

NOTE: This determination contains an order at paragraph [1] prohibiting publication of certain information

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

[2023] NZERA 263
3169302

BETWEEN ZHENG WANG
 Applicant

AND JASMINE CATERING LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: David Kim, advocate for the Applicant
 Martin Lyttelton, advocate for the Respondent

Investigation Meeting: 17, 18 and 19 January 2023 at Auckland

Submissions and Other
Information Received: 1 February 2023 from the Respondent
 2 February 2023 from the Applicant
 8 February 2023 from the Applicant
 18 February 2023 from overseas recruitment agent
 28 February 2023 from the Applicant
 28 February 2023 from the Respondent
 9 March 2023 from the Applicant
 30 March 2023 from the Respondent

Date of Determination: 25 May 2023

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] The Authority has issued a non-publication order in accordance with clause 10(1) of Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting the publication of Jasmine Catering Limited's (Jasmine Catering's) financial information that was filed in support of this claim. This is subject to the conditions that it does not apply to:

- (a) Information in this determination;
- (b) The employment institutions; or
- (c) Jasmine Catering Limited.

Undertaking

[2] Mr Kim provided a written undertaking on 16 January 2023 that said he would only use the financial information provided by Jasmine Catering for the purposes of the Authority's investigation and not for any other reason.

[3] Mr Kim also undertook that he would not provide Mr Wang with his own copy of the financial information, but would instead show him the financial information in his (Mr Kim's) presence, for the purposes of taking instructions.

Employment Relationship Problem

Mr Wang's claims

[4] Mr Zheng Wang was employed by Jasmine Catering Limited (Jasmine Catering) as a chef from 7 September 2015 until he resigned without notice on 16 January 2017. Ms Jessie Bo is the sole director of Jasmine Catering.

[5] Jasmine Catering has pursued a counterclaim against Mr Wang for the damages it claimed to have incurred, as a result of Mr Wang's resignation without notice. The counterclaim was heard and determined at the same time as this wage arrears claim.¹

[6] Mr Wang claimed that he is owed wage arrears from 4 April 2016 to 25 December 2016, for overtime hours he worked in excess of 40 hours per week, but was not paid for. Mr Wang also said he was not paid his annual holiday or public holiday entitlements, contrary to the requirements of the Holidays Act 2003 ("*the HA03*").

[7] Mr Wang said he was paid for his first few weeks in "*RMB*" (Chinese currency) that was paid to his family in China. He had no records of that and could not provide the Authority with any details in support of this broad allegation.

[8] He said that he worked at two restaurants that were owned and operated by Jasmine Catering. The first was Paradish restaurant which is located in Karangahape Road ("*K-Road*")

¹ *Jasmine Catering Ltd v Wang* [2022] NZERA 264.

Newton, Auckland, which is a Cantonese restaurant (“*the K-Rd restaurant*”). The second was the Chong Qing Cuisine restaurant, located in Lorne Street, Auckland Central which offers Sichuan and Northeast Dongbei dishes (“*the Lorne St restaurant*”).

[9] There is a dispute between the parties about the dates and hours Mr Wang worked at each restaurant. Jasmine Catering said from 4 April 2016 Mr Wang had only ever worked at the Lorne St restaurant. It denied he ever worked more than 40 hours per week.

[10] Although Mr Wang claimed he was not paid correctly for the duration of his employment, it was agreed (due to limitation issues) that his wage arrears claim runs from 4 April 2016 to 16 January 2017, because his first Statement of Problem was lodged with the Authority on 4 April 2022 to 16 January 2017 was the date his employment ended, when he resigned without notice in the early hours of that day.

[11] Mr Wang claimed that:

- (a) From 4 April 2016 to 31 July 2016, he was only paid for 40 hours per week. Mr Wang said he had actually worked 76 hours a week, over seven days, with his working time being split between the K-Rd and Lorne Street restaurants;
- (b) From 1 August 2016 to 25 December 2016, he was only paid for 40 hours per week when he had actually worked 54 hours per week, over six days, at the Lorne Street restaurant;
- (c) He worked the following public holidays, but did not receive his statutory public holiday entitlements (time and a half for the hours worked and an alternative holiday) for doing so:
 - (i) Anzac Day – 25 April 2016;
 - (ii) Queen’s Birthday – 6 June 2016;
 - (iii) Labour Day – 24 October 2016;
 - (iv) Christmas Day – 25 December 2016.
- (d) He was not paid for the following unworked public holidays, that he said were otherwise a working day for him:
 - (i) Boxing Day – 26 December 2016;
 - (ii) New Year’s Day – 1 January 2017;

- (iii) 2 January 2017.
- (e) He took approved accrued annual leave from 26 December 2016 to 15 January 2017 but was not paid any annual leave entitlements either at that time or after his employment ended on 16 January 2017. The Authority notes Mr Wang was wrong about the date of “26 December”, because it should have been “20 December”; and
- (f) He was not paid normal monthly wages for December 2016, because his last normal wages pay was on 7 December 2016, for the work he did in November 2016.

Employment agreements

[12] On the second day of the Authority’s investigation meeting, Mr Wang told the Authority for the first time that he had two different written employment agreements, one in Mandarin and one in English which he said he had signed on the same day.

[13] Mr Wang was given these two different employment agreements by the overseas recruitment agency he had engaged to help him find a job outside China, which introduced him to Jasmine Catering. Mr Wang said he had been told the employment agreements were the same and he signed both employment agreements on the same day, without anyone explaining the contents of either agreement.

[14] The witnesses speak Mandarin as their first language, so English was their second language. Mr Wang does not speak or read English. He said the first time he realised the agreement were different was when his immigration agent told him that in October 2016, when he was applying for a work to residency visa in October 2016.

[15] The Authority noted that the English version of the employment agreement has 35 clauses, two Schedules and a declaration on the signature page. The Mandarin agreement only had 15 clauses, so the differences between the two agreements would have been obvious at a glance, even to someone who did not speak both languages.

[16] Mr Wang said he had lodged his first Statement of Problem before he realised he had a copy of his Mandarin employment agreement. That contradicted his evidence that he knew back in 2016 that the content of both employment agreements were different. He did not raise the different versions with Ms Bo or the overseas recruitment agency, or anyone else for that matter.

[17] In terms of the material agreed terms, there was no dispute between the parties that Mr Wang was verbally offered, and accepted, employment by Jasmine Catering for a minimum of 40 hours per week, at a pay rate of \$36,400 gross per annum. Mr Wang agreed Ms Bo told him he would be paid overtime if he worked more than 40 hours per week, but there was no guarantee overtime would be available. He was paid monthly, by direct credit into his bank account.

[18] On that basis, Mr Wang's agreed wages were \$700 gross per week (being \$17.50 per hour x 40 hours), or \$3,033.33 gross per month. The minimum wage in New Zealand from 1 April 2015 until 31 March 2016 was \$14.75, increasing to \$15.25 per hour from 1 April 2016.

Discovery of wage arrears

[19] Mr Wang said he realised in May 2016 that he had not been paid overtime for hours worked in excess of 40 hours per week. That was approximately eight months after he had started work for Jasmine Catering.

[20] Mr Wang's explanation for not raising a concern about his alleged wage arrears at that point, was he was hoping Jasmine Catering would support him for residency. However, Mr Wang also told the Authority that he had never raised that possibility with Ms Bo or Jasmine Catering.

[21] The first time Mr Wang raised any issue about his wage arrears was in an anonymous WeChat message he sent Ms Bo on 10 February 2022, almost six years later.

Resignation

[22] Mr Wang unexpectedly resigned in a WeChat message sent at 1.54am on 16 January 2017 to Ms Bo on the same day he was expected to be back at work from his annual leave. Mr Wang resigned while he was still in China. Ms Bo saw his WeChat messages because she was up looking after a sick child.

[23] Mr Wang's resignation message sent via WeChat said:

Sister, I am sorry to bother you, something happen (sic) in my family now that I don't want to happen, so I can't continue to work now, I'm really sorry!

[24] Mr Wang then referred to the fact that him and his wife had divorced on 12 January 2017, and that he had the children in his care.

[25] Ms Bo replied to the WeChat message at 2.02 am on 16 January 2017 that said “*In your situation, why did you go abroad in the first place?*” When there was no answer to that she sent another message at 2.07 am on 16 January 2017 that said “*When you left, the work was not handed over, and now you suddenly tell me. How can I solve it?*”

[26] Mr Wang did not reply to that message. He said he overlooked it, but that response was not credible. Nor did Mr Wang answer Mr Bo’s calls to him to discuss his resignation. Ms Bo said that she was blocked when she attempted to contact Mr Wang to discuss his employment situation. The Authority accepted her evidence about being blocked.

First request for wage arrears to be paid

[27] After resigning, Mr Wang had no contact with Ms Bo for more than five years until he sent her a WeChat message on 10 February 2022. The message said:

Sister Jessie, good evening. When you have time, for I worked at your restaurant (employment period Sep 2015 – Dec 2016) pay me the salary (salary of November 2016 and salary of days before 25 December 2016 are unpaid), and, according to law, all entitled payments. Sorry for disturbing this late. Thank you. (sic)

[28] His second message said “*My ANZ account name is Mr Z Wang, and the account number is [redacted]*”.

[29] Ms Bo responded with a question mark and then a second message that said “*You are?*” She sent a third message that said “*Who are you?*” Ms Bo then received a further message from someone identifying himself as “*Xiaoji LI Senior Associate Carson Fox Legal*” that provided an email address and phone number.

[30] Ms Bo said “*I am sorry I really don’t know who you are, if you have any questions, please contact my lawyer and attach your contact information.*” Mr Wang then sent via WeChat the first page and the signature page of his English employment agreement with another message that said “*Okay, contact with your lawyer.*”

Respondent’s response to the claims

[31] Although Mr Wang claimed he had started work on 7 September 2015, Jasmine Catering said he did not start work until 1 October 2015.

[32] Jasmine Catering denied Mr Wang's wage arrears claims. It said Mr Wang had not worked on any of the public holidays he had identified. Ms Bo also said Mr Wang had to be authorised to work overtime, and that had not occurred for any of the overtime hours he had claimed. She also queried why he had left it so long to raise such claims.

[33] Jasmine Catering admitted Mr Wang was not paid his December 2016 wages or his final pay (due to him in January 2017) until 5 July 2022, which it said occurred because he could not be contacted after he resigned on 16 January 2017.

[34] Jasmine Catering said Mr Wang's final pay of \$5,820.35 consisted of his wages from 1 to 19 December 2016 of \$1,961.29 gross, accrued annual leave entitlements for the period 1 October 2015 to 30 September 2016 of \$2,953.85 and \$905.21 holiday pay from his anniversary start date.

[35] Jasmine Catering said that the applicable employment agreement was the English version. However both versions required Mr Wang to work 40 hours per week, provided he would be paid overtime for hours worked in excess of that and that he would be paid monthly by direct credit into his bank account. The employer was Jasmine Catering trading as Paradish restaurant in both agreements.

[36] Ms Bo said Mr Wang was required to keep a note of his days and hours of work by completing daily and weekly timesheets, which he was to submit to his employer. However, the evidence the Authority heard established that had not occurred and none of the employees actually did that. Record keeping was very casual as it was done verbally on an ad hoc basis.

[37] In terms of breaks, clause 5.2 of the English employment agreement said that Mr Wang would be entitled to a 30 minute unpaid meal break and that he would receive a ten minute rest break if he worked from four to six hours.

[38] The Authority noted that the evidence it received regarding the timing and duration of meal breaks was contradictory. It was agreed that Mr Wang could eat for free at the restaurant and he if he wanted to go to the restaurant on his day off then he was also permitted to eat for free.

[39] Ms Bo and Mr Liu said that kitchen staff at the Lorne St restaurant were given three 30 minute paid meal breaks during their working hours (11am to 11.30am, 2pm to 2.30pm and 9pm to 9.30pm) but the Authority did not find that evidence credible. It would have resulted

in all of the kitchen staff being paid for one extra hour they had not worked every week, which was highly unlikely to have occurred. Such a generous benefit (if it existed) would likely have been recorded in the employment agreement, and it was not.

[40] Jasmine Catering denied that Mr Wang worked at Paradish in K-Rd from 4 April 2016 onwards. It said that he had been employed to work at the Lorne Street restaurant, and he did so in early February 2016, shortly after the end of the Chinese New Year on 8 February in 2016.

[41] Ms Bo said Mr Wang started fulltime work at the Lorne Street restaurant around mid-February 2016. She said that he had only worked at the K-Road restaurant for about three weeks, while he was becoming familiar with the Lorne Street restaurant. Jasmine Catering said there was no need for Mr Wang to have worked at both the Lorne Street and K-Road restaurants from 4 April to 31 July 2016, as he had claimed. The Authority accepted that evidence.

[42] Records established that Mr Wang was paid \$3,200 monthly (in arrears) into his bank account, which the Authority noted was higher than his contractual wage rate.

[43] Jasmine Catering said Mr Wang's first pay was on 9 November 2015 and his last pay (excluding the payment made in July 2022) was made on 7 December 2016, for his November wages. It was agreed that Mr Wang was paid \$25,600 gross over that period. If his final pay of \$5,820.35 that was paid to him on 5 July 2022 is added to that, then Mr Wang's total gross earnings from Jasmine Catering amounted to \$31,420.35.

[44] Jasmine Catering denied paying Mr Wang any of his wages in cash or to his family in China, or in RMB currency. It said all payments were made in New Zealand dollars, by direct credit into his bank account.

Employment records

Record keeping obligations

[45] Jasmine Catering failed to provide the Authority with copies of Mr Wang's wage and time records, in breach of s 130 of the Employment Relations Act 2000 (*"the Act"*). Nor did Jasmine Catering provide the Authority with Mr Wang's holiday and leave records, in breach of s 81 of the HA03.

Wage and time records

[46] In accordance with s 132 of the Act, Jasmine Catering's failure to keep or produce wage and time records for Mr Wang, as required by s 130 of the Act, has prejudiced his ability to bring an accurate wage arrears claim under s 131 of the Act.

[47] Accordingly, pursuant to s 132(2) of the Act, that failure meant that unless Jasmine Catering proved his claims incorrect, the Authority may accept as proved Mr Wang's evidence about:

- (a) The wages he was paid including overtime and any penalty payments;
- (b) The hours, days and times he worked.

Holiday and leave records

[48] Pursuant to s 83 of the HA03, Jasmine Catering's failure to keep and provide a copy of Mr Wang's holiday and leave records has prevented him from bringing an accurate claim. In accordance with s 83(3) of the HA03, the Authority makes a finding to that effect.

[49] In light of that finding, s 83(4) of the HA03 permitted the Authority to accept as proved Mr Wang's statements about his holiday pay or leave that was actually paid to him and about the leave he had actually taken while employed, in the absence of evidence to the contrary.

The Authority's investigation

[50] The Authority held a three day in-person investigation meeting in Auckland to investigate Mr Wang's wage arrears claims and Jasmine Catering's counterclaim. The Authority was assisted by a Mandarin interpreter, who provided full interpretation of the investigation meeting.

[51] Mr Wang and a former colleague of his, Mr Diabo Duan, who had worked as a chef at the Lorne Street restaurant from September 2015 to July 2017 both gave evidence. Mr Duan gave evidence by telephone, for health-related reasons. Mr Wang gave evidence with the assistance of the Mandarin interpreter.

[52] The Authority also heard from Ms Bo, Mr Yuchao Zhang and Mr Fubin Liu. Mr Zhang was the Head Chef of the K-Road restaurant from 2012 to 2018. Mr Liu was the Head Chef of the Lorne St restaurant from September 2015 until October/November 2016.

[53] The Authority received new evidence from the parties both during the investigation meeting and after it.

Questions to overseas recruitment agent

[54] The discovery of the different Mandarin version employment agreement resulted in further inquiries being made, after the investigation meeting, into the circumstances of how that had occurred. This occurred by the parties putting forward questions they wanted to ask the overseas recruitment agent who Mr Wang had used to help him obtain employment with Jasmine Catering.

[55] The Authority used those questions to prepare a letter that it sent to Mr Xingui-Jingui Zhang, who had previously worked for Liaoning Talent Despatching Company Limited (“*Liaoning*”), in China, which was the recruitment agency the parties had engaged with. The parties were consulted about, and agreed with, the content of the letter before it was finalised by the Authority.

[56] The letter asked Liaoning (via Mr Zhang) specific questions relating to:

- (a) The preparation of each version of the two employment agreements;
- (b) The signing of each version of the employment agreements;
- (c) The advice given to Mr Wang regarding the Mandarin and English versions of the employment agreements he had been given.
- (d) What Mr Wang had been told about the content of each of the two employment agreements.

[57] Mr Zhang responded by providing as much information as he could recall in response to the Authority’s queries. Although Jasmine Catering asked for a further investigation meeting, so that Mr Wang could be questioned about Mr Zhang’s response, that was declined as the Authority did not believe it was necessary.

INZ records

[58] The Authority obtained a copy of Mr Wang’s Immigration New Zealand (“*INZ*”) file in advance of the investigation meeting, and relevant documents from that were shared with the parties. Although Mr Wang claimed that he had worked up to and including 25 December 2016, his immigration records established that he left New Zealand on 20 December 2016.

[59] The Authority finds that Mr Wang's wage arrears claim for overtime hours worked but not paid therefore ran from 4 April 2016 to 19 December 2016 (not 25 December as he had claimed).

Mandarin employment agreement

[60] After the investigation meeting, Mr Kim provided a copy of the Mandarin employment agreement and the Authority engaged a Mandarin interpreter to provide a written translation of that document, which was provided to the parties.

Recruitment agency agreement and other communications with it

[61] It is important to note that Mr Wang was Liaoning's client, not Jasmine Catering.

[62] Mr Wang therefore filed a copy of the recruitment agency agreement he had entered into with Liaoning. Jasmine Catering also provided the Authority with copies of the email communications it had had with Liaoning about Mr Wang's employment.

Accounting evidence

[63] After the investigation meeting Jasmine Catering's accountant, Xinyue (Fiona) Zhang (who is not related to Liaoning's Mr Zhang) filed an affidavit on 31 January 2023, along with supporting financial information relating to both the K-Road and Lorne Street restaurants. This included detailed information about the till transactions at each restaurant on particular days Mr Wang claimed he had worked, to show that was unlikely to have occurred.

[64] Although Mr Wang was given an opportunity to respond to this new evidence, he did not do so.

[65] The accounting records Ms Zhang referred the Authority to included information about the Eftpos trading receipts on particular days. She also provided a list of the public holiday days and dates that showed when the Lorne Street restaurant was likely closed. She also provided information about the Lorne St restaurant's normal closedown dates in different years.

Airline ticket

[66] During the investigation meeting, Mr Wang provided a copy of a receipt for his flight from China to New Zealand on 6 September 2015, along with WeChat messages that he had exchanged with witnesses who gave evidence to the Authority.

[67] The Authority considered that supported his claim that he started work on 7 September 2015, not 1 October 2015 as Jasmine Catering had claimed.

Qzone messages

[68] During the course of the investigation meeting Mr Wang provided copies of messages and photos he had posted to the Qzone (“QQ”), which is China’s social network and the online home of QQ users. These included photos that Mr Wang said he had posted either before work or after working at the Lorne Street restaurant.

[69] He provided that information as proof that he had worked on particular public holidays and to support his claims regarding his times of work. However, the Authority found this evidence of limited assistance because the photos did not show him actually working in the restaurant and the photos could have easily been taken at any time.

Mr Duan’s PAYE records

[70] On 1 February 2023, Jasmine Catering filed PAYE records for Mr Duan which showed that he had not been paid as a full time employee.

[71] When Mr Duan was asked about this, he said he was paid half of his wages directly into his bank account and half his wages in cash. Ms Bo Jasmine told the Authority she did not know about that arrangement, had not authorised it, and that it was contrary to what would have been permitted as Jasmine Catering said it paid all employees by direct credit only.

Submissions

[72] Both parties provided submissions. Jasmine Catering also provided the Authority with some notes that it had prepared highlighting what it believed were key parts of the evidence given by various witness during the investigation meeting. This was produced to support its submissions. Although Mr Wang had an opportunity to respond to those notes, he did not do so.

Issues

[73] The following issues are to be determined:

- (a) Credibility findings;
- (b) Which employment agreement governed the employment relationship?

- (c) Findings on material facts;
- (d) How many hours did Mr Wang work each week?
- (e) Did Mr Wang work on any public holidays in 2016?
- (f) If so, what was Mr Wang entitled to be paid for the public holidays he worked?
- (g) Was Mr Wang entitled to be paid for any unworked public holidays?
- (h) What if any public holiday arrears was Mr Wang owed?
- (i) What annual holiday was Mr Wang entitled to?
- (j) What should Mr Wang have been paid?
- (k) What annual holiday pay should Mr Wang have been paid when his employment ended?
- (l) What should Mr Wang's total gross earnings have been from his employment with Jasmine Catering?
- (m) What did Jasmine Catering pay Mr Wang?
- (n) What, if any, wage arrears is Mr Wang owed?
- (o) What costs and disbursements should the successful party be awarded?

Credibility findings

[74] The Authority was not satisfied that any of the witnesses it had heard from could be considered to be completely reliable, for a range of reasons.

[75] The passage of time since these events likely affected the quality of the evidence, as did the lack of appropriate documentation. Each witnesses had strong personal reasons to give evidence that benefited themselves, or one party over the other. In certain respects, each witness gave evidence that the Authority did not find credible. It was either illogical, inherently unlikely, or was contradicted by the witness themselves, or by other witnesses and/or documents.

[76] This was therefore not a case where the Authority could rely entirely on what one witness or party had said over the other. Instead, the Authority has carefully considered all of the evidence given by all of the witnesses and has closely examined the available documents, to assess what was more likely than not to have occurred.

[77] Sections 132(2) of the Act and s 83(4) of the HA03 have also been relied on by the Authority, in terms establishing whether or not Mr Wang's claims were correct or if any of this claims/evidence had been proven to be incorrect.

Which employment agreement governed the employment relationship?

[78] Mr Wang said the Mandarin employment agreement should apply. Jasmine Catering said the English version should apply. The Authority resolved that conflict in Jasmine Catering's favour. Its evidence was in material respects corroborated by Liaoning's information, while Mr Wang's account was inherently unlikely and did not make any logical sense.

[79] Mr Wang acted as if the English version applied. He submitted it to INZ before he got his first work visa, and although he was told it was different from the Mandarin version in October 2016 he did not raise any issues about that. He lodged his Statement of Problem without referring to it and filed his evidence to the Authority without referring to it.

[80] In fact Mr Wang did not refer to the existence of the Mandarin version of the employment agreement until day two of the Authority's investigation, and the details he gave about it at that point were very vague and unclear. There was no evidence that he had been working in accordance with the Mandarin version, in fact the contrary was established.

[81] Accordingly, the English version of the employment agreement governed the parties' employment relationship.

[82] It was more likely than not that Mr Wang was told by his own recruitment agent, before he accepted Jasmine Catering's offer of employment, that the Mandarin version was simply a previous 'placeholder' agreement that did not comply with New Zealand law, so it had been superseded by the English version of the agreement he signed. The English version of the employment agreement also contained an express clause to that effect.

[83] Based on the information received from Liaoning, the Authority was confident that Mr Wang's recruitment agent would have taken him through each clause of the English version of the employment agreement and carefully explained it to him.

[84] Mr Wang's evidence that no-one told him what was in the employment agreement was not accepted, as that was extremely unlikely given the strict protocols Liaoning had in place regarding the signing of overseas employment agreements.

Findings on material facts

[85] In accordance with s 174E of the Act, the Authority has not set out a record of all of the evidence it heard or received. Nor has it recorded or summarised all of the submissions the parties made.

[86] In terms of the material conflicts in the evidence the Authority, after weighing all of the evidence, formed a view about what was more likely than not to be true. On that basis, the Authority has made the following findings:

- (a) Mr Wang was employed from 7 September 2015 (not 1 October 2015 as Jasmine Catering claimed), based on his airline tickets and s 132(2) of the Act;
- (b) Mr Wang did not work at the Paradish restaurant in K-Road at all over the period 4 April 2016 to 31 July 2016. The evidence of Ms Bo, Mr Zhang and Mr Liu was preferred over Mr Wang's on that point;
- (c) Mr Wang's wage arrears claim is limited to any hours in excess of 40 hours per week that he worked at the Lorne Street restaurant from 4 April 2016 to 19 December 2016;
- (d) Mr Wang asked for annual leave to go to China on 18 December 2016. It was granted on the basis he promised to be back at work on 16 January 2017, which he agreed to before he returned to China on 20 December 2016;
- (e) Mr Wang only worked until 19 December 2016, because he left New Zealand on 20 December 2016, as per his INZ records;
- (f) The Lorne Street restaurant was likely closed on 25 April 2016, so Mr Wang could not have worked on that public holiday, as per the Eftpos records. Nor could he have worked on 25 December 2016, as he was not in New Zealand on that day;
- (g) Jasmine Catering did not establish that Mr Wang had not worked on the public holidays that fell on 6 June 2016 or 24 October 2016, so that evidence is accepted pursuant to s 132(2) of the Act and s 83(4) of the HA03, because Jasmine Catering did not provide evidence to the contrary;
- (h) Mr Wang likely worked for 7.5 hours on the 6 June 2016 and 24 October 2016 public holidays, so 14 hours in total for both days. His evidence that he was paid

his normal wages for those days was accepted, as per s 132(2) of the Act and s 83(4) of the HA03;

- (i) Mr Wang was not paid time and a half for the hours he worked on the Queen's Birthday and Labour Day public holidays in 2016, nor did he receive an alternative holiday for working on those two public holidays;
- (j) Mr Wang was not paid for two unused alternative holidays when his employment ended in January 2017, or when he received his final pay on 5 July 2022;
- (k) The following public holidays were clearly otherwise working days for Mr Wang, as he normally worked Sundays and Mondays; 25 December 2016 (Christmas Day), 26 December 2016 (Boxing Day), 1 January 2017 (New Year's Day) and 2 January 2017. He was entitled to be paid his normal wages on those public holidays;
- (l) Mr Wang took an unpaid meal break from 2.30pm to 5pm when the Lorne St restaurant closed between the lunch and dinner services. He was provided with free staff meals on days he worked;
- (m) Mr Wang worked during the hours that the Lorne Street restaurant was open, namely 11 am until 2.30 pm and then from 5 pm until 9.30 pm. He did not work from 2.30 pm until 5 pm when the restaurant was closed. All of the kitchen staff worked these same opening hours, which were displayed at the front entrance of the restaurant;
- (n) All kitchen staff would come and go at the same time. If it was quiet then they would undertake other activities such as cleaning, organising and the like. Evidence that they were sent home early and would make up the time the next week was not accepted, as there were no records of that;
- (o) There were no rosters made by Jasmine Catering or the Head Chef regarding who would work what hours on what day, because everybody worked the same hours;
- (p) Mr Wang worked six days a week at the Lorne Street restaurant. He worked for 7.5 hours each working day, meaning he worked for 45 hours per week;

- (q) The kitchen staff would decide amongst themselves each week which day they would have off. Mr Wang would sometimes have a Tuesday, Wednesday or Thursday off work, but that actual day off varied from week to week. He always worked Mondays and Sundays;
- (r) Mr Wang did not keep a record of his days or hours of work, he did not submit timesheets to the Head Chef at either restaurant he worked at or to Ms Bo, and he was not asked to do so while employed. Nor did any other staff;
- (s) Jasmine Catering's evidence that Mr Wang had a half hour paid meal break from 11am until 11.30am (as soon as he started work), a second paid meal break from 2 pm until 2.30 and the third paid meal break from 9 pm until 9.30 pm was not accepted;
- (t) The fact that Mr Wang was in China from 20 December 2016 until 16 January 2017 was not an excuse for Jasmine Catering to not pay his wages. These were due to be paid by direct debit into his bank account, so his pay should have been processed as usual;
- (u) There are 286 days between 4 April 2016 and 16 January 2017, or 41 weeks.
- (v) There are 26 days between 20 December 2016 and 15 January 2017, four of which are public holidays. Mr Wang therefore used 19 days accrued annual holiday over this period;
- (w) Mr Wang's employment agreement provided for him to be paid \$36,400 gross per annum, which is \$700 per week for 40 hours work, paid at the rate of \$17.50 per hour, or \$3,033.33 gross per month;
- (x) Mr Wang was paid a monthly wage of \$3,200, meaning his gross wages per annum were \$38,400. He was therefore paid \$166.67 per month more than his contractual entitlement, meaning he was paid for 9.5 hours overtime each month based on a rate of pay of \$17.50 per hour; and
- (y) Mr Wang has been paid \$31,420.35 gross in total by Jasmine Catering (being \$25,600 while employed from 4 April to 15 January 2017 plus \$5,820.35 in the final pay that was paid to him in July 2022).

How many hours did Mr Wang work each week?

[87] The Authority did not accept Mr Wang's evidence that he worked 76 hours a week, over seven days, from 4 April 2016 to 31 July 2016. Nor did it accept his evidence that he had worked 54 hours a week, over six days, at the Lorne Street restaurant over the period 1 August 2016 to 25 December 2016.

[88] Mr Wang worked 45 hours per week, five hours of which was over time, from 4 April 2016 to 19 December 2016. Because he worked 45 hours per week every week, his annual holiday and public holiday entitlements were based him normally working six days a week, for 45 hours in total. That meant his normal weekly wage should have been \$787.50 (being 45 hours multiplied by \$17.50 per hour).

Did Mr Wang work on any public holidays in 2016?

[89] Mr Wang's claim that he worked on 25 April 2016 did not succeed. Mr Wang's claim that he worked at the Lorne Street restaurant on 6 June 2016 and 24 October 2016 succeeded, because Jasmine Catering failed to establish that his evidence about that was incorrect. Those claims are therefore established on the evidence, in accordance with s 132(2) of the Act and s 83(4) of the HA03.

What was Mr Wang entitled to be paid for the public holidays he worked?

[90] Mr Wang worked his normal 7.5 hour day on each of those two public holidays. He was therefore entitled to be paid time-and-a-half for the hours he actually worked (meaning he is owed an extra 3.75 hours pay for each of those days) plus an alternative holiday for each public holiday he worked.

Was Mr Wang entitled to be paid for any unworked public holidays?

[91] Mr Wang is entitled to be paid for an unworked public holiday if it would clearly otherwise be a working day for him.

[92] It was clear that Mr Wang always worked Sundays and Mondays. Because the following public holidays fell on Sundays or Mondays, these public holidays were clearly otherwise working days for Mr Wang:

- (a) Christmas Day 2016;
- (b) Boxing Day 2016;

- (c) New Year's Day 2017;
- (d) 2 January 2017.

What public holiday arrears was Mr Wang owed?

[93] Mr Wang was entitled to public holiday arrears of \$376.25 consisting of:

- (a) \$131.25 for the time and a half wage arrears he was owed for the 14 hours he worked in total over two public holidays;
- (b) \$245 for two alternative holidays arrears he should have received for working on two public holidays.

What annual holiday was Mr Wang entitled to?

Annual holiday entitlements

[94] Mr Wang became entitled to four weeks paid annual holiday on 7 September 2016, being the one year anniversary date of his employment. Because he worked six days a week, one week of annual holiday was six days. He had therefore accrued 24 days of annual holiday, being four weeks multiplied by six days a week.

[95] Any annual holiday Mr Wang used while he was employed was to be deducted from this total annual holiday entitlement, to determine what accrued annual holiday he was entitled to be paid out when his employment ended.

[96] When his employment ended, Mr Wang was also entitled to be paid 8% of his total gross earnings from his anniversary date of 7 September 2016 to 16 January 2017, being the date his employment ended.

Annual holiday taken by Mr Wang

[97] Mr Wang was entitled to four weeks' paid annual holiday by the time he took his annual holiday from 20 December 2016 to 15 January 2017. There are 26 days over this period. Four of these 26 days were public holidays. Because Mr Wang worked six days a week, three of these days were not working days (because three of these days were his normal one day off per week).

[98] That meant Mr Wang was entitled to be paid for the 19 days accrued (and approved) annual holiday he took from 20 December 2016 to 15 January 2017. That should have been paid to him as part of his normal monthly wages payment.

Accrued annual holiday

[99] Mr Wang is therefore owed five days of unused accrued annual holiday pay (24 days less 19 days used). That should have been paid to him in January 2017, when his employment ended.

[100] Mr Wang normally worked 7.5 hours a day, so multiplying that by the five days of accrued holiday he had owing to him when his employment ended, meant he was owed \$656.25 accrued annual holiday pay (being 37.5 hours x \$17.50 per hour).

Annual holiday pay from anniversary date

[101] Mr Wang is also entitled to eight percent of his total gross earnings from his anniversary date of 7 September 2017 until his employment ended on 15 January 2016. This is calculated based on what he should have been paid, not on what Jasmine Catering actually paid him, because he is owed wage arrears.

What should Mr Wang have been paid?

[102] Mr Wang worked from 4 April 2016 to 15 January 2017. He was employed for 41 weeks and worked 45 hours per week, at the rate of \$17.50 per hour, so should have been paid \$32,287.50 gross.

[103] That amount included his normal wages, five hours overtime per week, unworked public holiday entitlements and 19 days of paid annual holiday. However there are other amounts that needed to be added to Mr Wang's total gross earnings.

[104] Mr Wang should have been paid the following total public holiday entitlements \$376.25, consisting of:

- (a) \$131.25 addition wages as the time and a half payment for the 14 hours he worked in total over the two public holidays that fell on 6 June 2016 (Queen's Birthday) and 24 October 2016 (Labour Day); and
- (b) \$245 gross for the two alternative holidays he had accrued for working on the 6 June and 24 October 2016 public holidays, but which he had not used before his employment ended in January 2017.

[105] Mr Wang was also entitled to be paid five days' accrued but unused annual holiday pay when his employment ended. He worked 7.5 hours a day, so was entitled to be paid \$656.25 (being 37.5 hours x \$17.50 per hour).

[106] In addition, Mr Wang should have been paid 8% of his total gross earnings from his anniversary leave date of 7 September 2016 until his employment ended on 15 January 2017. There are 130 days over that period, or 18.5 weeks.

[107] If he had been paid correctly, then his total gross earnings over that period would have been \$15,535.63 consisting of:

- (a) \$14,568.75 (18.5 weeks x \$787.50 per week, based on 45 hours work a week at \$17.50 per hour);
- (b) \$65.63 as the time and a half payment for the 7.5 hours worked on the 24 October 2016 public holiday;
- (c) \$245 for the two unused alternative holidays; and
- (d) \$656.25 for his five days of accrued but unused annual holiday.

What annual holiday pay should Mr Wang have been paid when his employment ended?

[108] Mr Wang's annual holiday entitlement under s 25 of the HA03 was \$1,242.85, being 8 percent of \$15,535.63. His annual holiday entitlement under s 24(1) of the HA03 was \$656.25 being five days left out of his 24 days annual holiday entitlement, because he had used 19 days of his accrued annual holiday over the period 20 December 2016 to 15 January 2017.

What should Mr Wang's total gross earnings have been from his employment with Jasmine Catering?

[109] If Jasmine Catering had paid Mr Wang correctly, that would have amounted to total gross wages of \$34,562.55 consisting of:

- (a) \$32,287.50 gross wages, based on him working 45 hours per week for 41 weeks;
- (b) \$376.25 public holiday entitlements, consisting of:
 - (i) \$131.25 time and a half for the two for the two public holidays he worked;

- (ii) \$245 for the two alternative holidays he had accrued for working on two public holidays; and
- (c) \$1,898.80 annual holiday pay, consisting of:
 - (i) \$656.25 for 5 days accrued but unused annual leave; and
 - (ii) \$1,242.55 as 8% of his total gross earnings since his anniversary date.

What was Mr Wang paid?

[110] Mr Wang was paid \$31,420.35 total gross earnings by Jasmine Catering.

Is Mr Wang owed wage arrears?

[111] Although Mr Wang should have been paid \$34,562.55, he only received \$31,420.35, so he is owed wage arrears of \$3,142.20 gross. His wage arrears claim therefore succeeds.

Outcome

[112] Within 28 days of the date of this determination, Jasmine Catering is ordered to pay Mr Wang wage arrears of \$3,142.20 gross.

What, if any, costs and disbursements should be awarded?

[113] Mr Wang has been successful in his wage arrears claim and on the counterclaim.² It is therefore appropriate for costs on both matters to be determined, by an exchange of costs memoranda, at the same time. The parties' submissions will therefore need to address the assessment of costs on both matters (this wage arrears claim and Jasmine Catering's counterclaim).

[114] Mr Wang has 14 days within which to file cost submissions and Jasmine Catering has 14 days after receipt of Mr Wang's submission in which to file its costs submissions (on both matters). No submissions will be considered outside of this timetable, without the prior leave of the Authority.

[115] This matter involved a three day investigation meeting, so the starting point for assessing costs is \$11,500, being \$4,500 for the first day of the investigation meeting and \$3,500 for the subsequent days.

² Above n1.

[116] This notional starting tariff will be adjusted to reflect the particular circumstances of this case. The parties are therefore invited to identify factors that should result in the notional starting tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority