

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 369
3075597

BETWEEN	LONG PAN Applicant
AND	JUYI INTERNATIONAL LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Applicant in person Jared Moss, counsel for the respondent
Investigation Meeting:	8 and 9 June 2020 in person and 12 June 2020 by telephone
Submissions received:	9 and 12 June 2020 from the applicant 12 June 2020 from the respondent
Date of determination:	14 September 2020

DETERMINATION OF THE AUTHORITY

- A. Juyi International Limited is ordered to pay Long Pan the followings sums within 28 days of the date of this determination:**
- (i) \$504.74 gross as sick pay; and**
 - (ii) \$12,454.31 gross as holiday pay.**
- B. Juyi International Limited is to pay Mr Pan \$71.56 for the Authority's filing fee within 28 days of the date of the determination.**
- C. Other costs are reserved and a timetable set if the matter cannot be resolved by agreement.**

What is the Employment Relationship Problem?

[1] From 29 August 2017 until 15 March 2019 Long Pan worked as a bench top stone worker for Juyi International Limited (Juyi or the company). Juyi, trading as Eden Cabinets, is operated by director and shareholder Min Yang, along with her husband general manager Guoping Zhang.

[2] Mr Pan claims that he was not provided with all of his statutory entitlements by Juyi, including breaks and holiday pay. Juyi largely denies that Mr Pan did not receive his entitlements, claiming that he was treated well and is now pursuing the company in order to fund a competing business he set up after leaving Juyi.

[3] An investigation meeting was held in person on 8 and 9 June 2020 with submissions completed by phone on 12 June 2020. I received written witness statements and heard oral evidence from Mr Pan, Ms Yang, Mr Zhang and Wenbin Hua (a builder). I was assisted by two interpreters of the Mandarin language.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified resulting orders.

What are the issues?

[5] The issues for investigation and determination are:

- (a) Did Juyi fail to provide Mr Pan with work for which he was available and if so, how much does it owe him?
- (b) Did Juyi meet its obligations to Mr Pan regarding rest breaks and if not, how much, if anything, does Juyi owe him?
- (c) Does Juyi owe Mr Pan for sick leave and if so, how much?
- (d) Does Juyi owe Mr Pan holiday pay and if so, how much?
- (e) Did Juyi meet its obligations to Mr Pan regarding Kiwisaver and if not, how much, if anything, does it owe him?
- (f) Should either party be required to contribute to the other party's costs?

[6] No penalties are sought against Juyi.

What was the working arrangement?

[7] This case demonstrates difficulties which can arise when little documentation is used in the employment setting and the parties later fall out. There are widespread areas of disagreement between Mr Pan and the Juyi witnesses although not all areas need be decided in order to resolve the employment relationship problem.

[8] Mr Pan and Mr Zhang were friends, having been to university together in China. Mr Zhang describes taking Mr Pan on at Juyi as a supportive gesture.

[9] Although a migrant with little English, Mr Pan would not usually be seen as a vulnerable employee. He was a reasonably well paid skilled worker and had been in New Zealand for some time. He was not dependent on Juyi for a work visa.

[10] Mr Zhang believes there was a written employment agreement but Juyi was unable to produce one. Ms Yang and Mr Pan do not think there was a written agreement.

[11] Juyi and Mr Pan agreed that he would receive pay of \$1,000 net a week for full time work. Other than Mr Pan, staff at Juyi were paid on the basis of a gross figure. However, with Mr Pan no gross amount was agreed. Juyi calculated the grossed up figure as \$1,261.86. From June 2018 Mr Pan's weekly rate increased to \$1,080 net, which equates to a gross figure of \$1,379.94. Usually eight hours a day were worked.

[12] No adequate wages and time record was provided by Juyi. The company operated a warehouse and office, using a timecard system with staff clocking in and out. Juyi provided what it had of Mr Pan's timecards. These covered most but not all of his time at the warehouse.

[13] Juyi filed payslips but it was evident when matched against the net payments recorded in Mr Pan's bank accounts that the payslips were not always accurate. To be fair, these instances were not always in Juyi's favour. Mr Pan did not receive payslips whilst working at Juyi. Juyi gave payslips to staff who wanted them, but not otherwise.

Was work provided as promised?

[14] Mr Pan claims that for a total of seven weeks he was not offered work despite being available. He was not paid for that time.

Closedown periods

[15] Some of the time Mr Pan claims was in the Christmas holiday period each year. Since it started in business, Juyi closed down over that time. Customers and suppliers were not working and were often away, so the company decided it made sense to close.

[16] Businesses are permitted to have an annual closedown and, having given the specified notice, require employees to take holidays under ss 29 to 35 of the Holidays Act 2003.

[17] Juyi was entitled to close down over Christmas. It should have made annual leave available and did not always do so.¹ However, Mr Pan's holiday pay claim covers that. He has not established that he is entitled to any additional pay under this head.

March 2018

[18] The other period Mr Pan claims he was not offered work is 5 to 30 March 2018. He says the factory was short of work and some staff, including himself, were told to stay home. He was instead paid for work he undertook for a friend in that period although seemingly at a lower rate than he received for Juyi.

[19] Juyi says that Mr Pan chose not to work in this period. Ms Yang says he applied for leave in March 2018, having not had taken leave since his 2016 start at Juyi. His request was granted. Because of an arrangement to exchange leave for kitchen cabinetry referred to in more detail below, Mr Pan was put on unpaid leave. Mr Pan denies Juyi's suggestion that he took leave to help with his friend's business.

[20] Ms Yang says that after having no stone worker when Mr Pan was on leave, the company hired an additional person to do the same job to make sure Juyi always had someone available to complete that work. Mr Pan did not dispute that another stone worker was hired. It seems unlikely that another worker would have been employed if the company had insufficient work for Mr Pan alone.

[21] On balance I prefer the evidence that Mr Pan was on unpaid leave for this period. The issue of whether Juyi owes him holiday pay is dealt with below.

¹ Holidays Act, s 33.

Did Mr Pan get rest breaks?

[22] Mr Pan claims that he was not allowed two 15-minute tea breaks for January to March 2019. He seeks payment for eleven weeks of breaks.

[23] At the Juyi premises the staff had their breaks at the same time. When Mr Pan started there were two 15-minute rest breaks and a one hour meal break with the work day running from 8am to 5pm. Juyi decided to change its breaks practice after a customer complained about being unable to contact the company. Juyi put out a proposal to change the hours of work. No objection was received.

[24] A note from Ms Yang set out the new hours as follows:

Start time:	9am
Lunch	12:00 – 12:45
Afternoon tea:	15:00 – 15:15
Finish:	18:00

[25] For that work period, employees are entitled to two 10-minute paid breaks and one 30-minute unpaid break a day.² Although there is some room for flexibility in the timing of breaks, it is a legal requirement that such breaks are taken unless an exception applies.

[26] I conclude that Mr Pan did not receive a morning tea break although he was paid for a 50% longer afternoon tea break than was legally required. However, there is difficulty providing Mr Pan with a remedy for this in the circumstances of this case. He was paid for his time, he simply was not able to take a rest. There is no personal grievance claim here which could potentially have led to remedies nor a penalty claim where any consequences for him could have been taken into account.

Does Mr Pan have a claim for sick leave?

[27] Mr Pan claims for several days' sick leave.

[28] Although Mr Pan did nominate specific days, it was apparent from his evidence that he relied on the fact he had occasionally not received his usual weekly pay rather than remembered particular sick days or recorded dates himself. He worked backwards from lower paid weeks to claim that he must have had unpaid sick leave that week.

² Employment Relations Act, s 69ZD.

[29] Juyi appears to have had no system for recording sick leave being taken other than broadly noting any absence from work. This is despite the obligation on employers to keep holiday and leave records, which include the recording of current sick leave entitlements, the dates sick leave was taken and the amount of payment for sick leave.³ Juyi could potentially have avoided this claim by operating a reliable system to record why staff had time off.

[30] Mr Pan received pay of \$900 net for two weeks in May and June 2017. Timecards were not available for that period. This is when Mr Pan bought a house and had appointments with lawyers or others. Time off to make arrangements for a house purchase is not time off because an employee was sick, and thus does not establish a sick leave entitlement.

[31] The company accepts there was one day of pay deducted on each of the first weeks of December 2017 and February 2018. The timecards show that Mr Pan did not clock in on 6 December 2017 and 7 February 2018. In the absence of any other explanation or Juyi record of Mr Pan being off work for another reason, I accept that Mr Pan should be paid for two days' sick leave.

[32] Juyi denies that there was a sick day on 4 January 2019 as it fell in the Christmas closedown period. This is consistent with the timecards which show no clocking in by Mr Pan. However, Mr Pan received four days' pay that week. I take that to be statutory holiday pay. The day not paid will effectively be allowed for in the holiday pay calculation below.

[33] Mr Pan has established that he is owed for two days of sick leave. Based on the then daily rate of \$252.37 gross, Juyi is ordered to pay Mr Pan the sum of \$504.74 gross as sick pay within 28 days of the date of this determination.

Does Mr Pan have a claim for holiday pay?

[34] The parties considered that Mr Pan did not take any paid annual leave whilst at Juyi. However, an examination of bank statements reveals some payments during closedown which were more than the statutory holiday entitlements. I will take those into account below.

³ Holidays Act, s 81(2)(f) and (g) and (h).

[35] Juyi asserts that it does not owe Mr Pan any holiday pay because:

- (a) There was an agreement that Mr Pan's holiday pay for an initial period would go to buy a kitchen which Juyi supplied to him; and
- (b) In 2018 the company began paying staff 8% holiday pay on top of wages and met its obligation that way.

[36] Mr Pan dispute those assertions.

Kitchen

[37] Juyi says that when Mr Pan bought a new house in 2017, he asked the company to make a kitchen and another wash area for him. Ms Yang says he brought her a draft he had drawn up and she gave it to the office designer who put it through a software programme. Ms Yang gave Mr Pan a formal quotation for over \$12,000 for the manufacture of the two kitchen areas, including bench tops and cabinetry. This was based on mate's rates with Mr Pan undertaking the making of the stone bench tops himself from stone ordered through Juyi. According to Ms Yang, Mr Pan decided to go ahead.

[38] Mr Zhang says that he and Mr Pan reached an agreement that Mr Pan would use two years' holiday pay in exchange for receiving kitchen cabinetry and a bench top. The accrued holiday pay as well as some future holiday pay were thus set-off against the kitchen costs. Mr Zhang further says he installed the kitchen at Mr Pan's house, as installation was his focus at Juyi.

[39] Juyi lodged the quotation in Mr Pan's name, and computerised sketches of the kitchen designs and layouts, along with computer file information indicating that the company had a client file for Mr Pan. A document headed "Holiday payment form Eden Cabinets", in the form of a pay slip showing the set-off, was provided although Ms Yang was upfront that this was created after Mr Pan made his Authority claim.

[40] When I asked Mr Pan about the kitchen claim, rather than accepting or rejecting Juyi's position, he said that the company needed to provide proof of that. Similar answers were given to further questions. I found Mr Pan's evidence regarding the kitchen somewhat evasive. He initially disputed receiving a kitchen and denied that he had asked Juyi to design a kitchen for him or had seen the drawings. Similar evidence

was given under cross examination although he admitted that the designs looked like his kitchen. He insisted that there had to be a contract document for the supply of kitchens, rather than just a quotation. He noted that the quote was not signed.

[41] The following day when questioning Ms Yang, Mr Pan accepted that a kitchen and wash area sketch lodged by Juyi did reflect his kitchen. He did not accept that the designs were completed at Juyi but clarified that he had drawn up the designs and put them into the computer at work to see what they looked like. When clarification was sought by Juyi's representative, Mr Pan accepted that he had not put the designs into the software himself but that Ms Yang or someone else at Juyi had done that for him.

[42] I found it unlikely that Mr Pan would have completely forgotten about having had his sketches put into software at work. Mr Pan's evidence also did not fit readily with the computer file evidence indicating that client files under his name had been worked on over a period of time.

[43] Mr Hua had undertaken renovations on Mr Pan's house and saw kitchen cabinetry being delivered from a Juyi van by a Juyi staff member. He also remembered Mr Zhang assisting with the installation of the kitchen. I accept Mr Pan's point that Mr Hua was not entirely independent, being Mr Zhang's friend and having some connection with the Juyi business. However, I found him credible.

[44] Overall I find it more likely than not that there was an agreement to set off a bench top and cabinetry against holiday pay. However, that is not the end of the matter, as I must be satisfied that the Holidays Act has been complied with. That legislation makes no provision for an exchange between the employer and employee of goods in return for holiday pay. In some situations which I outline below, holiday pay may be paid with an employee's pay.⁴ There is also provision for up to one week's holiday a year to be paid for, sometimes referred to as cashed up.⁵

[45] However, here Juyi gave Mr Pan goods in exchange for his entitlement. He was not paid money. Holiday pay and leave pay are to be treated as salary or wages.⁶ And under the Wages Protections Act 1983 salary and wages must be paid in money, with

⁴ Holidays Act, s 28.

⁵ Holidays Act, s 28A.

⁶ Holidays Act, s 85.

very limited exceptions.⁷ None of those exceptions apply here.⁸ Juyi did not meet its obligation to pay Mr Pan his holiday pay in money.

[46] I conclude that Mr Pan is owed holiday pay and the provision of the kitchen cannot be taken into account to reduce that amount.

8% addition

[47] Juyi also argues that from late May 2018 it started paying 8% pay on top of its employees' wages for holiday pay, on a pay as you go basis. Mr Zhang wanted not to owe employees any money (for accrued annual leave). Ms Yang had heard of another company doing the same thing. Unfortunately there is no indication of any checking against the Holidays Act requirements beforehand. Juyi says Mr Pan agreed to the plan.

[48] Mr Pan denies any such agreement. He says that Mr Zhang told him he would get a pay rise to \$1,080 net per week, after Mr Pan complained about having the four weeks off unpaid in March 2018.

[49] Mr Pan did receive a net increase of 8%, in keeping with Juyi's version of events. The amount seems rather large for a single pay increase.

[50] However, regardless of why Mr Pan received the extra money, the requirements of the Holidays Act have not been met. Section 28 of that Act sets out the only two situations when annual holiday pay is permitted to be paid with an employee's pay. They are that the employee:

- (a) is employed on a fixed-term agreement to work for less than 12 months; or
- (b) works on such an intermittent or irregular basis that it is impracticable for the employer to provide four weeks' annual holidays.

[51] There are additional requirements but I need not go into them as Juyi cannot meet the first test. Mr Pan was not employed for less than 12 months on a fixed-term basis and he did not work intermittently or irregularly.

[52] Where an employer has incorrectly paid holiday pay with an employee's pay, the employee become entitled to annual holidays as per s 16 of the Holidays Act.⁹ So

⁷ Wages Protections Act, s 7.

⁸ Wages Protection Act, ss 9 to 10.

⁹ Holidays Act, a 28(4).

Mr Pan remained entitled to paid annual holidays and not having taken them, he should have been paid them out when his employment finished.¹⁰

Conclusion on holiday pay

[53] Juyi owes Mr Pan holiday pay for the entire period of his employment, less any paid holidays he took.

[54] Mr Pan claims holiday pay on the basis of 8% of his total earnings. However, where an employee such as Mr Pan has worked for longer than a year, holiday pay is calculated on four weeks' pay for each year completed plus 8% of wages for the remaining part year.¹¹ The four week block/s must be paid at the greater of the ordinary weekly pay at the end of employment or the average rate during the 12 months immediately before the end of the last pay period before the end of employment.¹² In Mr Pan's case, the ordinary weekly pay is greater.

[55] Mr Pan worked for Juyi for two complete years and a part year. I have calculated his holiday pay entitlement as follows:

(a) Four weeks a year for two years, totalling eight weeks. At the ordinary weekly pay of \$1,379.94 at the end of Mr Pan's employment, this amounts to \$11,039.52 gross; and

(b) 8% of \$39,742.27 gross for the part year to March 2019, totalling \$3,179.38.

[56] This totals \$14,218.90 gross.

[57] On examining Mr Pan's bank statements it was evident that Juyi in fact made payments during the closedown periods, some of which appear to be for public holidays. Having taken into account the four public holidays in that period, the remaining amounts should be deducted as they represent holiday pay paid during the close downs:

(a) \$200 net (\$252.37 gross) on 30 December 2016; and

(b) \$1,200 net (\$1,512.22 gross) on 29 December 2017 and 5 January 2018.

¹⁰ Holidays Act, ss 24 and 25.

¹¹ Holidays Act, ss 24 and 25.

¹² Holidays Act, s 24(2).

[58] I order Juyi to pay Mr Pan the sum of \$12,454.31 gross as holiday pay within 28 days of the date of this determination.

What happened about Kiwisaver?

[59] Mr Pan claims that Juyi failed to make Kiwisaver contributions on his behalf. Juyi says that some staff, including Ms Yang, are Kiwisaver members with contributions forwarded for them.

[60] The state of the evidence regarding Mr Pan's Kiwisaver was somewhat unsatisfactory.

[61] When asked by the Authority if he was a Kiwisaver member before he started at Juyi, he denied that he was. However, information he filed from the IRD and his Kiwisaver provider suggested he had been a member of a Kiwisaver scheme since at least the year before he started working for Juyi.

[62] Mr Pan initially accepted that he did not talk to anyone about Kiwisaver when he started at Juyi but seemed to change his position and say he had talked to Mr Zhang. Mr Zhang as the general manager was not the most obvious person to speak to about Kiwisaver although he was Mr Pan's friend. Mr Zhang denied having spoken to Mr Pan about Kiwisaver. I found Mr Pan's evidence about when he spoke to Mr Zhang confusing. Mr Pan indicated that he had given his Kiwisaver account to Juyi but could not remember when that occurred. Ms Yang thought that she asked Mr Pan about Kiwisaver as part of the induction discussion on bank account and IRD details.

[63] Mr Pan's Kiwisaver records from the IRD and his Kiwisaver provider indicate that in February 2018 and August 2019 Mr Pan's Kiwisaver scheme received money from Juyi (via the IRD).

[64] Juyi says that these payments were in error and were intended for another employee who was contributing to Kiwisaver. The name of the other employee was identified. Evidence given that the amounts paid were not an appropriate percentage of Mr Pan's salary but rather reflected the pay rate of the other employee. In addition I found Juyi's explanation of the payments plausible as it seems unusual that in an almost three year period, an employer would decide to make two widely spaced contributions but no more.

[65] Some months prior to the investigation meeting Mr Pan informed the Authority that he was awaiting a “formal letter from IRD showing Juyi International Limited submitted a KS2 form (Kiwisaver deduction form) to them for Long Pan at the start of employment”. That was said to arrive in one or two weeks, when it would be provided to the Authority. No such letter was lodged and no explanation offered.

[66] On the documentary evidence available, when Mr Pan started at Juyi he was on a Kiwisaver contributions holiday, with no contributions being made by him or his previous employer in the 2015 to 2016 period.¹³ Under a contributions holiday employers were not required to make deductions of contributions from an employee’s salary or wages nor to make employer contributions.

[67] On the state of the evidence before me, I cannot be satisfied that Juyi had any obligation to deduct contributions from Mr Pan’s salary or make employer contributions for him.

Costs

[68] Costs are reserved and the parties invited to resolve the matter.

[69] Mr Pan has succeeded in some of his claims and on the face of it would be entitled to a contribution towards costs incurred. However, Mr Pan was not represented so it may be that he has not incurred any advisory or representation costs which are claimable. However, if he has and the parties are unable to agree on resolution Mr Pan shall have 21 days from the date of this determination to file a memorandum on costs. Juyi shall have a further 14 days in which to file a memorandum in reply. Submissions claiming costs should include a breakdown the costs and be accompanied by supporting evidence. Any award would be likely to take into account Mr Pan’s partial success.

[70] Given the prospect of no other costs being claimed, I deal with the filing fee now. I order Juyi to pay Mr Pan \$71.56 within 28 days of the date of this determination.

Nicola Craig
Member of the Employment Relations Authority

¹³ Contribution holiday now known as savings suspension.