



New Zealand Employment Relations Authority Decisions

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Tan v Wong and anor CA189/10 (Christchurch) [2010] NZERA 752 (29 September 2010)

Last Updated: 11 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 189/10 5156771

BETWEEN BOON CHWEE TAN

Applicant

A N D CHUNG WONG

First Respondent

A N D ASHA CO LIMITED

Second Respondent

Member of Authority: Representatives:

Helen Doyle

John Horan, Advocate for Applicant

Robert Davidson, Counsel for First and Second Respondents

Investigation Meeting:

12 and 13 April 2010

Submissions Received:

21 May 2010 and 8 June 2010 from Applicant 28 May 2010 from Respondent

Date of Determination:

29 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Boon Chwee Tan worked at Asha Restaurant in Christchurch for a period of eight years from 10 December 2000 until 28 December 2008. Ms Tan says that during that time she did not have any paid holidays, was not paid time and a half for working on public holidays, did not receive an alternative day in lieu of working on public holidays and was not paid for alternative days, worked considerable overtime for which was not paid, was subjected to verbal threats, discriminated against and then unjustifiably constructively dismissed.

[2] Ms Tan said that she was employed by the first respondent, Mr Wong, however the Authority, after hearing the evidence during a two day investigation of this employment relationship problem, joined the second respondent to the proceeding

after receiving submissions to the proposal to do so in determination No CA121/10. Findings will need to be made as to whether the identity of Ms Tan's employer changed throughout her employment at Asha Restaurant.

[3] Ms Tan seeks the sum of \$141,571.21 as follows:

- Underpayment of salary and holiday pay - \$101,741.52;
- Alternative day entitlement for working on a public holiday - \$5,776.67;
- Two weeks' notice of termination - \$1,422.40;
- Interest - \$7,630.61;
- Personal grievance - \$25,000.

[4] Chung Wong and Asha Co Limited say that the claims that are not personal grievances are limited to a period not more than six years after the date on which the cause of action arose under [s.142](#) of the [Employment Relations Act 2000](#). Mr Wong and Asha Co Limited say that the personal grievances were not raised within the statutory timeframe under [s.114](#) of the [Employment Relations Act 2000](#) and in any event deny all of Ms Tan's claims in terms of money owing and alleged personal grievances.

[5] Further, Mr Wong says that he was not Ms Tan's employer after 31 July 2003 when her employer became Asha Co Limited. Asha Co Limited accepts that it employed Ms Tan from that date.

Issues

[6] The issues for the Authority are the following:

- Was Ms Tan employed by Mr Wong and/or Asha Co Limited when she worked at Asha Restaurant;
- If it is found that Ms Tan was employed by both Mr Wong and Asha Co Limited over the course of her employment at Asha Restaurant, then what period of time was she employed by Mr Wong and what period of time was she employed by Asha Co Limited;
- In terms of the claims that are not personal grievances, is there a time limitation, and if so, from what date does that limitation run;
- Should the claims for alternative days and holiday pay, if upheld, be treated differently;
- What hours of work did Ms Tan undertake during her employment at Asha Restaurant, and was she appropriately remunerated for working the hours that she did;
- Is Ms Tan owed money for hours worked above that for which she was paid, working on public holidays, alternative days in lieu and holiday pay and, if so, how should they be calculated and is Ms Tan entitled to interest and, if so, from what period;
- Were the personal grievances raised within the statutory timeframe set out in [s.114](#) of the [Employment Relations Act 2000](#);
- If there was a personal grievance or grievances raised within the required timeframe, then what are the personal grievances and, depending on its nature, are they made out;
- What remedies is Ms Tan entitled to in respect of any personal grievances, and are there issues with respect to contribution and mitigation?

Was Ms Tan employed by Mr Wong and/or Asha Co Limited when she worked at Asha Restaurant?

[7] I have relied on the Inland Revenue Department summary of earnings for the tax year 1 April 2000 to 31 March 2001 to determine Ms Tan's date of commencement of employment at Asha Restaurant. This summary of earnings show that Ms Tan first received income from Asha Restaurant from 10 December 2000 and I find, for the purpose of this determination, that was the date she commenced her employment.

[8] At the time Ms Tan commenced her employment, Mr Wong operated the restaurant in partnership with his former wife. He accepts that from December 2000 until August 2003, Mr Wong and his wife employed Ms Tan directly.

[9] On 1 August 2003, Mr Wong incorporated a company called Asha Co Limited and was a 50% shareholder in that company with his brother. He says that from that day, the trading of the restaurant and employment of the staff was undertaken through the company. Mr Wong says that he personally advised Ms Tan of the incorporation of Asha Co Limited and advised her that she should inform the Department of Immigration about this. Mr Wong said that he told Ms Tan that he had borrowed money from his brother and had therefore given him a shareholding in the company. Mr Wong said that all holiday pay owing was assigned to the company. In the absence of any evidence to the contrary and accepting that Mr Wong had the ability as a director to so commit the company I accept his evidence on that point.

[10] Ms Tan, in her evidence at the investigation meeting, did not accept that Mr Wong advised her that she was now employed by a company, Asha Co Limited. Although not certain of the year when the discussion took place, Ms Tan did recall Mr Wong making a statement to the effect that he was in a joint venture with his brother.

[11] During the Authority's investigation meeting, I heard evidence from Clifford Kean-Teik Chan, a director of Clifford Chan

& Co Limited, chartered accountants. Clifford Chan & Co Limited undertook the preparation of financial statements for the partnership trading as Asha Restaurant initially and then for the company, Asha Co Limited trading as Asha Restaurant, from 1 August 2003. As I will set out shortly, Clifford Chan & Co Limited also dealt with taxation matters involving employees, including the preparation of employer monthly schedules for PAYE purposes. In order to attend to those matters the firm in consultation with Asha Restaurant compiled a schedule of payments made to employees, including Ms Tan. That is relied on as the record of wages gross and net paid to Ms Tan.

[12] I accept that the records supplied on behalf of Asha Restaurant support that the trading of the restaurant and payment of employees including Ms Tan was undertaken through Asha Co Limited from August 2003.

[13] Having heard from Ms Tan, I accept her evidence that she had little if any knowledge of this. She continued to be paid in cash each week by Mr Wong and received no written pay slips or advice that her employer had changed.

[14] The issue for the Authority as to who employed Ms Tan and for what period is an important one but is narrowed by signed employment agreements entered into between Ms Tan and Asha Co Limited on 13 July 2006 and January 2008. I accept that from 13 July 2006 Ms Tan agreed that Asha Co Limited was her employer.

[15] The period therefore in dispute as to who employed Ms Tan is between 1 August 2003 and 13 July 2006.

[16] On 19 May 2003, shortly prior to the incorporation of Asha Co Limited, Ms Tan entered into the first of three written employment agreements, the other two I have referred to above. The 2003 employment agreement was expressed to be between Ms Tan and Asha Restaurant and signed by the owner of Asha Restaurant, Mr Wong. There was also a letter of offer of employment that referred to the length of employment as a 3 year permanent position commencing 19 June 2002. Mr Wong said that this was a mistake and was from 19 June 2003. I accept that it is most likely an error and nothing really turn on that.

[17] Clause 10 of that agreement provides:

10.0 Changes to contract

10.1 The parties to this employment contract may, at any time while it remains in force, mutually agree in writing to the variation of any or all of its provisions as provided for in the [Employment Relations Act 2000](#).

Changes must be signed by both parties and be attached to this contract.

[18] There was no evidence of a variation to that agreement in terms of the employer parties.

[19] In *Mehta v. Elliott (Labour Inspector)* [2003] NZEmpC 110; [2003] 1 ERNZ 451, the Court held the following at para.[22]:

[22] The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change

[20] I am not satisfied, from the evidence, that Ms Tan agreed to a change during the course of her employment from Mr Wong as employer to Asha Co Limited until

13 July 2006.

What period of time was Ms Tan employed by Mr Wong and what period of time was she employed by Asha Co Limited?

[21] Ms Tan was employed by Mr Wong from 10 December 2000 until 13 July 2006 and then by Asha Co Limited from 13 July 2006 until her employment terminated in December 2008.

In terms of the claim for unpaid money, is there a time limitation and if so from what date does that period run?

[22] [Section 142](#) of the [Employment Relations Act 2000](#) provides a limitation period for actions other than personal grievances. It provides that no action may be commenced in the Authority or the Court in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose.

[23] An action under [s.142](#) is commenced with the filing of a claim - *Hopper v. International Paints of NZ Ltd (No 3)* [1948] NZLR 1051.

[24] A claim against Mr Wong was commenced when the statement of problem was lodged with the Authority on 6 May 2009. No action could be commenced in relation to the employment relationship problem that Ms Tan was not paid for all the hours that she worked and was not paid time and a half for working on public holidays prior to 6 May 2003.

[25] I accept Mr Davidson's submission that the claim against Asha Co Limited was only commenced when the company was

joined to the proceedings by a determination dated 14 May 2010. No action therefore could be commenced in the Authority in relation to the employment relationship problem against Asha Co Limited before 14 May 2004.

Should the claims for alternative days and holiday pay if upheld be treated differently?

[26] Entitlement for holiday pay and payment for alternative days in lieu does not crystallise until the employment ends: *Myatt (Labour Inspector) v. Antipodean Growers Ltd* AA153/10, Member Dumbleton. These matters, therefore, can be assessed from the commencement of Ms Tan's employment in December 2000.

What hours did Ms Tan work during her employment at Asha Restaurant and was she appropriately remunerated for work performed?

[27] Ms Tan was employed as a chef at the restaurant and in or about June 2006 was promoted to the position of Head Chinese Chef.

[28] The first individual employment agreement provided to the Authority was signed by Ms Tan and Mr Wong on 19 May 2003. Accompanying that agreement, was a letter containing the offer of employment. Remuneration was referred to in both the letter of offer of employment and the employment agreement itself. Remuneration was \$346 gross per week. The employment agreement provided in clause 4.1 for overtime payable on an hourly basis for work required over the minimum weekly hours.

[29] There is a conflict in the evidence as to what Ms Tan was paid and also what hours she worked. I shall turn first to the issue of what Ms Tan was paid.

[30] There was no dispute that Ms Tan was paid cash by Mr Wong every week. She worked for six days over the course of her employment and Tuesday was her day off. Mr Wong agreed that the restaurant was open for public holidays but he said that Ms Tan was paid extra for working on those days. There are no records about hours worked on public holidays and the wage records available make no reference to public holidays at all or additional payment.

[31] Ms Tan's evidence as to what she was paid was different from Mr Wong's evidence. Ms Tan said she was paid more in cash at least in the first part of her employment by Mr Wong than what Mr Wong said in his evidence. As I have mentioned earlier, records were provided to the Authority as compiled by the accountants for the restaurant for a six year period showing the gross weekly amount for the earlier part of the employment agreement of \$346 with PAYE of \$65.85.

[32] Mr Horan took strong objection to these written records. Having heard the evidence, I am satisfied that although there is no reference within the records to any times worked and simply the amount paid to Ms Tan each week, they form the most reliable evidence on which to base an assessment about what was received by Ms Tan and whether anything further is owing.

[33] I do want to stress that this is a case where Mr Wong does not agree that he paid Ms Tan anything additional other than the net amount after tax was deducted that is recorded. The records were prepared by the accountant in order to attend to payment of tax and preparation of monthly schedules. This was undertaken in circumstances where Mr Wong said that he did not speak or write well in English and left these matters up to the accountant to deal with. In those circumstances, I accept his evidence as to payments made and rely on the records provided on behalf of the respondent together with the employment agreements.

[34] The appropriate way to assess if further money is owing by way of overtime is to apply the hourly rate as agreed between the parties and payments already made. I then need to make findings on the balance of probabilities about the number of hours that Ms Tan worked. If Ms Tan has undertaken more hours than she has been paid for she will be owed money for overtime worked as set out in the employment agreements. In undertaking this exercise over the period of six years I am conscious of the passage of time and the resulting impact on memory. There are no records as to the actual times Ms Tan worked and no other records about working on public holidays or for annual leave. The Authority will need to reach a fair result but given the above matters and absence of records such a conclusion will not be able to be made with the same degree of accuracy had those records been available.

[35] The evidence from Ms Tan, was that she commenced work each day between 8.30 and 9am and would work through until the end of lunch at 3pm when she would have a break until between 4.30 and 5pm and then she would work through until 10pm. Mr Wong's evidence was quite different. He said that Ms Tan, during the initial part of her employment, worked four days between Monday and Friday starting at 12 noon until 2pm and then resuming from 4pm to 8pm. Mr Wong said Ms Tan would also work on Saturday and Sunday from 12 noon until 2pm and from 4pm until 8.30pm. Mr Wong said that this changed in September 2005 when Ms Tan's wages were increased and she worked from 11am to 2pm and 5pm to 8.30pm during the week and from 11am to 2pm and from 5pm to 9pm on Saturday and Sunday.

[36] I heard from Ms Ting Ting Sun who was a restaurant manager from January 2006. Ms Sun completed her degree in commerce and management and worked part time whilst doing so at the restaurant from 2004. Ms Sun gave evidence that Ms

Tan, in 2006, worked 40 hours per week over six days and that she spent time at the restaurant when she did not have to. Ms Sun said her understanding was that Ms Tan was not allowed to use the kitchen or lounge in which she occupied a room in. Ms Tan did not accept that.

[37] Ms Sun was not able to say what time Ms Tan started in the morning but did say in her evidence that she sometimes saw her shopping in the morning. In the evenings, Ms Sun said that Ms Tan would finish at 8 or 9pm and then have a meal for about half an hour. In 2004, Ms Sun was working part time in the evenings.

[38] I also heard from Mr Xiwen Wu who commenced his employment at Asha Restaurant in 2004 as a chef. Mr Wu would work during lunch time which he said in his evidence was about 11am to 3pm and then he took time off, returning in the evenings to do the dinner shift. Mr Wu said that there would not be anything for Ms Tan to do at the restaurant at 8.30 in the morning and that only the dim sim chef started early. Mr Wu said that Ms Tan finished work on a week day at 9pm and on the weekend between 9.30 to 10pm.

[39] Ms Tan's evidence as to when she started work was supported by Mr Ray Hobbs from whom Ms Tan rented a room. I was unable to form a firm view as to the exact dates that Ms Tan rented a room from Mr Hobbs. This was because another witness Chin Wah How, said that she rented a room at his house from 2002 until April 2005. Mr Hobbs in his evidence said that Ms Tan rented a room between April 2003 and July 2007. Nevertheless, and simply noting some overlaps, I accept that the evidence from Mr Hobbs supported the times that Ms Tan generally left home for work at Asha Restaurant and also her return times. Mr How had usually started work himself before Ms Tan left for work so his evidence on that was not as persuasive but he recalled the time she returned home.

[40] Mr Hobbs said in his evidence that Ms Tan would leave home between 8.15am each day and return at approximately 10-10.30pm. He described this routine as *like clockwork*. His home was about 10 minutes from the restaurant.

[41] I also heard from Trevor Taylor who was a close friend of Ms Tan for many years and has been in a relationship with her from November 2008. From November 2008 when Mr Taylor and Ms Tan lived together Mr Taylor said that Ms Tan would leave home at 8am to catch the bus and that he would pick her up from work never earlier than 10pm.

[42] I find that the evidence supports that Ms Tan arrived at the restaurant each morning between 8.30am and 9am but that there is then a dispute in the evidence as to whether she simply ate breakfast at the restaurant and undertook some shopping prior to lunchtime duties or whether she actually undertook some preparation.

[43] Considering the matter objectively, I find it more likely than not that Ms Tan arrived at that time in the morning in order to undertake some preparation of food in advance of the lunchtime period. Nevertheless, I have taken Ms Tan's start time from 9am and allowed half an hour for her to settle in and have some breakfast and then for one hour's preparation before the lunch period. In doing this, I have taken into account Ms Tan's evidence that there were occasions when, if she felt she was up-to-date, that she would take some time out and play the poker machines or go shopping.

[44] The next area of dispute is the lunch period. Ms Tan's evidence is that the lunch was from 11am until 3pm but Mr Wong says for a shorter period between 12 noon and 2pm only extending to 11am to 2pm in September 2005. Mr Wu, however, gave evidence that he worked from 2004 during the lunchtime from about 11am to 3pm and on that basis I accept that that was the time Ms Tan would work. Her evidence was that she would then have a break until 4.30 or 5pm and work from 5pm until 10pm. I have taken the commencement time thereafter from 5pm. There is significant dispute, though, as to when the evening dining finished.

[45] I have again placed reliance on Mr Wu's evidence in which he says that on a weekday Ms Tan finished work at 9pm and on the weekend between 9.30 to 10pm. I accept that Ms Tan routinely left work at 10pm. Given the likelihood that she had a meal, I have made an allowance of half an hour to conclude that she usually worked from 5pm until 9.30pm.

[46] Although the claim lodged on behalf of Ms Tan was for increased hours during the later part of her employment from 57 to 66 hours per week, the evidence from Ms Tan was that she worked the same hours over the course of her employment. Any findings, therefore, that I make about hours that Ms Tan worked over and above what she was paid for, therefore, apply for the whole six year period.

[47] I am satisfied that Ms Tan, as at 6 May 2003, worked longer hours than the 38 and then 40 hours described in her employment agreements as minimum hours. I consider it more likely than not that Ms Tan worked at least one hour prior to 11am undertaking preparation and then from 11am to 3pm for the lunch time. I have taken the time that she resumed employment for the evening as 5pm and her finish time as 9.30pm. That is a total of 9.5 hours per day for six days or 57 hours. I am not altogether satisfied though that lunchtime was always from 11am to 3pm and I accept there could have been some fluctuation during that period. In those circumstances, it would seem to me to be somewhat unfair to assess the hours at 9.5 per day without recognising that in some way. I have therefore deducted three hours across the week to allow for some variations.

[48] I arrive at a figure of average hours work undertaken by Ms Tan for the six year period of 54 hours per week. All three

employment agreements made provision for overtime for hours worked above the minimum hours at an hourly basis. In the two later agreements entered into in 2006 and 2008, the minimum hours were stipulated as 40 hours per week.

[49] I shall now calculate what I find is owing by way of overtime and payments for working on statutory days below. Ms Tan was paid on a weekly basis and as 6 May 2003 is a Tuesday I have simply taken the week from Tuesday to Tuesday.

6 May 2003 to 4 May 2004

[50] This period was governed by the employment agreement signed on 19 May 2003 in the main. In any event the evidence was clear that Ms Tan, prior to signing that agreement and it coming into effect received \$9.10 per hour.

[51] For this year, Ms Tan was paid \$346 gross per week for a 38 hours week at the hourly rate of \$9.10. The shortfall for each week is therefore the difference between $\$9.10 \times 54$ hours which is \$491.40 gross less the amount already paid of \$346 gross for 38 hours. The shortfall is \$145.40 gross per week which when multiplied by 52 is \$7560.80 gross due and owing to Ms Tan for overtime worked.

[52] There was no agreement between the parties for that year for an additional amount for working on a public holiday. The statutory provisions in [s.50](#) of the [Holidays Act 2003](#) did not come into force until 1 April 2004. After that date, there were three public holidays during this period on Good Friday, Easter Monday and Anzac Day. I have calculated the daily rate on the basis of my assessment of overtime as \$81.90. I accept that Ms Tan was paid for working on a public holiday albeit for less hours I have found that she worked and not at time and a half. On the daily rate therefore of \$81.90 Ms Tan is entitled to for the public holidays she worked to half that amount again which is \$40.95 for each day. There were three public holidays so the total amount owing is \$122.85.

[53] I order Mr Wong to pay to Ms Tan for this year for a shortfall in wages and for working on public holidays for this one year period the sum of \$7683.65

gross.

4 May 2004 to 3 May 2005

[54] For this year, Ms Tan was paid \$346 gross per week for a 38 hours week at the hourly rate of \$9.10. The shortfall for each week is therefore the difference between $\$9.10 \times 54$ hours which is \$491.40 gross less the amount already paid of \$346 gross for 38 hours. The shortfall is \$145.40 gross per week which when multiplied by 52 is \$7560.80 gross due and owing to Ms Tan for overtime worked.

[55] There were eleven public holidays and given the evidence that the restaurant was open on Public Holidays and Ms Tan worked on those days I have simply taken the daily rate as before and half again to arrive at an amount owing for working on

public holidays of \$450.45.

I order Mr Wong to pay to Ms Tan for shortfall in wages and for working on public holidays for this one year period the sum of \$8011.25 gross.

3 May 2005 to 6 September 2005

[56] Part way through this year Ms Tan received a pay increase from \$346 gross to \$546.31 gross. The hours the parties agreed to an increase in hours at that time to 40 per week. I shall assess the shortfall for first 17 weeks of this yearly period on the basis of \$491.40 gross. The shortfall is \$145.40 multiplied by 17 and that is a figure of \$2471.80 gross. There was one public holiday during this period of Queens Birthday and there is \$40.95 owing for that.

6 September 2005 to 2 May 2006

[58] At the start of this period there was a pay increase. Ms Tan's pay increased to \$564.31 gross per week or an hourly rate of \$14.10. Applying that hourly rate to the 54 hours I have found Ms Tan worked I arrive at a gross figure of \$761.14 less \$564.31 to arrive at a shortfall of \$197.09. This figure multiplied by 35 weeks to the end of this part of the year is \$6898.15 gross.

[59] There were ten public holidays during this period. I have arrived at a daily pay by dividing \$761.14 by 6 to arrive at \$126.85. Half again on top of that is \$63.42 which multiplied by 10 = \$634.20.

- 1. order Mr Wong to pay to Ms Tan for this one year period for shortfall in wages and working on public holidays the sum of \$10004.15 gross.**
- 2. May 2006 to 1 May 2007*

[60] Ms Tan continued to be paid at the same rate of \$564.31 gross until January 2008. I have found however that from 13 July 2006 Ms Tan's employer changed to Asha Co Limited - second employment agreement signed 13 July 2006. The agreement

provided for a weekly payment of \$450 net for a 40 hour week. Using the existing calculation in terms of the shortfall based on a 54 hour week of \$197.09 there is a shortfall for payment for overtime worked that year of \$10248.68.

[62] There were 11 public holidays during this period and I am not satisfied that there was payment for those at time and a half. There is an amount owing therefore for those days of \$697.62 based on a daily rate of \$126.85 gross at time and a half for an additional \$63.42 gross.

[63] Mr Wong is only liable for payment during that period for the ten weeks between 2 May 2006 and 13 July 2006. That is overtime worked at \$1970.90 and one public holiday paid at time and a half on 5 June 2006 being \$63.42. That is a total of \$2034.32.

I order Mr Wong to pay to Ms Tan for this period of time the sum of \$2034.32 gross for the shortfall in wages and payment for working on public holidays.

I order Asha Co Limited to pay to Ms Tan the shortfall in wages and payment for working public holidays for this one year period the sum of \$8912.30 gross for this year.

1 May 2007 to 8 January 2008

[64] There was a pay increase in early January 2008 to \$711 gross per week. For the 36 weeks period before that increase I have assessed based on a shortfall of \$197.09 per week a gross figure of \$7095.24.

[65] There were 7 public holidays during this period. I am not satisfied that there was payment for those at time and a half. There is an amount owing therefore for those seven days. The daily rate is \$126.85 gross and half that again is \$63.42 multiplied by 7 is \$443.97.

8 January 2008 to 29 April 2008

[66] Ms Tan's pay increased to \$711 per week for the balance of the period she worked at Asha from early January 2008 - employment agreement signed 25 January 2008 although records show this rate applied from early January 2008. That is an hourly rate of \$17.77. For the balance therefore of this period and based on a working week of 54 hours Ms Tan should have received \$959.58 per week. There is therefore a weekly shortfall owing to her for this 16 week period of \$248.58. For the period in question that is a total shortfall of \$3977.28 gross.

[67] There were a further five public holidays during this period. Time and a half for those days should be calculated on the basis of a daily rate for six working days of \$118.50 and then half again is \$59.25. 59.25×5 is \$296.25. There is therefore an additional payment owed for working on public holidays of \$296.25 gross.

I order Asha Co Limited to pay to Ms Tan for this one year period for shortfall in wages and working on public holidays the sum of \$11812.74 gross.

29 April 2008 to 28 December 2008

[68] This was the final period that Ms Tan worked. It was 39 weeks. For this period there was a weekly shortfall in wages of \$248.58. That is a total shortfall of \$9694.62 gross.

[69] There were four public holidays during this period. Using the calculation I have already provided that is four days at \$59.25 which is \$237 gross.

I order Asha Co Limited to pay to Ms Tan for this final period for shortfall in wages and for working on public holidays the sum of \$9931.62 gross.

Alternative days and Holiday Pay

[70] Mr Wong in his evidence supported by Mr Wu and Ms Sun said that Ms Tan did take holidays and use her alternative days. Ms Tan does not accept this. The difficulty for the Authority is that there is no record of any annual leave taken or owing, statutory days worked or alternative days owing. I am satisfied therefore that under [s 81](#) of the [Holidays Act 2003](#) there is no holiday and leave record. All payments were made in cash. Mr Wong said that when Ms Tan left on 28 December 2008 he gave her \$500 and another payment of \$100. He then said he gave Ms Tan \$4000 in cash when she left for holiday pay. Ms Tan does not accept that payment was made.

[71] I accept therefore the statements of Ms Tan as I am able to do under [s 83](#) of the [Holidays Act 2003](#) that she did not take paid holidays or use her alternative days for working on public holidays. I intend to award payment for alternative days and annual leave for the entire period of Ms Tan's employment to 10 December 2008. I am not satisfied that Mr Wong paid \$4000

cash to Ms Tan. Ms Tan said that she was given \$100 cash over and above her weekly pay for working on Christmas day 2008 and the day after. Exercising the equity and good conscience jurisdiction I do not therefore make any award for alternative days or holiday pay between 10 December

2010 and 28 December 2010.

[72] In terms of alternative days [s 60 \(2\)](#) of the [Holidays Act 2003](#) provides that if the employee has not taken the alternative holiday before the date on which her employment ends that it is calculated at the rate of the employee's relevant daily pay for her last day of employment. That is therefore 88 days for alternative holidays at the relevant daily pay for Ms Tan's last day of employment at \$118.50. That is a sum owing for alternative days of \$10428.00.

I order Asha Co Limited to pay to Ms Tan the sum of \$10428.00 gross being payment for alternative days during her employment.

[73] I have calculated holiday pay for Ms Tan on the basis of [s.24](#) of the [Holidays Act 2003](#) where her employment ended and an entitlement to holidays has arisen. [Section 24 \(2\)](#) provides that payment must be at a rate that is based on the greater of the employee's ordinary weekly pay as at the end of the employee's employment or the average weekly earnings during the 12 months immediately before the end. The greater rate is the ordinary weekly pay as at 28 December 2008 which was \$711.

[74] Ms Tan commenced her employment on 10 December 2000. On 10

December 2001, 2002, 2003, 2004, 2005 and 2006 Ms Tan was entitled to three

weeks annual leave. On 10 December 2007 and 2008, this had increased to an entitlement to four weeks annual holidays under the [Holidays Act 2003](#).

[75] In 2003 Ms Tan's first written employment agreement provided for a maximum of three weeks paid leave following the first year of employment and also stated that leave not taken in the year that is due will be forfeited in full unless prior arrangement have been settled between the employer and employee. The other agreements did not have this forfeiture provision. In the absence of any records about holidays and leave including whether leave had been regarded previously by Mr Wong as forfeited I do not find the provision can now be relied on by Mr Wong to deprive Ms Tan of her leave between 2003 and 2006 when her next agreement was signed.

[76] Ms Tan is entitled to 26 weeks pay for annual holiday entitlement at her ordinary weekly pay as at the date of the end of her employment. That is 26 weeks at \$711 per week which is \$18486.00 gross.

I order Asha Co Limited to pay to Ms Tan the sum of \$18486.00 gross being annual holiday pay.

Interest

[77] Under clause 11 of the second schedule to the [Employment Relations Act 2000](#) I order that interest is payable on the alternative days and annual leave payment of \$28914.00 from the last day of Ms Tan's employment on 28 December 2008 to the date of payment at 4 % which rate does not exceed the 90 day bill rate plus 2% at the date of this determination.

[78] I order that interest is payable on the shortfall in payment for hours worked and payment for working on public holidays being the sum of from the date of this determination to the date of payment at 4 %. For Mr Wong this is based on the sum of \$27733.37 and for Asha Co Limited on the sum of \$30656.66. I have arrived at a different date for assessing interest for these matters because there was significant dispute about the hours and identity of Ms Tan's employer that required careful analysis and determination.

Were the personal grievances raised within the timeframe set out in [s 114](#)?

[79] The first time I find any personal grievance was raised on behalf of Ms Tan was by letter from Mr Horan dated 31 January 2009. The events therefore within the 90 day period prior to that can be considered. I accept Mr Davidson's submissions that personal grievances were not raised in terms of a general allegation that Ms Tan suffered verbal abuse and harassment for the 8 years of her employment.

[80] To the extent that there is an issue as to whether the grievances within the 90 day period prior to the letter of 31 January 2009 were raised with Asha Co Limited or just Mr Wong I am satisfied that they were sufficiently raised with Asha Co Limited. Mr Davidson responded to the 31 January 2009 letter on behalf of Asha Co Limited.

[81] I find that Ms Tan raised a grievance that she was unjustifiably constructively dismissed when Mr Wong threatened her when she requested Christmas day 2008 off and/or that she was unjustifiably actually dismissed. No other personal grievance was raised within the 90 day period. To the extent that there was reference to discrimination within that period I am not satisfied that there was any evidence or factual basis to support that.

[82] I have therefore limited my consideration for a personal grievance to the events that led to the termination of

employment.

Was Ms Tan unjustifiably dismissed constructively or actually?

[83] Ms Tan said that her partner Mr Taylor advised her that she should not work public holidays unless she received the correct rate for doing so. I find the evidence supports an argument took place then between Ms Tan and Mr Wu about who should work on Christmas day. I accept Mr Wu's evidence as likely that Ms Tan told him that if she worked on Christmas Day her partner would cause trouble for the restaurant.

[84] Although the grievance was that Mr Wong made a threat about Ms Tan not working on Christmas Day I find this less likely because the issue about working on Christmas day was discussed between Mr Wu and Ms Tan. There may have been some heated exchanges between Mr Wu and Ms Tan. Mr Wong is adamant that he was not involved in that discussion. The threat that it is alleged Mr Wong made was a very serious one. I am not satisfied to the required standard of proof that he made such a threat about working on Christmas day.

[85] Ms Tan's evidence is that she told Mr Wong that her partner was going to sue him for money many times and that Mr Wong responded that he had no money to pay her. I find from her evidence that she was starting to feel quite torn between her partner's view that she should not work in such conditions and her work place where she had worked for eight years. She gave evidence that she was very tired and worn out. She decided to finish her job and said that she gave two weeks notice on 22 December 2009 but that Mr Wong initially said go 30 December but then told her to go on 28 December 2008.

[86] Mrs Tan said that her physical condition was such that she had to have a year off after she left the restaurant.

[87] Mr Wong's evidence is that Ms Tan told him that on 22 December 2008 that she wanted to leave her job. He said that he did not argue with her or make threats. He said that Ms Tan advised him that she didn't want to work because her partner would make trouble. Mr Wong said that Ms Tan only gave one weeks notice until 29

December 2009.

[88] In order to find that Ms Tan was constructively dismissed there has to be a breach of the employment agreement that is serious and a causative link between that breach and the resignation.

[89] The threat alleged was a serious one. It may have been made by another employee but I am not satisfied that it was made by Mr Wong in relation to Ms Tan working on Christmas day. I am not therefore satisfied that it was relied on in terms of making her decision to resign. I find that the reason for Ms Tan resigning was the pressure she was feeling about claiming money and enforcing rights in circumstances where she was continuing to work at the restaurant. I am not satisfied that she resigned because of a breach on the part of Asha Co Limited.

[90] I do find that in all probability Ms Tan gave two weeks notice from 22 December 2008 as required under her employment agreement and that Mr Wong did ask her to leave after one week during the notice period. I formed the view from the evidence that a disagreement preceded this. I find that Ms Tan was actually dismissed during her notice period on 28 December 2008 and that no justification being advanced for such dismissal it was unjustified. Ms Tan has a personal grievance that she was unjustifiably dismissed.

Remedies

[91] I make no award for the one week's salary during the notice period. I do this because there was evidence that Mr Wong did give Ms Tan some cash when she ended her employment of about \$500 and \$100 for working on public holidays. I am not satisfied that this sum was not in addition to that for actual work performed. There can be no further claim for lost wages beyond that one week because Ms Tan was resigning in any event.

[92] Ms Tan is entitled to some compensation recognising the circumstances of her dismissal. I asked Ms Tan what she wanted by way of remedies. Ms Tan said that she wanted to be treated fairly for working hard for eight years. She said that her health was not good nor her physical condition and that she worked long hours. The awards made in terms of these hours and holiday pay will go some way towards dealing with that matter.

[93] I see Ms Tan's concerns mainly about her working conditions and payment throughout the eight year period of her employment. I do however make an award of \$3000 compensation for the undignified way the relationship ended. I do not find any contribution on Ms Tan's part.

I order Asha Co Limited to pay to Ms Tan the sum of \$3000 without deduction under [section 123 \(1\) \(c\) \(i\) of the Employment Relations Act 2000](#) for compensation.

Costs

[94] I reserve the issue of costs. Mr Horan has until 21 October 2010 to lodge and serve submissions as to costs and Mr Davidson has until 11 November 2010 to lodge and serve submissions in response.

Summary of findings and orders made

- I have found Ms Tan was employed by Mr Wong from 10 December 2000 until 13 July 2006 and that she was then from that date until her employment ended employed by Asha Co Limited.
- I have found that no action could be commenced against Mr Wong for shortfall in payments for work performed or for time and a half for working on public holidays prior to 6 May 2003 and against Asha Co Limited prior to 14 May 2004 for shortfall in payments for work performed or for time and a half for working on public holidays..
- I have found that for the six years from 6 May 2003 Ms Tan worked an average of 54 hours per week and that she is owed money for hours over and above that she was paid.
- I have found that claims for alternative days and holiday pay entitlements do not crystallise until the employment ends.
- I have ordered Mr Wong pay Ms Tan \$27733.37 gross being shortfall in payment for hours worked and from 1 April 2004 time and a half for working on public holidays.
- I have ordered Asha Co Limited pay Ms Tan \$30656.66 gross being shortfall in payment for hours worked and time and a half for working on public holidays.
- I have ordered interest at 4% payable from the date of determination to the date of payment. For Mr Wong this is based on \$27733.37 and for Asha Co Limited this is based on \$30656.66.
- I have ordered Asha Co Limited pay to Ms Tan the sum of \$10428 being payment for alternative days for the eight years of employment.
- I have ordered Asha Co Limited pay to Ms Tan the sum of \$18486 for holiday

pay.

- I have also ordered interest on these amounts at 4% from 28 December 2008.
- I have found that Ms Tan was actually dismissed during her notice period and that such dismissal was unjustified. I have ordered Asha Co Limited to pay to Ms Tan the sum of \$3000 without deduction under [s123 \(1\)\(c\)\(i\) of the Employment Relations Act 2000](#).
- I have reserved the issue of costs and timetabled for an exchange of submissions.

Helen Doyle

Member of the Employment Relations Authority