$40,421.24 gross, which the Labour Inspector may recover from Mr Zeng.

[49] I order Mr Zeng pay to the Labour Inspector, for the benefit of LGF, \$40,421.24 gross within 28 days of the date of this determination.

*Should interest be awarded on the arrears due to LGF?*

[50] The Labour Inspector submitted I should order payment of interest on the arrears due to LGF under the Interest on Money Claims Act 2016 (IMCA), as LGF was significantly disadvantaged by being underpaid for more than two years and not having received the annual and public holidays he should have received in his final pay.

[51] Given these payments were due to LGF over the course of his employment with the Restaurant, with the latest payment due in his final pay in May 2021, I accept the Labour Inspector’s submissions that an order for payment of interest is appropriate. The Labour Inspector’s amended investigation report was issued on 22 September 2022. In this instance I adopt the most favourable outcome for Mr Zeng and set 22 September 2022 as the date from which interest should accrue.

[52] I order Mr Zeng to calculate and pay the Labour Inspector, for the benefit of LGF, interest on the amount of \$40,421.24 gross in accordance with the IMCA from 22 September 2022 until the above amount has been paid in full, to be calculated using the civil debt calculator on the Ministry of Justice website.<sup>6</sup>

### **Penalties**

[53] The Labour Inspector sought penalties against Mr Zeng as a person involved in breaches under s 142X of the Act.

---

<sup>6</sup> <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

### *Relevant Law*

[54] In deciding whether to impose a penalty, and if I decide to how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*<sup>7</sup>, *Labour Inspector v Daleson Investment Ltd*<sup>8</sup> and *Nicholson v Ford*.<sup>9</sup>

### *Submissions*

[55] I summarise the Labour Inspector's submissions as follows:

- a. While the Labour Inspector identified eight breaches of ss 24, 25, 27, 40, 50, 56 and 60 of the HA2003 and s 6 of the MWA, they considered it appropriate to globalise those into three breaches, being of annual holiday entitlements and public holidays entitlements under the HA2003 and of the MWA. This generated a maximum penalty of \$30,000;
- b. Total arrears initially claimed by the Labour Inspector of \$41,360.59 was a significant amount of money that LGF was deprived of and the Restaurant and Mr Zeng benefited from not paying when they should have;
- c. Non-payment of these amounts was intentional, apart from in relation to alternative holidays, with no mitigating actions, despite promises by Mr Zeng to make payments for annual holiday pay due;
- d. The Labour Inspector identified two previous complaints about the Restaurant, although acknowledged one was not substantiated and the other was resolved without an investigation;
- e. Citing what they considered were similar cases<sup>10</sup>, the Labour Inspector said an appropriate starting point for penalties was 60% of the maximum, with a 5% reduction appropriate for the partial cooperation of Mr Zeng. No reduction was proposed for means to pay, although a small reduction was proposed for proportionality, with a final recommendation for a penalty of \$15,000; and

---

<sup>7</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143 at [137] to [151].

<sup>8</sup> *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12 at [19].

<sup>9</sup> *Nicholson v Ford* [2018] NZEMPC 132 at [19].

<sup>10</sup> *A Labour Inspector v Doma* [2021] NZERA 469, *A Labour Inspector v Kiran Cuisine Limited* [2021] NZERA 279 and *A Labour Inspector v Yuan and Sun* [2024] NZERA 189.

- f. The Labour Inspector invited me to award part of the penalty to LGF to reflect the significant loss he had suffered and the time since his employment ended.

*What penalties should be awarded?*

[56] I broadly accept the Labour Inspector's submissions as to penalties, except as noted below. I accept the Labour Inspector's approach to globalisation meaning the maximum total penalties are \$30,000 and the starting point of 60% brings the provisional total for penalties to \$18,000. While I awarded slightly less than the Labour Inspector initially claimed in total arrears, I consider the sum awarded is not insignificant. I decline to make a reduction for the limited engagement Mr Zeng had with the Labour Inspector, given he has not participated in the Authority proceedings.

[57] Finally, I have considered proportionality in relation to the total penalties to be awarded, taking into account other similar cases the Labour Inspector referred to. I consider a reduction is appropriate for proportionality to \$12,000. I consider it appropriate to award 25% of this amount to LGF to recognise the impact of being deprived of the arrears I have awarded to him.

[58] I order Mr Zeng to pay the Labour Inspector a penalty of \$12,000 within 28 days of the date of this determination, with \$3,000 to then be paid to LGF and the remainder to be transferred to a Crown bank account.

**Costs**

[59] Counsel for the Labour Inspector requested I proceed to determine costs as part of this determination. Given Mr Zeng has not engaged in these proceedings, I consider doing so is appropriate.

[60] The Labour Inspector sought costs based on half of the first day of the "daily tariff" for an investigation meeting, which is \$2,250. I consider this amount is appropriate for this matter, which was determined on the papers but involved substantial presentation of evidence by the Labour Inspector and required additional actions due to Mr Zeng's non-engagement. The Labour Inspector also sought disbursements of \$1,671.20 for the costs of translation of documents, the filing fee and costs of a process server. I am satisfied these disbursements were properly and reasonably incurred, and are appropriate. Orders are made accordingly.

[61] Mr Zeng is ordered to pay the Labour Inspector costs of \$2,250 and disbursements of \$1,671.20 within 28 days of the date of this determination.

### **Summary of outcome**

[62] I have found:

- a. New Zealand LJ Food Express Taupo Limited trading as No 1 China Restaurant - In Liquidation (the Restaurant) failed to keep wages and time records as required under s 130 of the Employment Relations Act 2000 (the Act) and holiday and leave records as required under s 81 of the Holidays Act 2003 (HA2003), and those failures prejudiced the Labour Inspector's ability to bring accurate claims in these proceedings;
- b. the Restaurant owes LGF unpaid annual holiday pay in the amount of \$12,218.56 gross under ss 24, 25 and 27 of the HA2003;
- c. the Restaurant owes LGF unpaid public holiday entitlements in the amounts of:
  - (i) \$1,377.48 gross for the Restaurant's failure to pay time and a half when LGF worked on public holidays in breach of s 50 of the HA2003;
  - (ii) \$2,731.25 gross for the Restaurant's failure to provide alternative holidays when LGF worked on public holidays in breach of ss 56 and 60 of the HA2003; and
  - (iii) \$118.75 gross for the Restaurant's failure to pay for an unworked public holiday in breach of s 40 of the HA2003;
- d. the Restaurant owes LGF unpaid wages in the amount of \$23,975.20 gross under s 6 of the Minimum Wage Act 1983 (MWA);
- e. Xian Zeng was a person involved in the Restaurant's breaches of employment standards related to LGF as defined by s 142W of the Act, as he:
  - (i) was the sole director of the Restaurant;
  - (ii) had knowledge of the essential facts of those breaches; and
  - (iii) aided, abetted, counselled or procured the breaches and was knowingly concerned in, or party to, the breaches;
- f. the Restaurant is unable to pay any of the amounts ordered at subparagraphs [62]b, c and d above and the Labour Inspector is able to recover these amounts from Mr Zeng under s 142Y(1) of the Act;

- g. Interest on those amounts under the Interest on Money Claims Act 2016 (IMCA) is appropriate from the date the Labour Inspector's amended investigation report was issued on 22 September 2022 until those amounts are paid in full; and
- h. Mr Zeng, as a person involved in breaches of employment standards, is liable for penalties under s 142X of the Act for breaches of annual holiday entitlements and public holidays entitlements under the HA2003 and of the MWA.

### **Orders**

[63] For the above reasons I order Mr Zeng to pay to the Labour Inspector within 28 days of the date of this determination:

- a. \$40,421.24 gross under s 142Y(1) of the Act, for the benefit of LGF;
- b. Interest on that amount under the ICMA calculated from 22 September 2022 until that amount is paid in full;<sup>11</sup>
- c. a penalty of \$12,000, with \$3,000 to then be paid to LGF and the remainder to be transferred to a Crown bank account; and
- d. costs of \$2,250 and disbursements of \$1,671.20.

Shane Kinley  
Member of the Employment Relations Authority

---

<sup>11</sup> To be calculated using the civil debt calculator on the Ministry of Justice website: <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.