

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 352
3180199

BETWEEN LING XIA WANG
 Applicant

AND BLOCKHOUSE BAY
 HEALTHCARE LIMITED
 Respondent

Member of Authority: Alex Leulu

Representatives: John Wood, advocate for the Applicant
 Danny Gelb, advocate for the Respondent

Investigation Meeting: 21 and 22 February 2023 at Auckland

Submissions and further 28 February 2023 from the Applicant
information received 20 March 2023 from the Respondent
 19 April 2023 from the Applicant

Determination: 3 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ling Xia Wang was employed by Blockhouse Bay Healthcare Limited (BHL) in two roles, as a registered nurse and a caregiver. Towards the end of 2020 Ms Wang handed in her notice of resignation to BHL. While working out her notice period, Ms Wang and her manager, Raveendra Singh became engaged in a discussion about her visa status and her ability to legally work out her notice period. This discussion led to Ms Wang leaving the workplace and as a result she says she was unjustifiably dismissed by BHL.

[2] Ms Wang also makes three further claims. Firstly, that BHL had failed to correctly pay her wages and holiday pay and secondly, that BHL failed to provide her wage, time, and holiday records (wage and time records) upon request. Her third claim

is for payment for work she claims was a trial for BHL prior to the start of her permanent employment.

[3] BHL says that its reason for ending Ms Wang's employment was justified although its process was not ideal. In respect of the other claims, it says Ms Wang has now been paid all her wages and holiday pay. It admits there was a delay in providing Ms Wang's her requested records, but the delay was reasonable. BHL also denies that Ms Wang was engaged in any type of work prior to her permanent employment for BHL.

The Authority's investigation

[4] In the course of investigating this employment relationship problem, written witness statements were lodged from Ms Wang, Qiyu Zhang, payroll administrator, Selafina Napota, senior healthcare assistant and Mr Singh the BHL facility manager. All four witnesses attended the investigation meeting, where under oath they answered questions from me and the parties' representatives. The representatives also submitted closing written submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination are:

- (a) Did BHL unjustifiably dismiss Ms Wang?
- (b) If so, whether she is entitled to:
 - (i) Remuneration for lost wages; and
 - (ii) Compensation for humiliation, loss of dignity and injury to feelings?
- (c) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Wang that contributed to the situation giving rise to her grievance?

- (d) Was Ms Wang engaged in a valid work trial for the purposes of s 67A of the Act and if so, was she entitled to payment for that work?
- (e) Had BHL failed to:
 - (i) Provide Ms Wang a copy of her wage and time records upon request; and
 - (ii) Correctly pay Ms Wang's wages and holiday pay entitlements?
- (f) If any of the above failures are established, to determine whether a penalty should be imposed against BHL?
- (g) Should either party contribute to the costs of representation of the other party?

[7] In her submissions, Ms Wang also makes a number of claims against BHL for deficiencies in how they assisted Ms Wang's visa application to Immigration New Zealand. It was unclear from Ms Wang's submissions how these claims correlate to BHL's obligations under the Act. BHL submits that these allegations are framed in the form of an unjustified disadvantage claim which was not included in Ms Wang's statement of claim. Ms Wang has not previously raised a grievance in respect of these claims. For these reasons, no determination will be made in reference to them.

Background

Ms Wang's Resignation

[8] BHL operates as a rest home which also provides health care to its residents. On 21 February 2020, Ms Wang commenced her employment with BHL as a registered nurse and as a caregiver. She signed separate individual employment agreements for each role as each position had its own distinct set of tasks and pay rates.

[9] Throughout her employment Ms Wang also received support from BHL in obtaining work visas to allow her to work for BHL. BHL obtained New Zealand immigration accredited employer status in 2021 and around 30 percent of its staff are on work visas.

[10] On 13 November 2021, Ms Wang gave BHL her eight weeks' notice of termination in accordance with each of her employment agreements. This was accepted by BHL, and it was agreed that her last day of work was 8 January 2022.

[11] Ms Wang also wanted to check how many annual and alternative holidays were owing to her. On Friday 31 December 2021 she emailed BHL requesting a copy of her wage and time records.

The discussion in the nursing office

[12] Ms Wang was rostered to work the late shift on Friday 31 December 2021. Upon arriving to work to start her 3pm shift, Ms Wang met with Mr Singh as part of the usual shift handover.

[13] As part of a casual conversation, Mr Singh asked Ms Wang whether she had a new visa for her new role. Ms Wang acknowledged by showing him a copy of her latest visa on her mobile phone. It showed that her new visa was valid from 22 December 2021, and it contained a condition that Ms Wang was to work only for her new employer.

[14] Mr Singh became worried about BHL's immigration obligations and said to Ms Wang that she could not work for BHL anymore because of her visa conditions. He also told her that she should have informed BHL about her new visa.

[15] Mr Singh then explained that she could finish her work shift for that day but not to return for her rostered shift on the following day. Ms Wang became upset by the situation and explained that she could not continue to work the shift. Mr Singh responded by explaining that she could go home if she needed to but to inform him when she leaves and to do a 'handover' with Ms Napota. This included providing Ms Napota with keys to certain areas of the workplace. Ms Wang left the work premises shortly after without doing both.

[16] On the following day on 1 January 2022, Ms Wang emailed Mr Singh asking why her employment was terminated. In an email response on the same day (the 1 January email), Mr Singh explained the following:

"As per Immigration NZ, it is an offence for an employer to employ a person who is not entitled to work for them in New Zealand. So I did not have any other options except to terminate your employment with us ... I have attached your job offer letter which clearly states that if at any time during your employment we discover that you do not hold the required work visa or cease

to be legally entitled to work in New Zealand, we may terminate your employment.”

[17] In the same email, Mr Singh also attempted to obtain permission from Ms Wang to access the Immigration New Zealand VisaView website to ascertain if she was able to work her remaining days with BHL. Ms Wang declined BHL’s request for permission.

[18] This interaction was followed by a number of emails from both Ms Wang and her representative to Mr Singh which consisted of references to the events of 31 November and further requests for Ms Wang’s wage and time records.

Was Ms Wang unjustifiably dismissed?

When did Ms Wang’s employment end?

[19] Ms Wang says BHL terminated her employment as a result of the discussion with Mr Singh on 31 December 2021. The reasons for termination being that Mr Singh told her that she was not legally able to work for BHL and he told her not to come to work the next day.

[20] This is consistent with her evidence at the investigation meeting where she explained that she approached other BHL staff members to say her last goodbyes before leaving the workplace on 31 December 2021.

[21] BHL does not specifically say when it terminated Ms Wang’s employment, but by the time Mr Singh contacted Ms Wang through the 1 January email, the decision was already made to terminate her employment. It is accepted that the BHL made the decision on 31 December 2021.

Was Ms Wang’s dismissal justified?

[22] In determining whether a dismissal is justifiable, the Authority must consider whether the employer acted on reasonable grounds and whether the process taken to reach that decision was fair.¹

[23] BHL relies on the wording of its offer of employment to Ms Wang which states that should BHL discover that Ms Wang did not hold the required work visa, then BHL may terminate her employment with immediate effect.

¹ Employment Relations Act 2000, s 103A.

[24] The wording within the offer refers to the term “*may terminate your employment*” which suggests that BHL has some discretion on whether to terminate Ms Wang’s employment. This invites an analysis on BHL’s actions around termination of Ms Wang’s employment.

[25] Under the minimum standards of procedural fairness set by s 103A of the Act, the Authority must consider whether the allegations against Ms Wang were sufficiently investigated, concerns raised with her, whether she had a reasonable opportunity to respond to the concerns and whether such explanations were genuinely considered before her dismissal.

[26] Ms Wang submits that the way her employment ended was procedurally unjustified as BHL did not follow any particular process in terminating her employment.

[27] BHL concedes its process was not a textbook example. At the time of Ms Wang’s termination, BHL did not have in place a formal policy or process to address employment relationship problems. Much of what occurred appeared to be based on Mr Singh’s reaction to finding out about Ms Wang’s visa condition.

[28] Mr Singh admits he had not been in that situation previously and felt stressed because of potential sanctions against BHL for immigration breaches including the liability of a fine and a potential ban from hiring migrant staff.

[29] Mr Singh’s reaction to the situation led to a number of procedural deficiencies. The first being that he had expressed to Ms Wang conflicting views on the seriousness of BHL’s concerns in regard to a potential breach of immigration requirements. Although he relied on the seriousness of the matter to require Ms Wang not to attend her next shift, he still asked Ms Wang to finish her shift on the day of their discussion. This caused unfair confusion to Ms Wang who was already upset by BHL’s position on her visa.

[30] The situation was not helped by the fact that the discussion took place in the nurse’s office. This was an open area to other BHL staff which gave little privacy to Ms Wang. Ms Napota was in the office, and she confirmed she overheard the visa discussion between Mr Singh and Ms Wang. Ms Wang was entitled to some form of privacy and because she was not provided this, it only contributed further to her emotional state.

[31] BHL also failed to properly investigate Ms Wang's ability to continue to work for BHL. Ms Wang wasn't given a reasonable opportunity to understand, consider and respond to BHL's concerns before her employment was terminated. Ms Wang was only informed of the grounds of her dismissal through the 1 January email where BHL had relied on a sentence in her job offer. By the time Ms Wang had received the 1 January email, the decision was already made to terminate her employment.

[32] Although Mr Singh carried out some form of inquiry into Ms Wang's ability to work out her notice period, his inquiry was limited to reviewing the Immigration New Zealand website and his request to Ms Wang for VisaView access which was after the fact.

[33] BHL had the appropriate resources and the ability to properly investigate Ms Wang's circumstances, but it failed to do so. Given its reliance on migrant workers, BHL usually engages the services of an immigration advisor to assist with any immigration problems and issues. Although it is accepted that due to it being New Year's Eve it may have been difficult to obtain the services of an advisor, no attempt was made by Mr Singh to contact the advisor.

[34] The Authority must not determine a dismissal to be unjustified due solely to minor defects in a process that did not result in unfair treatment of Ms Wang.² This is not the case here. BHL's failure to properly investigate the matter and the other procedural deficiencies in relation to the discussion on the day are significant defects that resulted in Ms Wang being treated unfairly. For these reasons, BHL has failed to discharge its obligations under s 103A of the Act. Ms Wang's dismissal was unjustified.

[35] Mr Singh believed he was acting reasonably at the time because he understood it was illegal for an employer to employ a person who had a visa to work only for another person. Although he was not aware of the specific statutory provision, it appears he had in mind what is said in s 350 of the Immigration Act 2009 (Immigration Act), which makes it a criminal offence to allow a person not entitled under that Act to work in an employer's service. However, s 350(7) of the Immigration Act states that:

No employer is liable for an offence against this section in respect of any period during which the employer continues to allow any person to work in the employer's service in compliance with the minimum requirements of any

²Employment Relations Act 2000, s 103A(5).

employment agreement (within the meaning of the Employment Relations Act 2000) relating to the giving of notice on termination of employment.

[36] Both parties provided submissions on the applicability of this section to Ms Wang's circumstances. The Authority is not in a position to determine if s 350 of the Immigration Act applied in Ms Wang's circumstances. What is clear is the s 350(7) exemption of the Immigration Act was not considered by BHL at the time of Ms Wang's termination. This resulted in her being treated unfairly and made the decision to dismiss her unfair and so she has established her personal grievance.

Is Ms Wang entitled to a remedy?

[37] Ms Wang was due to finish her employment on 8 January 2022 and because she was unjustifiably dismissed, she missed out on six days and seven and a half hours of work she would have worked up until the end of her notice period. Accordingly, an award for reimbursement under the Act is appropriate which equates to a payment of \$2,194.56 gross from BHL to Ms Wang.³

[38] Ms Wang also seeks \$15,000.00 compensation under the Act for humiliation, loss of dignity and injury to feelings.⁴

[39] BHL submits that no compensation should be awarded to Ms Wang. In the event that the Authority finds that compensation should be awarded, BHL says further that any compensation amount should be at the very lower end of the scale due to the minimal time Ms Wang was without work before starting her next job.

[40] Ms Wang's termination had an impact on her emotional wellbeing at the time. She was upset and felt depressed with how her employment ended given that she generally had a previously good relationship with BHL staff including Mr Singh.

[41] Ms Wang was due to finish her notice period with BHL within a week before her termination. She was also due to begin her new job thereafter. This itself would have gone some way to address any ill feeling which resulted from the experience of her termination. In light of all these circumstances it is appropriate that Ms Wang is awarded compensation of \$8,000.00.

Should the remedy be reduced for blameworthy conduct by Ms Wang?

³ Employment Relations Act 2000, s 123(1)(a).

⁴ Employment Relations Act 2000, s 123(1)(c)(i).

[42] The Authority must consider whether any remedies awarded should be reduced due to any actions of the worker which contributed to the situation giving rise to the personal grievance.⁵

[43] BHL is of the view that Ms Wang's actions contributed 100 percent to the situation and submits that the immigration processes required Ms Wang to inform Immigration New Zealand upon application of her new visa that she had a notice period to work out with BHL.

[44] While Ms Wang is responsible for her own visa obligations there is no evidence before the Authority to suggest that she had failed to follow any immigration application process or any such failure contributed to her grievance for unjustified dismissal. This was not sufficiently blameworthy conduct to warrant a reduction to the remedies awarded to her.

Did Ms Wang work a trial period for BHL?

[45] Prior to starting her permanent employment, Ms Wang claims she worked for BHL as part of a work trial which lasted three weekends with two shifts in each. These occurred in 2020 on 31 January and 1 February, 7 and 8 February, and 14 and 15 February.

[46] In support of her evidence, she refers to an email she sent to BHL on 21 January 2020 offering her services as a volunteer. At the time, Ms Wang was residing in Hamilton, so she also refers to bus tickets showing her travel to Auckland and back on each of the weekends in question.

[47] BHL disputes the claim and says that it holds no records of Ms Wang carrying out any paid or volunteer work for BHL during these times. Mr Zhang also had some involvement with Ms Wang's recruitment and says that Ms Wang did not perform any work prior to her permanent employment with BHL.

[48] Mr Zhang also says that before Ms Wang started her employment with BHL, she was provided free accommodation by BHL. Her travel between Hamilton and Auckland was due to her moving her belongings from Hamilton to Auckland.

[49] Taking this limited evidence into account, there is insufficient evidence to conclude Ms Wang had worked an unpaid trial for BHL.

⁵ Employment Relations Act 2000, s 124.

Did BHL comply with the requirements for keeping wage and time records?

[50] Employers are required to keep appropriate wage and time records and to provide them to an employee upon request.⁶ The records must also be kept in a manner that allows the information to be easily accessed and converted into written form. The latter requirement allows records to be provided to an employee without delay. These same requirements are replicated for holiday records under the Holidays Act 2003.⁷

[51] BHL concedes its systems for record keeping and the paying of its employees was not perfect. I accept this contributed to its disputes with Ms Wang over payment of wages, holidays and the provision of records on request.

[52] On 31 December 2021, Ms Wang emailed Mr Singh for a copy of her wage and time records for BHL. Since then, she made at least six further requests for her records with her last request being on 9 June 2022. In response, BHL provided her an incomplete set of records on 16 May 2022 with further records provided on 4 July 2022.

[53] BHL acknowledges the delay in providing the records and attributes the delay to restrictions associated with the COVID-19 epidemic. However it contends that any of its record keeping failures were genuine mistakes as opposed to any wilful action.

[54] Due to the nature of BHL's business as a care provider, it is acknowledged that a COVID-19 outbreak presents a significant risk on both its staff and patients. It is also accepted that around the time of Ms Wang's requests, BHL was also attempting to limit a potential outbreak and in doing would have disrupted its normal business operations. This included responding to Ms Wang's wage record requests without some form of delay.

[55] Wage and time records are supposed to have been kept in an easily accessible manner and BHL should have been in a position to access and provide the records to Ms Wang within a more reasonable timeframe. Because BHL had failed to keep appropriate records it was unable to provide complete records to Ms Wang until 6 months from her first request. This delay in time is unreasonable. For these reasons, BHL has failed to provide Ms Wang's wage and time records to her within a reasonable time in accordance with the legislative requirements.

⁶Employment Relations Act 2000, s 130.

⁷Holidays Act 2003, s 80 and 81.

Was Ms Wang paid her correct wages and holiday pay?

Was Ms Wang paid at her correct payrate?

[56] In accordance with her employment agreements, Ms Wang was paid two separate pay rates for when she worked either as a caregiver or as a nurse. She was paid these rates from the start of her employment in February 2020 up until when Mr Singh became her reporting manager in October 2020. From then on, BHL paid Ms Wang her higher nurse rate for all work she carried out for BHL.

[57] Ms Wang argues that she should have been paid her nurse rate for all work from the start of her employment. BHL disagrees and says that Ms Wang was paid the correct rate in accordance with her employment agreements.

[58] The terms of the employment agreements support BHL's position on this point and there is no evidence to suggest she should have been paid her nurse rate prior to Mr Singh's tenure as Ms Wang's manager. It is correct that BHL made a subsequent unilateral decision to pay all her work on the higher rate, but the nature of the decision was to Ms Wang's benefit. There is no evidence to suggest she objected to this. Ms Wang's claim for arrears in relation to payment at her nurse rate is declined.

Was Ms Wang correctly paid for public holidays?

[59] Ms Wang claims she is owed payment for three public holidays which amounts to \$779.44 gross.

[60] An employee is entitled to an alternative holiday if they worked on a public holiday that would otherwise have been a normal working day. If in the same scenario the employee did not work on that day, they would be paid their normal rate.⁸

[61] BHL determined an otherwise working day for Ms Wang as a day she would have been rostered on prior to the start of her shift. As a result, her entitlement to public holidays and alternative holidays arose on days she was rostered on a public holiday.

[62] Ms Wang disagrees with this approach and is of the view that her otherwise working day should be determined by her pattern of work leading up to a public holiday.

⁸Holidays Act 2003, s 49.

[63] BHL believes Ms Wang's public holidays were correctly paid. It is unclear from BHL's records how it reaches this conclusion. It is also unclear which three days Ms Wang claims were unpaid public holidays.

[64] BHL's failure to keep proper holiday records has hindered Ms Wang's ability to bring an accurate claim. On that basis Ms Wang is entitled to payment for three public holidays which amounts to \$779.44 gross.⁹

Resolution of previous claims

[65] Ms Wang had initially made further claims in her statement or problem for payment of unpaid wages, annual holidays and public holidays which were not paid correctly to her.

[66] Prior to the start of the investigation meeting, BHL had acknowledged and rectified the arrears which were documented in a pay advice schedule that was lodged as evidence at the investigation meeting.

[67] Ms Wang has accepted the payments for the resolved claims but has asked the Authority to consider these claims in the event that a penalty is imposed against BHL for failure to make these payments to Ms Wang when they were due.¹⁰

Should penalties be imposed against BHL?

[68] A penalty may be imposed against BHL for failing to pay Ms Wang her wages when they were due.¹¹ Ms Wang has also sought a penalty for BHL's failure to provide her wage and time records upon request which also attracts penalties.¹² These breaches all appear to stem from BHL's inadequate wage, time and holiday record keeping practices and its wage payment systems.

[69] Although Ms Wang submits that these breaches are intentional, it appears that BHL's actions were negligent at worst. BHL mitigated these breaches by paying some of the outstanding arrears before the commencement of the investigation meeting. However, had Ms Wang not taken action in the Authority it is unclear whether BHL would have understood the importance of providing records upon request.

⁹ Holidays Act 2003, s 83(3) & (4).

¹⁰ Wages Protection Act 1983, s 4.

¹¹ Wages Protection Act 1983, s 13.

¹² Holidays Act 2003, s 75 and Employment Relations Act 2000, s 133.

[70] In this case a penalty is appropriate to emphasize the importance of keeping and providing records in accordance with minimum requirements and to deter others from failing to do so. For these reasons, a penalty is imposed against BHL on a global basis taking into account the various breaches. BHL is to pay a penalty of \$7,000 with half of that penalty (\$3,500) payable to Ms Wang and the remaining half (\$3,500) to the Crown and to do so within 28 days of the date of this determination.

Should either party contribute to the costs of representation of the other party?

[71] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[72] If the parties are unable to resolve costs between them and an Authority determination on costs is needed Ms Wang may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum BHL would then have 14 days to lodge any reply memorandum.

[73] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹³

Alex Leulu
Member of the Employment Relations Authority

¹³ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.