

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 144
3127974

BETWEEN CHUAN WANG
 Applicant

AND SONIA YANGYANG GILL
 Respondent

Member of Authority: Rachel Larmer

Representatives: May Moncur, advocate for the Applicant
 No appearance by Respondent

Investigation Meeting: 20 January 2022 at Auckland

Submissions Received: 22 January 2022 from the Applicant

Date of Determination: 14 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sonia Gill was the sole director and shareholder of New Zealand Qiang Sheng Trading Limited (in liquidation) (“NZQSTL”). NZQSTL has been removed from the Companies Register. Prior to its removal NZQSTL carried on business as an importer and exporter of snack foods. Ms Gill was solely responsible for the day to day operation of NZQSTL.

[2] Mr Wang came to New Zealand as a young international student and he completed a Master of Professional Accounting at Waikato University. Mr Wang was granted a three year open work visa by Immigration New Zealand (INZ) on 3 April 2020. Mr Wang’s work visa allowed him to work fulltime in New Zealand for three years for any employer.

[3] Mr Wang found it very difficult finding a job as a new graduate. He applied for 400-500 jobs without success. Mr Wang was desperate to obtain experience in New Zealand in his

chosen career as he intended to apply for New Zealand residency, and he wanted a New Zealand employer's support for that.

[4] In early May 2020 Ms Gill offered Mr Wang full-time employment by NZQSTL as a bookkeeper. However, Mr Wang said the offer of employment was conditional on him paying Ms Gill \$NZ 90,000. In return Mr Wang would be employed as a bookkeeper by NZQSTL and Ms Gill would support his residency application.

[5] Mr Wang said Ms Gill told him that if his New Zealand residency application did not succeed then she would repay him the money he had paid her.

[6] Mr Wang made the following payments totalling NZ \$90,000 to Ms Gill:

- (a) \$1,000 cash paid on Mr Wang's behalf by his girlfriend to Ms Gill directly on 5 May 2020;
- (b) \$22,000 transferred by Mr Wang's girlfriend from their joint account to a New Zealand bank account nominated by Ms Gill on 5 May 2020;
- (c) RMB 100,000 paid by Mr Wang's mother to a bank account in China that was nominated by Ms Gill. The payer name in the Chinese RMB remittance transaction receipt from the Bank of China is noted as Jiexia Liang.
- (d) RMB 98,000 paid by Mr Wang's mother to the Chinese bank account Ms Gill had nominated. When Mr Wang questioned whose bank account it was, Ms Gill replied to him in a WeChat message "*Older uncle*";
- (e) RMB 92,765.26 paid by Mr Wang's mother to the same bank account in China Ms Gill had nominated the other payments to go into.

Applicant's claims

[7] Mr Wang claimed the NZ\$90,000 Ms Gill sought and received was an employment premium that breached s 12A of the Wages Protection Act 1983 (the WPA). Mr Wang sought to recover that amount from Ms Gill personally.

[8] Mr Wang asked the Authority to impose a penalty on Ms Gill for her breach of s 12A of the WPA and he asked that some or all of any penalty imposed on her be paid to him personally instead of, or as well as, the Crown.

[9] Mr Wang initially claimed unpaid annual holiday pay, but he withdrew that claim after he was paid what he was owed in September 2021.

Respondent's response

[10] Ms Gill denied breaching the WPA. In her witness statement she said she never asked Mr Wang to pay her any money and she never received any payments from him. Ms Gill also said that the payments Mr Wang alleged had been made were transferred to accounts that did not belong to her.

Withdrawal of Ms Gill's representative

[11] The notice of investigation meeting was sent to the parties' representatives by email on 27 September 2021. On 21 December 2021 Ms Gill's then representative, Kenneth Sun, withdrew from representing her. In an email dated 21 December 2021 Mr Sun provided the Authority with Ms Gill's contact details.

[12] Mr Sun also confirmed that Mr Gill had received a copy of the notice of investigation meeting. Before his withdrawal Mr Sun had received a copy of all of the evidence that Mr Wang relied on in support of his claims. Ms Gill therefore had an opportunity to respond to that evidence while she was represented.

Authority's investigation

In person IM

[13] The Authority investigated this matter during an in-person investigation meeting held in Auckland. Mr Wang and his witnesses attended and were questioned about their evidence. Ms Gill did not appear at the investigation meeting and she has not personally communicated with the Authority about this matter.

Communications with Ms Gill

[14] The Authority emailed Ms Gill on 17 January 2022 reminding her of the need to present a vaccination certificate in order to attend the investigation meeting in person on 20 January 2022. Ms Gill was also advised that if she was unable to present a vaccination certificate then she should contact the Authority so we could arrange for her to attend the investigation meeting by Zoom. She did not respond to that.

[15] The Authority Officer called Ms Gill on the mobile phone number that her former representative had provided. The Authority Officer left voice messages (two on 17 January 2022 and one on 18 January 2022) informing Mr Gill about the investigation meeting and the need for her to present a vaccination certificate.

[16] None of these attempts to contact Ms Gill were successful. She has not engaged with the Authority after her representative withdrew on 21 December 2021.

IM proceeded in Ms Gill's absence

[17] The Authority was satisfied that Mr Gill had been served with all of the documents filed by Mr Wang and that she was aware of the date of the investigation meeting. The Authority conducted the investigation meeting in Ms Gill's absence, in accordance with its power in s 173(2) of the Employment Relations Act 2000 (the Act).

[18] Ms Gill filed an unsworn and unsigned witness statement on 3 September 2021 that responded to the allegations against her. The Authority used that statement to question Mr Wang, to ensure that his evidence was appropriately tested, even though Ms Gill was not present at the investigation meeting.

Opportunity given to respond to Mr Wang's submissions

[19] The Authority gave Ms Gill an opportunity to respond to the submissions that Mr Wang filed on 22 January 2022, after the investigation meeting. These were emailed to Ms Gill on 24 January 2022 at the email address her former representative had provided to the Authority.

[20] The Authority advised Ms Gill that it had conducted the investigation meeting and that she had been given until 4 February 2022 to file any response to Mr Wang's submissions. Ms Gill did not respond.

Witnesses

[21] The Authority heard from Mr Wang and Kristine Qian in person and from Andrew Chain and Zoe Zhao by telephone.

[22] Ms Qian was employed by Ms Gill from 13 November 2020 to 15 January 2021. Ms Qian said she was not paid for all of the hours she worked and was not paid the minimum wage.

[23] Ms Qian said Ms Gill told her about Mr Wang's personal grievance and that she (Ms Gill) was going to put NZQSTL into a "*false liquidation*" so he could not get any money. Ms Zhao described how Ms Gill had a habit of failing to pay the minimum wage to, and/or PAYE for, people she had employed.

[24] Ms Zhao worked for NZQSTL between April 2020 and 22 November 2020. She also told the Authority that Ms Gill did not pay PAYE tax for her while she was employed. Ms Zhao gave evidence that Ms Gill had told her that Mr Wang had paid her money for his job because he wanted to apply for residency later with her (Ms Gill's) support.

[25] Ms Zhao was present when Ms Gill and Mr Wang discussed the tax evasion issues on 10 November 2020. Ms Zhao confirmed Mr Wang's evidence about that and the accuracy of the transcript Mr Wang had provided of his discussion with Ms Gill on 10 November 2020.

[26] At Ms Gill's request Ms Zhao prepared a word document on 11 November 2020 that recorded the money Mr Wang had paid Ms Gill, the employment expenses Ms Gill would deduct from the amount she had been paid and the partial amount Ms Gill was prepared to repay, provided Mr Wang deleted the recording he had made on 10 November 2020.

[27] Mr Chain is a chartered accountant based in Hamilton who has previously acted for Ms Gill and her businesses. Mr Chain told the Authority that Ms Gill was also known as Angelina Hilton and by her Chinese name of LIU Yang. Mr Chain gave evidence about the irregular and non-legally compliant way in which Ms Gill ran her businesses.

[28] Mr Chain said Ms Gill's business practices had been investigated and penalised by the Inland Revenue Department (IRD) and that she was known within the Hamilton and Auckland Chinese communities to run phoenix companies.

Liquidation of NZQSTL

[29] Ms Qian told the Authority she had asked Ms Gill what she had meant when she said she was going to do a "*false liquidation*". Ms Gill told Ms Qian a false liquidation involved changing the company's name and getting a new business number, but the business address, the business' operations and the employees would remain unchanged.

[30] Ms Qian said Mr Gill told her she was doing that so "*Mr Wang would not be able to get a penny from her*".

[31] Mr Wang's personal grievance was raised on 26 November 2020. The next day Ms Gill put NZQSTL into voluntary liquidation and she incorporated New Zealand Little Pumpkin Group Limited (NZLPG) that same day.

[32] Ms Gill is the sole director of NZLPG. Ms Gill was the sole shareholder of NZLPG until 11 May 2021, when she became one of four shareholders. Ms Gill was removed as a shareholder of NZLPG on 16 December 2020.

[33] After NZLPG was incorporated, Ms Qian told the Authority that everything remained the same as it had been with NZQSTL. That included the office address, the employees, the phone number, the ads and the warehouse which were all exactly the same as they had been for NZQSTL. Ms Qian said that Ms Gill transferred the entire NZQSTL business to NZLPG.

[34] Mr Wang's representative said he did not have the resources to be able to pursue Ms Gill for creating a phoenix company.

Background

10 November 2020 tax evasion discussion

[35] Mr Wang discovered NZQSTL was not paying the full amount of tax it was legally required to pay to the IRD. Mr Wang was concerned that tax evasion by NZQSTL could jeopardise his future residency application, because NZQSTL would be supporting it as his employer.

[36] Mr Wang raised the incorrect tax issues with Ms Gill on 10 November 2020. Ms Zhao was present when it was discussed and Mr Wang also made a partial recording of his discussion with Ms Gill. A transcript of the recording was provided to the Authority and Ms Gill. She has not challenged its accuracy.

[37] Ms Gill became angry at Mr Wang's insistence that NZQSTL had to pay tax correctly. Ms Gill made it very clear that she was not going to comply with NZQSTL's tax obligations and instead she would decide what amount of tax to pay each month. This would be less than it was legally required to pay.

[38] Ms Gill improperly attempted to use her power over Mr Wang as his employer, and her future support for his residency application, to get him to ignore the tax issues he had discovered. Ms Gill made also threats and tried to get Mr Wang to pay NZQSTL's tax out of

his own wages. Ms Gill told Mr Wang that “*others have to pay [tax] for themselves if they want to get immigration support [from their employer].*”

[39] Ms Gill said she would stop paying Mr Wang’s wages if he insisted that NZQSTL had to pay tax correctly and she would not support his work visa or the residency application. Ms Gill also told Mr Wang to either pay NZQSTL’s tax out of his wages or find another job. Mr Wang was given written notice of termination of his employment on 11 November 2020, after he refused to pay NZQSTL’s taxes himself out of his own wages.

References to payments in the transcript

[40] The transcript of Mr Wang’s and Ms Gill’s discussion on 10 November 2020 records Ms Gill talking about the NZ\$90,000 he had paid her. Ms Gill is recorded as saying she would repay some of the money Mr Wang had paid her, after she had deducted the cost of his employment (including the amount of tax that had to be paid on his wages) from the amount he had paid her.

Attempts by Mr Wang to recover money paid to Ms Gill

[41] Mr Wang approached Ms Gill after his dismissed in an attempt to recover the money he had paid her. However, Ms Gill has not repaid Mr Wang any of the money he paid her.

[42] Ms Gill told Mr Wang she would consider a “*partial repayment*” provided he destroyed the recording he had made on 10 November 2020. Ms Gill also said she would be making “*a deduction*” from what he had paid her to “*reimburse the company for its operational costs*”. These were the costs of Mr Wang’s employment that Ms Gill had asked Ms Zhao to record on 11 November 2020 in the word document she had been asked to prepare.

Personal grievance

[43] Mr Wang’s advocate raised a personal grievance for him on 26 November 2020. Ms Gill refused to discuss the repayment of the money Mr Wang had paid her with his advocate. Ms Gill also refused to attend mediation and she threatened to sue Mr Wang and his advocate. Ms Gill filed a counterclaim against Mr Wang that was subsequently later withdrawn.¹

¹ AEA 3130455 was the *Gill v Wang* counterclaim matter.

What did Mr Wang pay for?

[44] Mr Wang was desperate to obtain employment in New Zealand and Ms Gill was the first person who offered him that opportunity. Mr Wang wanted work experience in New Zealand so he could apply for residency with his employer's support. Ms Gill said she would employ Mr Wang and sponsor his visa application when he was ready to apply for residency if he paid her NZ\$90,000.

[45] Mr Wang discussed the matter with his girlfriend and parents who agreed to financially support him with the payments Ms Gill had requested. Mr Wang said it was really important to him to obtain a fulltime job so he could start his career. He saw the offer of employment by Ms Gill, on behalf of NZQSTL, as the first step towards being able to build a future in New Zealand.

WeChat messages

[46] Mr Wang and Ms Gill communicated about the payment she had requested and received via WeChat messages, copies of which were provided to the Authority. In multiple messages Ms Gill is seen asking Mr Wang to pay her NZ\$90,000, identifying the bank accounts he had to pay the money into and informing him of the dates on which payments had to be made. Ms Gill also asked for clarification on, and confirmation of, the amounts Mr Wang had paid her.

[47] Mr Wang also provided business related WeChat's between him and Ms Wang to show that the payment related WeChat messages had been sent between the same contacts as the work related WeChat messages had. Mr Wang also pointed out that the unique identifier in the WeChat messages remained the same, regardless of whether the name or photo associated with the messages had potentially changed.

[48] The Authority was satisfied the WeChat messages about the payment were sent to and from Ms Gill.

Examples of the content of some of the WeChat messages

[49] The following are examples of some of the WeChat messages Ms Gill and Mr Wang exchanged about the money he had paid her. All quotes are verbatim of the English translation of the messages that were in Mandarin.

[50] On 5 May 2020 Mr Wang said in response to Ms Gill's requests for payment:

There is another alternative which is transferring \$100,000 to you tomorrow first, then I shall transfer NZ\$24,000 to your husband's account by using JunJun's account, which is equivalent to RMB 100,000. It follows that you would have received 200,000 by tomorrow. Later the final 100,000 will then be transferred to you on the next Monday.

[51] Ms Gill replied that same day:

I will think about it.

I shall advise you shortly.

The total is 90,000, correct?

NZ dollars.

She then sent a screenshot of exchange rates and asked "*Is this exchange rate alright?*"

Mr Wang responded:

Is it acceptable to pay 70,000 initially this week and next Monday?

The exchange rate is right.

Ms Gill replied:

What I meant is, the total sum is NZ\$90,000.

Alright?

In total.

Mr Wang replied "*Yes*".

Ms Gill then said:

We shall do it by instalments.

I am fully ready to start the process. [...]

What I meant is that the first payment is NZ\$70,000 dollars. The balance of \$20,000 is to be paid within three months.

4 August is it?

Mr Wang replied "*Correct*".

Ms Gill sent a screenshot of exchange rates and said:

This should be the first payment which is to be based on today's fees.

Correct?

Ms Gill also stated later in their exchange "*You should draft an agreement*".

Mr Wang replied "*Do you agree that we transfer NZ\$24,000 to you?*"

Ms Wang replied:

Based on today's exchange rate shown on my mobile.

Is it OK?

Mr Wang replied "*ok*".

Ms Gill said:

The balance you pay me in RMB.

Is it OK? [...]

How much is the sum in RMB?"

Mr Wang replied "*Let's take it as 46,000, how much is it?*"

Ms Gill replied "*Let's talk about in person.*"

[52] Mr Wang produced a WeChat message where Ms Gill sent him a copy of her passport and said "*The passport has been provided to you*". In the same exchange, Ms Gill stated "*I will give you my account details*". These are then screenshotted to Mr Wang.

[53] In WeChat messages on 6 May 2020 Ms Gill said:

I will get the employer's supporting letter written for you today.

You then need to pay the balance by a few instalments. I remember it should be three instalments [...]

After that the balance is to be paid on 4 August.

[...]

I have received 47231

[...]

The balance is 42769, correct?

[54] In another WeChat exchange that occurred on 7 May 2020 Ms Gill stated:

Dear, based on NZ\$90,000 and what you've paid, how much is the balance in RMB that is to be paid?

Mr Wang replied:

NZ\$42,769 there's 20,000 which is to be paid within three months, the balance is 22769. Based on today's exchange rate the balance to be paid is RMB 98,000.

If everything is added together it should be RMB 184,100.

[55] Also, on 7 May 2020 Ms Gill asked Mr Wang:

By the way how much is the next RMB payment?

He responded: 100,000. Will later pay the final balance.

Ms Gill replied:

The most important things are your IRD records, employer's sponsorship and your contract.

These three factors plus my cooperation.

100%.

[...]

I will co-operate. You can be sure of that.

It follows that counting the 20,000 which is to be paid after three months, it will be finished in three instalments.

Correct?

[56] Mr Wang responded to Ms Gill:

Two instalments.

100,000 Next Monday. The last remaining sum is about 100,000, two instalments.

Ms Gill replied:

How about 4 August?

Have you added the sum that needs to be paid in three months?

Mr Wang replied:

Have already added the sum. You see you've already received over NZ\$20,000, it is equivalent to RMB 100,000. You have received 100,000 today. The final balance is two instalments of 100,000. Total is to be 400,000.

Contract regarding the money Mr Wang paid Ms Gill

[57] Mr Wang told the Authority that Ms Gill met him at his girlfriend's place and asked Mr Wang to type up a contract in Mandarin about the premium payments on his girlfriend's computer. The translated version of the contract stated:

Contract

From 4 May 2020, Sonia Yangyang Gill (passport number) is to provide Chuan Wang (passport number [redacted for privacy]) with job position, as well as to support Chuan to deal with a New Zealand Permanent resident VISA.

Chuan Wang needs to pay Sonia Gill for Ninety Thousand New Zealand dollars. The amount should be paid by four instalments. The first three instalments should see Seventy Thousand New Zealand dollars be paid. The final Twenty Thousand New Zealand dollars should be paid no later than 4 August.

Chuan Wang needs to pay the first instalment of Twenty Four Thousand New Zealand dollars on 5 May, 2020, the second instalment of One Hundred thousand Chinese RMB on 6 May, 2020, the first part of the third instalment of Seventy Thousand on 11 May, 2020. All the money transfer will be calculated based on the exchange rate on that day.

If Chuan Wang failed in his New Zealand Permanent resident visa application in the end, based on real situation, Sonia Gill needs to pay back the money after deducting the expenses paid by Sonia Gill.

Party A: *Signature in English* Sonia Gill Party B: *Signature in English* Chuan Wang

Date: 5 May 2020

Date: 5 May 2020

[58] Ms Gill's signature on the contract Mr Wang produced to the Authority looked the same as Ms Gill's signature on the employment agreement with Mr Wang that she signed on 4 May 2020.

Payments made by Mr Wang

[59] Mr Wang made five payments to Ms Gill. Four payments were made into bank accounts nominated by Ms Gill (one account in New Zealand and three payments into one account in China). The remaining (fifth) payment was a cash payment Mr Wang's girlfriend made on his behalf to Ms Gill on 5 May 2020. There was no receipt for that cash payment.

[60] Mr Wang produced a WeChat log with Ms Gill where he asks:

Does this account belong to your friend or relative? My mum has asked because she was concerned about the lack of proof given processing these small payments separately (to other people's account) but not yours.

[61] Ms Gill replied "*Older uncle*" and gave Mr Wang a bank account number to give his mother for her to deposit the payments into. The bank account payments were supported by bank receipts and were consistent with the WeChat logs that were produced to the Authority about the payments.

Corroborating evidence

[62] Ms Zhao told the Authority that a few weeks after she had started work Ms Gill told her (Ms Zhao) that Mr Wang had paid her (Ms Gill) money to get his job because he wanted to apply for residency with Ms Gill's support. Ms Zhao said she initially did not know how much Ms Gill had charged Mr Wang for the job, but later found out it was NZ\$90,000.

[63] Ms Zhao told the Authority that it was not a secret that Mr Wang had paid Ms Gill for the job because other employees knew about it and even a neighbouring company within the same building (which she named to the Authority) knew about Mr Wang's payment to Ms Gill.

Word document of repayment information

[64] Ms Zhao said that on 11 November 2020 (the day after the discussion between Ms Gill and Mr Wang about NZQSTL's tax evasion) Ms Gill asked her (Ms Zhao) to prepare a Word document and send it to Mr Wang detailing Ms Gill's repayment arrangements for the money she had been paid by him.

[65] This document was provided to the Authority, and it stated that Ms Gill would remit 200,000 RMB to a Chinese bank account of Mr Wang before 20 November 2020. The document charged Mr Wang for six months' employment expenses. This included the difference between what he was paid and the minimum wage, rent for his office space, a residency application fee and PAYE payments that should have been paid by his employer NZQSTL.

[66] According to the document Ms Gill instructed Ms Zhao to prepare, after deducting the "*expenses*" that Ms Gill said Mr Wang had to pay for his employment, the balance of 22,253.55

would be paid to him in the next two months (from 11 November 2020 to 11 January 2021) - if he did not do anything harmful to the company. No payments were ever made to Mr Wang.

[67] Ms Zhao also referred to messages she had been sent by Ms Gill that required Mr Wang to delete the 10 November 2020 recording and which referred to Ms Gill deducting the money she said Mr Wang owed for his employment from the amount she would agree to repay.

Issues

[68] The following issues are to be determined:

- (a) Which party's evidence was more credible?
- (b) Did Ms Gill request and/or receive an employment premium from Mr Wang?
- (c) Is Ms Gill a person involved in the non-compliance of the WPA?
- (d) If so, should Mr Wang be given leave to recover any employment premium he paid Ms Gill?
- (e) If so, should Ms Gill be ordered to personally repay any employment premium Mr Wang paid her?
- (f) Should interest be awarded on any money Ms Gill is ordered to repay Mr Wang?
- (g) Should a penalty be imposed on Ms Gill for a breach of s 12A of the WPA?
- (h) What costs and disbursements should the successful party be awarded?

Which party's evidence was more credible?

[69] The Authority finds that Mr Wang's evidence is more likely to be correct than the position Ms Gill recorded in her Statement in Reply and unsworn unsigned witness statement.

[70] Mr Wang's evidence was tested by questioning. It was also corroborated by the transcript of the recording he made on 10 November 2020, bank receipts, WeChat messages, other witnesses, the contract signed by the parties on 5 May 2020 and the word document Ms Gill asked Ms Zhao to prepare on 11 November 2020.

Did Ms Gill request and/or receive an employment premium from Mr Wang?

[71] An employment premium is consideration paid by an employee for their employment. It is clear that Ms Gill asked Mr Wang to pay \$90,000 for his job with NZQSTL and that she did in fact receive that total amount from him.

[72] Section 12A of the WPA states:

No employer or person engaged on behalf of the employer shall seek or receive any premium in respect of the employment of any person, whether the premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[73] Ms Gill’s request for, and receipt of, the NZ\$90,000 from Mr Wang was an employment premium that breached s 12A of the WPA.

Is Ms Gill a person involved in the non-compliance of the WPA?

[74] Section 11A(5) of the WPA states that “*a person is involved in the non-compliance*” of the WPA, for the purposes of s 11A(1) and(3) of the WPA, if they would be treated as a “*person involved in a breach*” within the meaning of s 142W of the Employment Relations Act 2000 (the Act).

[75] Section 142W of the Act states that “*a person is involved in a breach*” of employment standards if they (among other things) “*procured the breach*” or has been “*directly*” or “*knowingly concerned in the breach*”. Ms Gill procured, and was directly and knowingly involved in the breach of s 12A of the WPA.

[76] Ms Gill is therefore “*a person involved in a breach within the meaning of s 142W of [the Act].*” The Authority finds that Ms Gill is also “*a person involved in the non-compliance*” of the WPA, as per s 11A(1)(c) of the WPA.

Should Mr Wang be given leave to recover the employment premium he paid Ms Gill from her personally?

[77] Under s 11A(3) of the WPA a worker may recover any premium paid from a person involved in non-compliance with s 12A of the WPA. Section 11A(4) of the WPA only permits a worker to recover a premium under s 11A(3) of the WPA with the prior leave of the Authority and to the extent that the employer is unable to repay the premium.

[78] Mr Wang’s employer NZQSTL has been liquidated and removed from the Companies Register. NZQSTL is therefore unable to repay Mr Wang any of the employment premium Ms Gill requested and received.

[79] The Authority therefore grants Mr Wang leave under s 11A(4) of the WPA to recover the full amount of the employment premium he paid Ms Gill from her personally.

Should Ms Gill be ordered to personally repay the premium Mr Wang paid her?

[80] Ms Gill has enriched herself at Mr Wang’s expense, in breach of s 12A of the WPA. She needs to fully repay the money Mr Wang paid her.

[81] Within 28 days of the date of this determination, Ms Gill is ordered to repay Mr Wang NZ\$90,000. Because the parties are in New Zealand, Ms Gill is ordered to personally repay Mr Wang the NZ\$90,000 she owes him into his New Zealand bank account. Ms Gill is directed to obtain Mr Wang’s bank account details from his advocate, May Moncur.

Should interest be awarded on the money Ms Gill has been ordered to pay Mr Wang?

[82] Ms Gill’s breach of s 12A of the WPA deprived Mr Wang of the use of money that he should never have had to have paid to her. It is therefore appropriate for him to be awarded interest on the unlawful employment premium he paid Ms Gill to recognise the opportunity costs associated with the premium payment. Accordingly, interest is awarded to Mr Wang under the Interest on Money Claims Act 2016. Interest is to be calculated in accordance with the civil debt interest calculator on the Ministry of Justice website.

[83] The Authority orders that interest is to run from 4 August 2020, being the date the last premium payment was made to Ms Gill, on the full NZ\$90,000 premium Mr Wang paid up to and including the date on which that amount has been repaid to him in full.

Should a penalty be imposed on Ms Gill for a breach of s 12A of the WPA?

[84] Section 13(2) of the WPA provides for penalties to be imposed under the Act for breaches by any employer, or person on the employer’s behalf, of the WPA.

[85] Every person “*involved in the contravention or failure*” of the WPA may have a penalty imposed on them. This includes “*a person involved in a breach*” as defined by s 142W of the Act. These definitions capture Ms Gill for her breaches of s 12A of the WPA.

[86] However, s 13(3) of the WPA provides that a worker may only seek a penalty be imposed on their employer. Only a Labour Inspector may recover a penalty from a person who is not the employer.

[87] The Labour Inspector has not filed a penalty claim against Ms Gill and the 12 month time limit for doing so has expired. Mr Wang's employer NZQSTL is not a party to these proceedings, and even if it was, it cannot have a penalty imposed on it because it has been liquidated and removed from the Companies Register.

[88] Although Ms Gill's breaches of s 12A of the WPA are exactly the type of conduct that needs to be punished by penalties, because she was not personally Mr Wang's employer, the Authority does not have jurisdiction to impose a penalty on her. Accordingly, Mr Wang's penalty claim does not succeed.

What costs and disbursements should be awarded?

[89] Ms Moncur asked the Authority to determine costs at a level it considered appropriate. Ms Gill had an opportunity to respond to Mr Wang's costs application, because she was provided with a copy of his submissions. Ms Gill did not respond.

[90] The Authority has adopted its usual notional daily tariff based approach to costs. The current tariff is \$4,500 for a one day investigation meeting. This matter involved a half-day investigation meeting, so the notional starting point for assessing costs in this matter is \$2,250. That notional starting tariff then needs to be adjusted to reflect the particular circumstances of this matter.

[91] The Authority is not aware of any factors that should result in the notional starting tariff being reduced.

[92] Ms Moncur submitted that costs should be increased to reflect the additional time that was required due to the need to translate all documents and to provide a transcript of the recording that Mr Wang took on 10 November 2020. That exercise was required after Ms Gill in her witness statement denied Mr Wang's evidence about their discussion on 10 November 2020.

[93] The Authority finds that the notional starting costs should be increased by 2.5 times to reflect that Mr Wang's actual costs were unreasonably increased by Ms Gill's response to his claims.

[94] Within 28 days of the date of this determination, Ms Gill is ordered to pay Mr Wang \$5,625 towards his actual legal costs plus \$71.56 to reimburse his filing fee.

Orders

[95] The Authority makes the following findings and orders:

- (a) Ms Gill breached s 12A(1) of the WPA by requesting and receiving from Mr Wang a NZ\$90,000 employment premium for his employment by NZQSTL and for her support of his residency application;
- (b) Under s 12A(2) of the WPA Mr Wang can recover the NZ\$90,000 employment premium he paid;
- (c) Because Mr Wang's employer NZQSTL has been liquidated and removed from the Companies Register, it is unable to repay him any of the employment premium he paid;
- (d) Ms Gill is a person involved in:
 - (iv) A breach of employment standards in accordance with s 142W of the Act; and
 - (v) Non-compliance with s 12A of the WPA;
- (e) Mr Wang is granted leave by the Authority under s 13A(4)(a) of the WPA and s 142Y(2)(a) of the Act to recover the employment premium he paid Ms Gill from her personally;
- (f) Within 28 days of the date of this determination, Ms Gill is ordered to repay Mr Wang the NZ\$90,000 employment premium he paid her;
- (g) Ms Gill is to repay the \$90,000 premium by depositing it into Mr Wang's New Zealand bank account and she is directed by the Authority to obtain his bank account number from Mr Wang's advocate, May Moncur;

- (h) Ms Gill is ordered to pay interest under the Interest on Money Claims Act 2016 on the NZ\$90,000 she owes Mr Wang, which is to be calculated using the civil debt interest calculator on the Ministry of Justice website;
- (i) Interest is to be paid on the \$NZ90,000 Ms Gill has been ordered to repay Mr Wang from 4 August 2020, being the date the last premium was paid, up to and including the date on which that amount has been fully repaid;
- (j) Within 28 days of the date of this determination, Ms Gill is ordered to pay Mr Wang \$5,321.56 costs and disbursements, consisting of \$5,250 as a contribution towards his actual legal costs and \$71.56 to reimburse him for his filing fee.

Rachel Larmer
Member of the Employment Relations Authority