

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 43
5307745

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| BETWEEN | LING LIN Applicant |
| AND | SANDY ZHOU First Respondent |
| AND | NEW TIMES PRESS LIMITED Second Respondent |

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| Member of Authority: | K J Anderson |
| Representatives: | M Moncur, Advocate for Applicant T Mukusha, Counsel for Respondent |
| Investigation Meetings: | 3 November 2010, 14 December 2010, 10 March 2011 |
| Further Evidence Received: | 22 June 2011 |
| Submissions Received: | 14 March 2011, 25 July 2011 and 16 August 2011 from Applicant 26 April 2011, 4 August 2011 and 25 August 2011 from Respondent |
| Determination: | 31 January 2012 |

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Ling Lin, claims that she was constructively dismissed, on or about 20th April 2010 and that the dismissal was unjustifiable. Ms Lin also claims that she was disadvantaged in her employment by an unjustified action by her employer. Ms Lin alleges that two weeks after commencing her employment at the New Times Press, she was asked to pay the sum of \$6,000 as “*guarantee money*” for the job opportunity given to her. Ms Lin also claims repayment of the sum of \$63,165.50. Ms Lin alleges that, effectively, she was required to pay her own wages

during the course of her employment. Finally, Ms Lin claims that she is owed unpaid wages and holiday pay.

[2] The respondent, New Times Press Limited (New Times/the company), denies all of the claims advanced by Ms Lin.

[3] In addition to the evidence of Ms Lin, there is evidence for her from Ms Xiang Li and Mr Jie Kuan Chen. For the respondent, there is evidence from Ms Sanyou Zhou, the Managing Director of New Times; Mr Xiao Xiaolan, Accountant; Ms Eryou Chen, Editor; Mr Weijan Chen, Editor-in-Chief; Wei Peng, Journalist/Editor; and Qiang Ding, Journalist. The parties have provided various documents and have presented written submissions. All of the available evidence and material has been closely considered by the Authority, albeit it may not be specifically referred to in this determination.

Background facts and evidence

[4] Ms Lin is a Chinese citizen. She came to New Zealand and studied arts and media studies and political science at Victoria University; graduating in July 2007. Ms Lin obtained an open work permit that allowed her to undertake employment in New Zealand after her graduation. She initially obtained employment at a Star Mart outlet in Wellington.

[5] The evidence of Ms Lin is that, on 15th July 2008, she received a phone call from Mr Jie Kuan Chen who lives in Auckland. Mr Chen is the husband of Ms Lin's cousin. Ms Lin says that he advised her that New Times was "recruiting" and encouraged her to apply. Ms Lin says that she emailed her CV to Mr Chen for him to pass on to New Times. Ms Zhou denies that she received the CV from Mr Chen.

[6] Ms Lin attests that on 18th July 2008, she was interviewed by the (then) General Manager of the company, Mr Qi Yang, for the position of journalist. There is no evidence from Mr Yang. Ms Lin says that after the interview, she met with Ms Zhou, the Managing Director of the company. It is the evidence of Ms Lin that she was told by Ms Zhou that the company would like to offer her the opportunity for training (as a journalist) and that she could start her employment the following Monday; 21st July 2008.

[7] Ms Lin says that she did start the job with New Times on Monday, 21st July 2008. However, the evidence of Ms Zhou is that Ms Lin did not start work on that date. Rather, Ms Zhou says that Ms Lin was “engaged” from 18th August 2008 but she did not “report for duty until 1 September 2008”.¹ Ms Zhou says that the company accountant was told that Ms Lin would be starting with New Times on 18th August 2008 and as a result, the tax records show this, but in actual fact, according to Ms Zhou, Ms Lin did not commence her employment until 1st September 2008.

[8] However, the evidence of Ms Lin, in regard to the dates that she say she was interviewed for the position at New Times, and when she commenced her employment, is starkly at odds with the various transactions revealed by the National Bank statements that she has produced to the Authority. A bank statement (No 008) shows that there were three EFTPOS withdrawals on 18th July 2008 in Wellington, the date that Ms Lin says that she was interviewed. And on 21st July 2008, the date that Ms Lin says that she commenced her employment at New Times, there are a further four EFTPOS withdrawals, three of them in Wellington and, oddly, it seems, one in Bulls. Ms Lin also says that she was in Auckland on the evening of 17th July 2008, in readiness for her purported interview at New Times the next day. But her bank transactions show that there were three Wellington EFTPOS withdrawals that day. On the basis of the bank transactions, it appears that Ms Lin was in Wellington on 17th, 18th and 21st July 2008. Indeed, on the basis of her bank transactions, it appears that she moved between Wellington and Auckland from 24th July 2008 to at least, 4th August 2008. I also note that Ms Lin’s final pay from Star Mart was paid into her bank account on 6th August 2008.

[9] While the evidence of Ms Zhou is vague² in regard to when she first had contact with Ms Lin, the obvious conclusion, elicited from Ms Lin’s bank statements, is that she was not in Auckland on either 18th or 21st July 2008 and hence her evidence is not credible in regard to her version of events on those two days. Given the evidence of Ms Zhou, as collaborated by Mr Xiaolan, it is more probable that it was intended that Ms Lin was to commence her employment with New Times on 18th August 2008, but she may not have actually started until 1st September 2008. The

¹ The witness statement for Ms Zhou records the date being 1 September 2010 but this is clearly a typographical error.

² Ms Zhou appeared to have some difficulties in regard to fully understanding some of the evidence and while an interpreter was present and explained various matters, the response from Ms Zhou was, at times, enigmatic and less than forthcoming.

latter date is also consistent with the first salary payment made to Ms Lin on 21st October 2008, given that she was paid monthly in arrears.

[10] However, there is another aspect of the evidence in regard to when Ms Lin commenced her employment with New Times that remains unresolved. This is that while Ms Zhou told the Authority that Ms Lin did not commence her employment until 1st September 2008, in a questionnaire attached to a letter to Immigration New Zealand dated 18th June 2009, in support of Ms Lin's application for permanent residence, Ms Zhou informs that (in reference to Ms Lin): "*She started work as a journalist on 18th August 2008*" and then informs further that:

Ms Lin sent CV to New Times Weekly. She passed the interview and started her journalist position on 18th August 2008.

[11] Clearly, the information given to Immigration New Zealand is inconsistent with the evidence given to the Authority. On the basis of the overall evidence, particularly the first salary payment made to Ms Lin on 21st October 2008, the Authority is left to conclude that perhaps the information provided to Immigration New Zealand is incorrect. However, I can only say that the overall evidence about Ms Lin's employment commencement date with New Times remains inconclusive, except that it is clear that it was not 21st July 2008, as Ms Lin would have the Authority believe.

The terms and conditions of Ms Lin's employment

[12] The evidence of Ms Lin is that she was not offered a "*formal contract*" when she commenced her employment, as she was told she was "*on trial*". The parties did sign an employment agreement on 2nd March 2009. At Schedule 2 of the agreement it is recorded that the "*Starting salary*" is \$30,000 per annum. It is commonly accepted that Ms Lin was to be paid \$2,500 (gross) each month. At the heart of these proceedings is a dispute about how the monthly payments were made and I will return to that matter in due course.

[13] The evidence of Ms Lin is that on 24th July 2008, Ms Zhou told Mr Jie Kuan Chen that New Times was going to offer Ms Lin a job, but firstly, Ms Lin would have to pay \$6,000 as "*Guarantee Money*". There is now another obvious contradiction in Ms Lin's evidence. As already noted, Ms Lin's earlier evidence was that she started the job at New Times on 21st July 2008, but the Authority has found that this cannot

be so; and now Ms Lin claims that, on 24th July 2008, she was required to pay the sum of \$6,000, before she could start in the job.

[14] The apparent falsehood in Ms Lin's evidence is collaborated by the evidence of Mr Jie Kuan Chen in a sworn affidavit and by oral evidence when he eventually and reluctantly, appeared before the Authority under a summons issued by the Authority pursuant to s.160(1)(b) of the Employment Relations Act 2000. The Authority observed that Mr Jie Kuan Chen did not disguise his displeasure at having to appear and he was less than cooperative and engaging during the proceedings. Mr Jie Kuan Chen says that he loaned the sum of \$6,000 to Ms Lin as she did not have that amount; and when Ms Lin paid the \$6,000, she started in her job at New Times. When Mr Jie Kuan Chen was cross-examined by Mr Mukusha, he was evasive and uncooperative - particularly in regard to his contact with Ms Zhou - who denies Mr Jie Kuan Chen's version of events, albeit she acknowledges that she had a business relationship with him due to him placing advertising with the newspaper. On the whole, I regret to say that I found Mr Jie Kuan Chen to be an unreliable witness and hence little weight can be given to much of his evidence.

[15] Nonetheless, the evidence of Ms Lin is that, on 24th July 2008, she agreed to pay to Ms Zhou the sum of \$6,000 as "*guarantee money*" and referred the Authority to a copy of a facsimile dated 24th July 2008. The facsimile is from a commercial assistant at the ASB Bank. It is to Rong Lin, Ms Lin's cousin, and informs as follows:

Please sign and return this fax to 377 9715 to confirm the following transfer thank you:

Amount: \$6,000

Debit account: 12-3077-0461028-50 (L Lin)

Beneficiary account: 02-0144-0003622-00

Beneficiary name: New Times Press Limited

Bank: BNZ

[16] The facsimile is signed by an authorised person; being Rong Lin. Ms Lin says that her cousin, Rong Lin, had the authority to access Ms Lin's ASB account³ and it appears that the authorisation was on the instructions of Ms Lin to transfer the sum of \$6,000 to New Times Press Limited.

³ It appears that this may have been a joint account but this is inconclusive.

[17] The Authority notes that the BNZ bank account identified in the facsimile is that of New Times Press Limited, as confirmed by a copy of a bank statement that has been produced by the company during the proceedings.

[18] While I have found the evidence of Ms Lin and Mr Jie Kuan Chen to be unreliable in some regards, I accept that the sum of \$6,000 was paid by Ms Lin to New Times Press Limited and Ms Zhou does not deny that this occurred. But Ms Zhou says that the \$6,000 was a loan that she advanced to Ms Lin before she started working for New Times. The evidence of Ms Zhou is that before commencing her employment, Ms Lin had been to the New Times office a few times. Ms Zhou says that she “*developed sympathy*” for Ms Lin as she had told Ms Zhou of various problems in regard to her relationship with her cousin’s family and with obtaining an extension to her work visa. Ms Zhou says that she knew Ms Lin as she had met her in 2002 and was aware that she was related to Mr Jie Kuan Chen, who had advertised with New Times for “*dozens of years*”.

[19] Conversely, the evidence of Ms Lin is that she had never met Ms Zhou before the day that she had her interview. Ms Lin also denies that the \$6,000 paid to New Times was the repayment of a loan given to her by Ms Zhou.

[20] The conflict in the evidence about the payment of the \$6,000 raises an obvious issue for the determination of the Authority. Ms Zhou asserts that the \$6,000 received from Ms Lin by way of a bank transfer on 24th July 2008, was the repayment of a loan that she gave to Ms Lin before she commenced her employment. But I find that it is most improbable that this is so. I conclude that it is most unlikely that even the most magnanimous employer would loan \$6,000 to a young person that she hardly knew, as I doubt very much that Ms Zhou had ever met Ms Lin prior to the day that Ms Lin was interviewed (whenever that may have been). Further, there is no record of any loan arrangement and when asked by the Authority if there is a bank transaction record of the \$6,000, Ms Zhou responded that it was a cash payment to Ms Lin. Also pertinent, is the fact that Ms Lin had not commenced her employment at New Times and hence was not receiving any wages by which she may have repaid any purported loan.

[21] Therefore, I find that it appears more probable than not that Ms Lin was required to pay the sum of \$6,000 as so-called “*guarantee money*” in order to secure her employment at New Times and given the inconclusive evidence about such, it is

perhaps questionable whether Ms Lin ever participated in an interview for the job: but if so, when? Ms Lin's advocate, Ms Moncur, told the Authority that the requirement for such "guarantee" payments is "*common practice*" among some "*Chinese employers*" and that the money is "*a sort of bond*". Ms Lin says that: "*every international student knows about this.*" However, no tangible evidence has been produced to support the assertions of Ms Lin and her advocate as to the commonality of such practices, if indeed they do exist.

[22] In summary, I find that it is more probable than not that Ms Lin was required to pay to New Times Press Limited the sum of \$6,000 in order to secure her employment with the business.

[23] The question then arises: What is the effect of such a transaction in employment law terms? The answer is to be found in s.12A of the Wages Protection Act 1983 (the Act). It provides that:

No premium to be charged for employment

- (1) No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.
- (2) Where an employer receives any amount of money in contravention of subsection (1) of this section, whether by way of deduction from wages or otherwise, then, irrespective of any penalty to which the employer thereby becomes liable, the person by whom the money was paid or, as the case may be, from whose wages it was deducted, may recover that amount from the employer as a debt due to the person; and civil proceedings for the recovery of the amount may be instituted in the [Employment Relations Authority] by the person or, notwithstanding any disability to which the person is subject, by a Labour Inspector designated under [s.223 of the Employment Relations Act 2000] on behalf of the person.
- (3) Any such proceedings instituted by any Labour Inspector may be continued or conducted by the same or any other Labour Inspector.

[24] And then at s.13 of the Act, there is a provision for penalties as follows:

Where –

- (a) Any payment is made by or on behalf of any employer in contravention of this Act; or

- (b) Any employer or any person on that employer's behalf contravenes or fails to comply with any of the provisions of this Act, -

that employer is liable, at the suit of the worker or of a Labour Inspector designated under s.223 of the Employment Relations Act 2000, to a penalty imposed under that Act by the Employment Relations Authority.

Did New Times Press Limited seek or receive a premium in respect of the employment of Ms Lin?

[25] As previously stated, I find that it is more probable than not that New Times Press Limited, in the form of Ms Zhou as Managing Director, did receive a premium of \$6,000 in respect of providing employment to Ms Lin and by doing so, breached s.12A(1) of the Act. Therefore, pursuant to s.12(2) of the Act, New Times Press Limited is ordered to repay the sum of \$6,000 to Ms Lin.

[26] It is also appropriate that a penalty should be awarded pursuant to s.13(b) of the Act due to the contravention of s.12A(1) of the Act. Pursuant to s.161(1)(m) of the Employment Relations Act 2000, the Authority has the essential jurisdiction to make determinations pertaining to actions for the recovery of penalties under s.13 of the Wages Protection Act 2003. And, under s.135(2) of the Employment Relations Act 2000:

Every person who is liable to a penalty under this Act is liable, -

- (a) In the case of an individual, to a penalty not exceeding [\$10,000]:
- (b) In the case of a company or other corporation, to a penalty not exceeding [\$20,000].

[27] It seems to me that it is a particularly egregious action on the part of New Times Press Limited (via Ms Zhou as the Managing Director), to exploit the vulnerability of a young person in the position of Ms Lin, given her age, inexperience in the workforce and immigration status, particularly in regard to the latter factor, as Ms Lin was dependent upon her employment at New Times in order to retain a work permit and remain in New Zealand. Therefore, it is fitting that any penalty awarded should reflect the seriousness of the unlawful action of the company; hence I find that it is wholly appropriate to impose a penalty of \$15,000.

[28] Therefore, pursuant to s.135(b) of the Employment Relations Act 2000, New Times Press Limited is ordered to pay a penalty of the sum of \$15,000; and pursuant

to s.136 of the Employment Relations Act 2000, \$10,000 of the total amount (\$15,000) shall be paid by New Times Press Limited into the Authority for subsequent payment to the Crown bank account. The remaining \$5,000 shall be paid by New Times Press Limited to Ms Lin.

Ms Lin's allegation of being required to pay her own salary and tax

[29] The evidence of Ms Lin is that, on 15th September 2008, she was approached by Ms Zhou. Ms Lin says that Ms Zhou: "*asked me to give her money as she needed to 'pay tax'*". Ms Lin attests that Ms Zhou showed her:

... a piece of paper with a list of figures. She told me that these figures were the income tax, GST and ACC levy fee for each month.

[30] The further evidence of Ms Lin is that Ms Zhou told her that Inland Revenue needed to be paid on the 20th of each month and therefore:

I must give her the money before that time. I was also asked to pay my own salary as well.

[31] Ms Lin says that on 15th September 2008 she was told by Ms Zhou that she was required to pay "*over \$800*" in cash in order to satisfy the Inland Revenue requirements.

[32] Ms Zhou emphatically denies asking Ms Lin for any money to pay Inland Revenue. Ms Zhou says that the company accountant takes care of the tax payments for the company and she "*had no idea*" of how the numbers are calculated.

[33] The further evidence of Ms Lin is that on 19th September 2008 she paid the first two weeks' "*tax money*" in cash; being the sum of \$412.50. In support of this assertion, Ms Lin points to there being a withdrawal of the sum of \$390 from her bank account on that date and she says that she added a further \$22.50 to make the sum up to \$412.50 in cash that she then paid to Ms Zhou. But I have some difficulty with this assertion from Ms Lin as there are a significant number of withdrawals from her bank account at various times, not only for the month of September 2008, but also during the totality of her employment at New Times.

[34] For example, for September 2008, there are the usual day-to-day expenses that one would normally expect to see associated with most individual bank accounts. However, in Ms Lin's case, there were other cash withdrawals to the total sum of

\$2,350.10 (including the \$390.10 mentioned). None of this is particularly exceptional except that it shows that the withdrawal of the cash sum of \$390.10 is not proven to be particularly associated with any alleged payment made to New Times.

[35] There is also another more substantial matter that casts considerable doubt upon Ms Lin's allegations pertaining to the purported payment of "tax money". This is that Ms Lin testified to the Authority that, on 15th September 2008, Ms Zhou showed her a "*piece of paper with a list of figures*". Then somewhat remarkably, at the eleventh hour of the third investigation meeting, Ms Lin produced to the Authority the aforementioned "*piece of paper*". When asked why this document (Exhibit A) had only just now been produced to the Authority, Ms Lin's explanation (and that of her advocate) was less than convincing; hence some doubts about the reliability of Exhibit A have arisen, given that Ms Zhou denies ever asking for tax money to be paid by Ms Lin or having any involvement with Exhibit A.

[36] In regard to Exhibit A, the figures in question are written on the back of a New Times Press tax invoice (to an Auckland real estate company) dated 21/09/08, six days after the date that Ms Lin says she was given the document. The A4 page has been roughly torn in half. The writing is Chinese but it has been interpreted for the Authority. There are three separate categories listed

- (a) PAYE \$512.55 each month;
- (b) GST 12.5% \$312.50 each month;
- (c) ACC \$20.50 each month/\$246 each year.

[37] Apart from the fact that GST is not payable on wages, it was clear to the Authority; having other samples of Ms Zhou's handwriting available that reveal how numbers are written by her, it was noticeable to me that there was a marked difference in the way Ms Zhou wrote the number "7" in particular. Without prompting from the Authority, the closing submissions for New Times attached a sample of Ms Zhou's writing as a reproduction of the information contained in Exhibit A. It again was clear to the Authority that there was a distinct difference to the writing and hence the reliability of Exhibit A and the evidence given by Ms Lin about this document became questionable. A subsequent analysis by a senior document examiner with the New Zealand Police – Wellington, concluded that:

There are indications the author of the specimens attributed to Sanyou Zhou **did not** complete the text on the questioned document A which is directly comparable with her specimen material. I have prepared a demonstration chart which illustrates some of the reasons for my opinion. A copy is enclosed.

[38] The demonstration chart sets out eight separate examples of differences that the Police examiner found to exist between the document produced by Ms Lin and the specimen writing of Ms Zhou.

[39] Given the overall analysis of the documents before the Authority and the subsequent further submissions of the parties on this matter, regrettably I am left to conclude that it is more probable than not that Exhibit A, as produced by Ms Lin, is a fabrication. It follows that I do not accept Ms Lin's evidence that she was required to pay the tax money as she alleges.

The allegation that Ms Lin was required to pay her own salary

[40] The further evidence of Ms Lin (notwithstanding the above finding) is that, after she made the first tax payment, Ms Zhou "*reminded*" her that she would be required to pay to Ms Zhou the sum of \$2,500, in cash, before the 20th of each month. Ms Lin says that she was told by Ms Zhou that: "*the money was for my income tax and salary*". It is commonly accepted that Ms Lin would be paid an annual salary of \$30,000 with \$2,500 paid each month. Ms Lin told the Authority that she was required to pay Ms Zhou \$2,500 each month in cash; following which she would be given a cheque by Ms Zhou for a sum equivalent to the net salary after tax had been taken into account. Ms Lin also says that there were other employees at New Times who were also required to pay money to the company and she provided three names. But none of these people were called to give evidence and Ms Lin asserted that this was because their immigration status would be in jeopardy if they became involved.

[41] In regard to Ms Lin's allegation that she was required to pay for her gross salary in advance and then she would be paid the net amount, i.e. \$2,500 less tax; in order to arrive at some reasonable conclusions about this, some close analysis is required. The evidence of Ms Lin and Ms Zhou is completely at odds and so I am left to peruse the other available evidence. In substance, this is Ms Lin's bank statements and the cheque butts and wage/timesheets provided by New Times.

[42] Ms Lin was paid monthly, therefore the Authority has inspected the records available for each month; summarised as follows.

September 2008

[43] For these two months, the wage and time records and cheque butts have not been produced by New Times. Therefore, all we have is Ms Lin's bank statements. They show that on 5th September 2008, \$2,000 was deposited into her account via an automatic teller machine. A further \$750 is deposited between 12th and 19th September, some of which Ms Lin says was "transferred", presumably, from her ASB account to her National Bank account. But there is no record of her receiving any moneys associated with her employment at New Times.

October 2008

[44] On 21 October 2008, the sum of \$1,980 was deposited into Ms Lin's account. On the same day, \$1,980 was withdrawn in cash. The sum of \$470 in cash was withdrawn the day before and Ms Lin says that she paid \$2,500 cash to New Times, but there is no proof of this. Ms Lin says she received a cheque for the sum of \$1,987.45 and there is also a cheque butt (002179) from New Times dated 21/10/08 for this amount. But oddly, there is no record of this sum being deposited into Ms Lin's bank account and I am unable to reach any absolute conclusion about whether Ms Lin received the sum of \$1,987.45 and similarly, whether she paid or did not pay \$2,500 to New Times.

November 2008

[45] Ms Lin's bank statement shows that she was paid the sum of \$1,987.45 on 19 November 2008. This is consistent with the cheque butt from New Times for the same date and I accept this was her wages for November. Ms Lin says that she paid New Times \$2,500 in cash made up of \$250 withdrawn from her bank and added to by "cash saving". While the \$250 amount is verified, there is no proof of the remainder and hence her allegation that she paid a total of \$2,500 to New Times is not proven.

December 2008

[46] The evidence regarding what happened overall in November and December 2008 takes on a different hue altogether. Ms Lin attests that in November she went to China on a “*business trip*” and that, before she left, Ms Zhou gave her personal bank account number to Ms Lin and asked her to ensure that she kept paying the \$2,500 for the two months (December/January) while she was away. Ms Lin says that Ms Zhou wrote her bank account number on a piece of paper; this has been produced and appears authentic. Ms Lin’s evidence is that she made a payment of \$2,500 to Ms Zhou’s bank account in December 2008 and again in January 2009. This is verified by Ms Lin’s bank statement in that payments were made to Ms Zhou’s personal account on 19th December 2008 and 19th January 2009 respectively. Also on 22nd December 2008 and 21st January 2009, the sum of \$1,984.45 was paid into Ms Lin’s account. The bank statements for this period from New Times show that the December/January payments were transferred from the New Times account to that of Ms Lin, being her net wages for those two months.

[47] But Ms Zhou’s evidence about what Ms Lin was doing in China, and more particularly about the two payments of \$2,500, is at variance with that of Ms Lin. Ms Zhou attests that Ms Lin told her that she was going to China to: “... *get her Police certificate*”, apparently for immigration purposes. Ms Zhou says that due to the approaching December holidays, she told Ms Lin to enjoy her time with her family in China. Ms Zhou says she also asked Ms Lin to do some “*social research work*” while she was in China and that Ms Lin borrowed \$5,000 from her (personally) for buying gifts for her family. Ms Zhou says that Ms Lin “*promised*” to pay back the loan while she was in China and hence she was given Ms Zhou’s personal bank account number. When asked about a record of the \$5,000 purportedly loaned to Ms Lin, Ms Zhou said it was paid in cash and there is no record of any loan arrangement. Ms Zhou also says that other employees “*tend to borrow money*” from her on a “*regular basis*”.

[48] I have to say that the evidence pertaining to why Ms Lin returned to China is inconclusive, but I am not required to make any findings about that. Rather, the issue for the Authority is whether or not Ms Lin was loaned \$5,000 by Ms Zhou (in person rather than by the company) or whether, as Ms Lin claims, the two payments of \$2,500 made while she was in China were part of the alleged repayment of her wages for the months of December 2008 and January 2009.

[49] I find that it is most unlikely that Ms Zhou loaned Ms Lin the sum of \$5,000. Indeed, as Ms Lin has attested, she did not need to borrow money from Ms Zhou as she received money from other sources, namely her family. Indeed, her bank statement for February 2009 shows that she had the sum of \$18,017.83 deposited into her account, plus a further \$1,153.85 from New Times; a total of \$19,171.68, notwithstanding that \$15,303 was withdrawn that month. While the evidence of Ms Lin and Ms Zhou leaves some questions unanswered, in the round I find the evidence of Ms Lin to be the most probable in that she was required to repay the sum of \$5,000 to provide for her salary while she was absent for the months of December 2008 and January 2009.

[50] The circumstances fall within s.12A of the Wages Protection Act 1983 in that:

It prohibits employers from seeking, or receiving any premium in respect of employment of any person and it goes on to provide that where an employer receives any money in contravention of this prohibition, whether by way of deduction from wages or otherwise, then the amount deducted can be recovered from the employer as a debt due to the employee. In the normal understanding of the term, a premium imports some consideration paid or demanded as a price of a contract⁴.

[51] Therefore, I find that Ms Lin is entitled to repayment of the sum of \$5,000. The weight of the evidence is that this money was paid by Ms Lin to Ms Zhou personally and not New Times Press Limited. But given that Ms Zhou is the only shareholder and director of the company, and given the matter of the nature of the employment relationship, it seems appropriate in all the circumstances that, as the Managing Director of the company, that Ms Zhou should be liable for the repayment of the amount in question. And she has been cited as a respondent in these proceedings.

[52] Therefore, pursuant to s.12A of the Wages Protection Act 1983 (the Act), Ms Sanyou Zhou is ordered to repay the sum of \$5,000 to Ms Lin. And pursuant to s.13B of the Act and s.135(b) of the Employment Relations Act 2000, Ms Zhou is ordered to pay a penalty of the sum of \$7,000. Pursuant to s.136 of the Employment Relations Act 2000, \$4,000 of the total amount (\$8,000) shall be paid by New Times Press Limited into the Authority for subsequent payment to the Crown bank account. The remaining \$3,000 shall be paid by Ms Zhou to Ms Lin.

⁴ *Sears v. The Attorney-General in respect of the Comptroller and Auditor-General, Audit Department* [1994] 2 ERNZ 39 at 61

Further analysis of salary payments and bank statements: February 2009 to May 2010

February 2009

[53] As previously mentioned, Ms Lin's bank statements show that there was more than \$19,000 deposited into her account with more than \$15,000 withdrawn for the month of February 2009. Ms Lin says that her parents paid in the sum of \$14,017.43, a rather odd sum and no explanation is given as to why that payment would have been made. There is the sum of \$1,153.85 deposited on 25th February 2009. The timesheet for 15th January to 31st January shows Ms Lin working 6.5 hours each working day as compared with the eight hours previously and that she was paid \$1,153.85 gross and \$941.13 net, but oddly, it is the former sum that was banked. But then the payslip for the period shows that the gross wages were \$1,367 with the net amount being \$1,153.85 and this is the same sum as the cheque butt for 22nd February 2009. But in any event, Ms Lin received \$1,153.85 and there is no reliable evidence of any repayment of her January salary to New Times as alleged, albeit there are considerable sums withdrawn from Ms Lin's bank account during February 2009.

March/April/May 2009

[54] Ms Lin's evidence is that, in March 2009, she was about to submit her permanent residence application with Immigration New Zealand and she needed some documents from New Times regarding her employment status. Ms Lin says that Ms Zhou "*demand*ed" that Ms Lin should pay her \$15,000 for providing the documents and that the money could be paid in two instalments. The first instalment would be paid when Ms Lin submitted her application to Immigration New Zealand and the second when residence approval was granted. Ms Lin says that she paid \$1,000 in cash on 11th March 2009 and she paid a further \$4,500 to Ms Zhou's personal bank account on 18th May 2009, with the final payment of \$2,000 in cash on 22nd May 2009; making a total of \$7,500 being the purported first instalment that Ms Zhou had allegedly demanded.

[55] Ms Lin's bank statement for March 2009 shows that a total of \$11,789.16 was deposited into her bank account; \$2,037.16 of this being her salary from New Times. The March statement also shows that a total of \$13,730 was withdrawn with \$1,400 going to an immigration consultant. There is also a large withdrawal of \$8,830 on 3rd

March 2009. But there is no evidence of any withdrawal specific to the allegation of paying Ms Zhou \$1,000 cash on 11th March 2009, albeit the Authority has not been told what the \$8,830 withdrawal was for.

[56] Ms Lin also says that on 18th March 2009, Ms Zhou asked her to pay the sum of \$2,250 in cash for “*half the financial year of GST from September 2008 to March 2009*”. The bank statement shows a withdrawal of \$2,000 on 19th March 2009 and Ms Lin says that this was part of the monthly salary of \$2,500 paid to New Times, with a further \$500 from her “*cash saving*”. It remains unproven whether Ms Lin paid the GST tax that allegedly was demanded from her by Ms Zhou; and of course, there remains the fact that GST is not payable on wages in any event.

[57] Ms Lin’s bank statement for May 2009 shows that \$15,206.31 was deposited into her account with \$2,039.16 being her salary from New Times. There is a substantial deposit of \$12,192.15 paid into the account on 15th May 2009 but the Authority was not told where this sum came from. On 18th May 2009, \$4,500.30 was paid to another party (to her aunty, Ms Lin says) and on the same day there is a transfer of \$6,000 which Ms Lin says was to her savings account. There is a withdrawal of the sum of \$2,320 on 19 May 2009 and Ms Lin says this was paid to New Times for her salary for April 2009. There was a further withdrawal of \$2,000 on 22 May 2009 and Ms Lin refers to a withdrawal of \$2,200 on this date, but this does not appear to be so. I can only say that all of this adds to the overall confusion regarding Ms Lin’s evidence and the rather mysterious and unexplained transactions regarding her bank account.

June 2009

[58] The evidence of Ms Lin is that on 15th June 2009, Ms Zhou was required to provide certain financial information to Immigration New Zealand related to Ms Lin’s application for residence. Ms Lin says that Ms Zhou informed her that, as the information required by Immigration New Zealand related to Ms Lin’s application for residence, then she should pay the cost of preparing a “*financial report*”. Ms Lin attests that she paid \$2,000 in cash. She says that the withdrawal of \$2,000 from her bank on 22nd May 2009 was paid to Ms Zhou for the financial report, but this is inconsistent with Ms Lin’s evidence about the sum of \$2,200 being withdrawn on this date and further, Ms Lin makes no mention of the alleged financial report payment in the summary of payments attached to her witness statement.

[59] There is very little evidence from Ms Lin about what happened concerning any payments made or received between June and September 2009 and I note that the frequency of transactions in her bank records for each month in that period reduces considerably and apart from the salary payments from New Times, there is approximately \$2,000 each month deposited into Ms Lin's account. Nonetheless, Ms Lin says that she paid New Times \$2,500 for her June salary and that this consisted of a withdrawal from her bank of \$1,900 on 16th July 2009 and the further \$600 came from her "*saving*" but this remains unproven.

[60] In regard to the purported July 2009 salary payment, Ms Lin says that she withdrew \$2,250 from her bank account on 4th August 2009, which is verified, but she makes no reference to how the difference of \$250 was addressed. I note there was a deposit of \$2,200 made on the same day, but this does not appear to be associated with New Times.

[61] In regard to the alleged August salary payment, Ms Lin refers to sums totalling \$1,540 that were withdrawn between 3rd and 21st September 2009 and says that she paid \$2,500 to New Times, but Ms Lin makes no reference to how the difference between \$1,540 and the alleged \$2,500 payment was made up.

[62] Ms Lin says that before the 20th of each month she was reminded by Ms Zhou to pay her cash for her total salary, including tax. Ms Lin attests that Ms Zhou also used to remind her that "*other employees*" were paying money to her too. Ms Zhou denies this and says that on several occasions where Ms Lin says she made payments to her, Ms Zhou was out of the country, as verified by her passport records.

October 2009 to May 2010

[63] The evidence of Ms Lin is that, on 16th October 2009, Ms Zhou asked her for "*the other half of the financial year's GST*". Ms Lin says that she told Ms Zhou that she could not afford to pay her any more money. Ms Lin attests that Ms Zhou kept asking her for the tax money and eventually she made a payment of \$500. Ms Lin gives no details of when or how this payment was made, albeit her bank account shows that various cash withdrawals ranging from \$80 to \$400 totalling \$2,950; were withdrawn from her bank account between 2nd and 28th October 2009. Ms Lin continued to receive the net sum of \$2,039.16 paid into her account by New Times.

[64] Ms Lin states that on 25 November 2009, Ms Zhou's sister, Ms Eryou Chen, "*found out*" that Ms Lin had not paid the remainder of the money allegedly requested by Ms Zhou. Ms Lin says that she was required to meet with Ms Chen in the company's board room. It is the evidence of Ms Lin that Ms Chen informed her that she was the "*real boss*" of New Times Press Limited and that Ms Lin must pay the outstanding money to New Times. Ms Lin says that she was "*verbally abused*" by Ms Chen who informed her that: "*...if you don't have money, don't follow other people's footsteps and try to apply for [New Zealand] permanent residency*". Ms Lin attests that Ms Chen also mentioned that: "*...the other girl who had already paid all the money was richer than me*". Ms Lin says that because of "*the abuse*", she paid \$500 to Ms Chen.

[65] But Ms Chen denies that this conversation ever took place. Ms Chen also says that she is only a part time employee and because she is a resident of the United States of America, she cannot stay in New Zealand for more than five months of any given year; as verified by her passport records. Ms Chen's evidence is that she had no contact with Ms Lin at work. Ms Chen also says that because 25th November 2009 was a Wednesday, she would not have been at work in any event as she does not work on Wednesdays. Ms Chen attests that she did not receive any money from Ms Lin "*under any circumstances*".

[66] There is little evidence from Ms Lin about what occurred from December 2009 to April 2010 apart from the summary of payments attached to her written statement. In regard to the alleged salary payment from her to New Times for November 2009, Ms Lin refers to 14 withdrawals of cash between 27th November and 18th December 2009, totalling \$2,770; of which she says she paid \$500 to New Times on 18th December 2009 and a further \$2,000 on 22nd December 2009.

[67] Ms Lin's bank statement for November 2009 shows that a total of \$3,160 was withdrawn in cash in sums between \$50 and \$250 with two and three withdrawals on the same days in some instances. There is a similar pattern for December 2009, and January, February and March 2010 but there is no sustainable evidence that New Times (or Ms Zhou) ever received the amounts that Ms Lin alleges that she paid.

Rejection of application for residence

[68] Via a letter dated 4th February 2010 from Immigration New Zealand, Ms Lin was informed that her application for residence in New Zealand had not been approved. The immigration officer (the officer) makes reference to concerns that were raised with Ms Lin via a letter dated 26th August 2009. Listed among these concerns was:

- Your employment did not appear genuine as there seem to be discrepancies in pay records and evidence of you reimbursing your employer for your salary.
- Your employment did not appear genuine. It seemed false and misleading information had been supplied to Immigration New Zealand in your EOI and Residence application.

[69] The officer is also critical of Ms Lin's claim (and that of New Times) that she was working in China during the time in question. In reference to the two payments of \$2,500 made by Ms Lin to Ms Zhou while she was in China, the officer comments:

The only explanation as to the two payments reimbursed to Sandy Zhou, your employer, on 19/12/2008 and 19/01/2009 is that this was a personal loan to you and is not related to the company. There were no loan documents supplied as evidence of this. I do not consider that this could be a complete coincidence that the payments made to reimburse this claimed loan were the same amount as your gross salary for each of these months and paid to Sandy Zhou directly before your net salary was put into your account. I am not convinced of this claim of a personal loan to you. These payments to the employer by you still appear to be a direct reimbursement to the employer for your salary.

[70] The officer is also critical of the purported work that Ms Lin carried out while she was absent in China. He then goes on to state:

You have provided evidence of bank statements for the majority of 2009 which show payments going into your account which you claim are your wages. I have carefully considered this as evidence of you being employed by New Times Limited. However within the statements are again many large payments going out. As it appears quite clear you have reimbursed your employer for your wages on at least two occasions I am unable to accept that all of her claimed wage payments are legitimately paid to you. In conclusion, with all information currently on file, you have been unable to clearly demonstrate your employment is genuine and as such your claim of skilled employment does not meet SM7.15.a.ii of Immigration Policy.

[71] Ms Lin says that on 19th March 2010 and 24th March 2010, she made the last two payments to Ms Zhou totalling \$2,500 but her bank statement does not reflect

this, except to show that there were six withdrawals of cash between 1st March and 18th March 2010 of sums between \$100 and \$500, totalling \$1,140. Ms Lin says that she paid New Times \$2,500 from cash withdrawals between 26 February and 18 March 2010 totalling \$1,430 and she borrowed \$1,500 from a friend; but no proof of this has been forthcoming.

Did Ms Lin resign from her employment at New Times?

[72] Ms Lin's evidence is that, on 19th April 2010, she received a text from Ms Zhou saying that she should "*keep paying the money*". Ms Lin says that she was "*so angry*" she deleted the message. Ms Lin attests that she could not cope with the situation of having to pay her employer money so she decided to resign.

[73] The common evidence is that Ms Lin met with Ms Zhou on 20th April 2010 but there is considerable conflict in the evidence about what occurred that day. Ms Lin was accompanied by a friend, Ms Xiang Li.

[74] The evidence from Ms Lin about her discussion with Ms Zhou is sparse. She simply says that she gave her "*verbal resignation*". On the other hand, the evidence of Ms Zhou is more concise. She says that in April 2010 she was visiting the South Island and returned to Auckland on 17th April 2010. Ms Zhou informs that upon her return, she was informed by colleagues that Ms Lin had not been "*showing up for work*". Ms Zhou says that she phoned Ms Lin and it was agreed that they would meet on 20th April 2010. The evidence of Ms Zhou is that when Ms Lin arrived she was accompanied by Ms Li who Ms Zhou says she did not know; and so Ms Li was asked to wait outside the conference room, while she met with Ms Lin. Ms Zhou says that:

I had things to talk to Ms Lin [sic] and since that person wasn't an employee she didn't need to be part of it.

[75] The evidence of Ms Zhou is that Ms Lin did not talk about a resignation. Ms Zhou says that:

She [Ms Lin] just told me that her residence application had been rejected by Immigration. I asked her "what were her future plans?" I promised to help her whenever she needed my assistance. In reply she said she was not planning to appeal. Her family didn't think it was necessary as it would take too long. She said she was thinking of reapplying through other channels, such as marriage. But I told her it was not uncommon for residence applications to be rejected. One could always appeal or hire a lawyer to sort it out. To use marriage as a short cut was not a good option. Her answer was: "Do not try to

convince me any more. I can figure out ways". She then explained that the reason she had not been coming to work was because she needed time to sort out her thinking. She made a promise that she would soon come back to work again.

[76] Then there is the evidence of Ms Li. She says that she was present with Ms Lin at the meeting with Ms Zhou. Her written evidence is that Ms Lin: "...told Sandy that she would like to resign from the job. Sandy said to Ling, 'It is okay I accept your resignation'. Ms Li also attests that Ms Lin told Ms Zhou that her permanent residence application had been rejected by Immigration New Zealand and the reason was that the immigration officer thought that Ms Lin had been paying money to the company. Ms Li also says that Ms Lin: "...said to her boss that she didn't have money to pay the company and couldn't work without pay."

[77] Ms Li's oral evidence to the Authority is that: "*The boss said to pay the rest of the money – couldn't remember what the money was for*". Ms Li said that Ms Lin cried and "*I asked the boss to stop talking about it*" and then Ms Zhou told Ms Lin that she "*didn't have to pay the rest*". Ms Li also says that Ms Lin asked Ms Zhou "*for some of the money back*" but this was rejected by Ms Zhou.

[78] Finally, there is the evidence of Mr Chen, the Editor-in-Chief of New Times. His evidence is that Ms Lin was his assistant from 1st September 2008. Mr Chen referred to giving Ms Lin some work to do when she returned to China; and in February 2009, Ms Lin submitted her work "*which lacked depth*". The further evidence of Mr Chen is that:

At the beginning of 2010 her work had undergone a drastic change and she was often unable to fulfil the task I gave her and she would come late and leave early or not come at all without telling.

[79] Mr Chen attests that:

From the beginning of March 2010 she never came to work. I was very surprised that she left without telling [sic] letting me know since she directly reported to me. I discussed this with Sandy who said it was probably because of the emergency at home.⁵

[80] The further evidence of Ms Zhou is that, following the meeting on 20th April 2010, Ms Lin "*still did not come to work*". I note that the last salary payment from New Times to Ms Lin was on 24th March 2010. Ms Zhou says that, as a consequence of the failure of Ms Lin to return to work, she subsequently wrote to Immigration

⁵ There was no evidence before the Authority about any emergency.

New Zealand on 28th May 2010 advising that, as Ms Lin had been absent from work in excess of the days specified in the individual employment agreement, her employment had been terminated. Ms Zhou also added: “We therefore requests [sic] that this employee’s work permit be revoked with immediate effect as we no longer have any responsibility for this person”. It appears that Ms Zhou believed Ms Lin had abandoned her employment, having been absent from her place of work for a continuous period of three working days, (and more), as provided by clause 37 of the employment agreement.

[81] While all transactions relating to payments from New Times to Ms Lin’s bank account ceased as of 24th March 2010, her bank statements show that on 21st April 2010, the sum of \$21,428.70 was deposited, with a further \$7,200 being deposited for the month of May in seven transactions from \$400 to \$2,000. Then on 6th May 2010, there is a withdrawal of \$22,287 and further subsequent withdrawals making a total of \$23,377 being withdrawn for the month of May 2010.

[82] The Authority is not required to reach conclusions about all of this, but I cannot help but note that there were certainly some peculiar and unexplained transactions associated with Ms Lin’s bank account from July 2008, with \$17,500 being withdrawn that month, including three payments on 3rd July 2008 totalling \$7,900 to an entity recorded as “*Expressoholic*”, plus further withdrawals of \$9,600 in three separate transactions between 17th and 28th July 2008. In August 2008, a total of \$42,615.16 was deposited with \$44,585 being withdrawn. Viewing all of this and other unexplained transactions emanating from Ms Lin’s bank account for the period that she was involved with New Times and shortly before and after, it appears that Ms Lin’s circumstances may not have been totally as she portrayed.

Was there a constructive dismissal?

[83] While there is a marked conflict in the evidence regarding the circumstances of Ms Lin’s departure from the employment of New Times, I find the evidence of Ms Zhou and Mr Chen to be more reliable than that of Ms Lin and Ms Li. In the round, I do not accept that Ms Lin resigned on 20th April 2010 as she claims and while I cannot be completely certain, I believe that it is more likely that when Ms Lin was informed that her application for residence had not been approved by Immigration New Zealand, she subsequently decided, at some point, not to continue her employment with New Times. I think the situation was probably most credibly

revealed by the evidence of Mr Chen, who attests that from the beginning of March 2010, Ms Lin did not come in to work. It appears that she may have been also working at a Chinese restaurant.

[84] In summary, I find that it is more probable than not that Ms Lin abandoned her employment, rather than resigning because of demands for the payment of monies by Ms Zhou, or anyone else involved with New Times, as she alleges. Therefore, Ms Lin does not succeed with her claim of unjustified, constructive dismissal.

Conclusion

[85] I have to say that I have found the financial aspects of this case to be among the most difficult that I have ever had to determine. This is because of several factors, including some language difficulties and conflicting, unreliable and unclear evidence. While the role of the Authority allows for a proactive investigation of the matters before it, there is a limit to how far the Authority can reasonably test the evidence of respective witnesses, without being perceived to be biased or oppressive.

[86] This was a case that particularly required extensive and skilled cross-examination of the respective witnesses and unfortunately, with due respect to both advocates, this was not forthcoming to the extent required and the Authority was left to search for the answers to many matters and was left with less than satisfactory responses on occasions. I suspect this was because both parties were reluctant, for their own reasons, to reveal all that they could have in the circumstances.

[87] I have made findings that Ms Lin was required to pay the sums of \$6,000 and \$5,000 respectively to New Times and/or Ms Zhou, as shown by tangible or probative evidence that this was so. Orders have been made accordingly. On the basis of those payments being proven to my satisfaction, the question then arises that, given that this is so, perhaps there is some merit in what Ms Lin alleges in regard to the salary payments she purports to have made to New Times, i.e. \$2,500 each month. While there are some indicators that suggest that Ms Lin's claims are not totally lacking in some credibility, there is a lack of substantial evidence to demonstrate that Ms Lin made the payments that she claims to have made, i.e. \$63,165.50 in total; hence her claims are not proven and are unsuccessful.

[88] The bank statements of Ms Lin also lead to some speculation that, at times, Ms Lin was receiving from and paying moneys to, parties other than New Times.

The claim of unjustified disadvantage

[89] While this claim has not been argued in a meaningful manner, the Authority understands that it relates to the overall allegations of Ms Lin that she was required to repay monies to her employer. Where those allegations have been proven to the satisfaction of the Authority, penalties have been imposed, along with orders for the repayment of the monies involved. I believe that this is the appropriate remedy given the overall circumstances.

The holiday pay claim

[90] It appears that Ms Lin is entitled to be paid annual holiday pay based on 8% of her gross earnings whilst she was employed at New Times. However, there remains some uncertainty about whether at least some of the time that Ms Lin spent back in China in late 2008 and early 2009, was an annual holiday. There is also a lack of detail in regard to how this claim has been presented and the Authority did not receive any further enlightenment in support of this claim during the proceedings.

[91] I invite the parties to resolve this matter if they can by the applicant preparing and presenting a detailed claim in regard to the holiday pay that is alleged to be owed. This should be presented to the respondent for consideration, not later than 28 days from the date of this determination. In the event that the parties cannot reach an agreement on the matter of the holiday pay entitlement due to Ms Lin, consent is reserved for the parties to return to the Authority for a determination.

Summary of the determination and orders of the Authority

[92] For the reasons set out above the Authority has determined that:

1. New Times Press Limited and Ms Sanyou Zhou have breached s.12A (1) of the Wages Protection Act 1983 in that Ms Ling Lin was required to make a payment of the sum of \$6,000.00 to New Times Press Limited on 24th July 2008; and further payments being made by Ms Ling Lin to Ms Sanyou Zhou on 19th December 2008 (\$2,500) and 19th January 2009 (\$2,500), totalling \$5,000.00. These payments constitute the receipt of a premium by the employer.

2. Pursuant to s.12(2) of the Wages Protection Act 1983, New Times Press Limited is ordered to repay the sum of \$6,000.00 to Ms Ling Lin. And pursuant to

s.13(b) of the Wages Protection Act 1983 and s.135 of the Employment Relations Act 2000, New Times Press Limited is ordered to pay a penalty of \$15,000.00; with \$10,000 of this amount to be paid into the Authority for subsequent payment into the Crown Bank Account. The remaining \$5,000.00 shall be paid by New Times Press Limited to Ms Ling Lin.

3. Pursuant to s.12(2) of the Wages Protection Act 1983, Ms Sanyou Zhou is ordered to repay the sum of \$5,000.00 to Ms Ling Lin. And pursuant to s.13(b) of the Wages Protection Act 1983 and s.135 of the Employment Relations Act 2000, Ms Sanyou Zhou is ordered to pay a penalty of \$7,000.00; with \$4,000 of this amount to be paid into the Authority for subsequent payment into the Crown Bank Account. The remaining \$3,000.00 shall be paid by Ms Zhou to Ms Ling Lin.

4. The above payments must be made not later then 28 days of the date of this determination.

5. Ms Ling Lin was not constructively dismissed from her employment at New Times Press Limited and this claim is dismissed.

6. Ms Ling Lin has not succeeded with her claim for the repayment of the sum of \$63,165.50 as the alleged payments to New Times Press Limited and/or Ms Sanyou Zhou, are not proven by the overall evidence. The claim is dismissed.

Costs

[93] Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

