

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 80
3271759

BETWEEN	WILLIAM WEI Applicant
AND	XIAOLI (ERIC) LIU First Respondent
AND	LH STAR LIMITED Second Respondent

Member of Authority:	Rachel Larmer
Representatives:	Applicant in person Simpson Tong, counsel for the Respondents
Investigation Meeting:	7 November 2024 in Auckland
Submissions and Additional Information Received:	11, 14, 15, 18 and 19 November 2024 and 10 February 2025 from the Applicant 8 November 2024 and 10 February 2025 from the Respondent
Determination:	17 February 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr William Wei, claimed he was employed by the first respondent, Xiaoli (Eric) Liu. Mr Liu said Mr Wei was employed by the second respondent, LH Star Limited (LH Star). LH Star operates a Roast Shop in Auckland. Mr Lui is LH Star's sole director and shareholder.

[2] Mr Wei was not provided with a written employment agreement. Mr Wei said his employer failed to deduct and remit the correct PAYE and other legally required deductions (such as ACC levy and student loan repayments) to Inland Revenue Department (IRD) from his wages. The respondents admit no IRD payments have been

made, but they blamed that on Mr Wei's refusal to provide them with his IRD number. Mr Wei disputed that.

[3] Mr Wei claimed he was owed wage arrears for unpaid public holiday entitlements and unpaid annual holiday pay which was not correctly paid to him when his employment ended in December 2023.

[4] No wage and time records or holiday and leave records were kept for Mr Wei.

[5] The respondents admitted Mr Wei was owed annual holiday pay arrears, but said he had not yet been paid because he had refused to provide his bank account details, because he wanted to be paid cash only. They denied he was owed public holiday arrears.

[6] Mr Wei claimed he had been verbally abused by a co-worker named Hualing (Clair) Gong in the workplace in mid-November 2023. Mr Wei described this as "an assault" (the November incident). Mr Wei claimed the respondents failed to address this matter in an appropriate manner, which he alleged led to him being subjected to a "physical assault" in the workplace by Ms Gong on 13 December 2023 (the altercation).

[7] Ms Gong denied verbally abusing Mr Wei at all. Ms Gong and the respondents denied she was responsible for the December altercation, as Mr Wei was the instigator who had first assaulted Ms Gong.

[8] Mr Wei claimed he was unjustifiably dismissed because he was not given any further work after the December altercation. The respondents said Mr Wei was not given any further work to do after the incident because his assault on Ms Gong meant they could not have him in the workplace.

The Authority's investigation

[9] The Authority conducted an in-person investigation meeting (IM) on 7 November 2024 in Auckland. Mr Wei gave evidence on his own behalf. Mr Liu gave evidence for himself and LH Star, as did Ms Gong.

[10] The Authority was assisted by an interpreter who could speak Cantonese and Mandarin for the investigation meeting (IM).

CCTV footage

[11] The respondents provided CCTV footage of the December altercation in advance of the IM. The Authority carefully reviewed CCTV footage taken inside the workplace of the 13 December 2023 incident (the altercation in which Mr Wei claimed Ms Gong had assaulted him, and Ms Gong claimed Mr Wei had assaulted her).

[12] During the course of the investigation meeting the CCTV footage was closely and slowly reviewed on a stop/start basis, with each witness speaking to what was seen on screen. The witnesses also had an opportunity to describe what was being said, who else was around and what happened out of sight of the CCTV footage while it was being viewed during the investigation meeting.

Additional information

[13] After the conclusion of the investigation meeting both parties were required to provide additional information and documents.

Grossed up figures

[14] Because all of the payments Mr Liu made to Mr Wei were made in cash no IRD deductions occurred, and no employment documentation was kept for Mr Wei. It was therefore necessary to 'gross up' the cash payments Mr Wei had received so, that accurate figures could be applied to his wage arrears claim.

[15] The respondents said the 'grossed up' figures were provided by their accountant. They advised that a cash payment of \$1,500.00 net was \$1,804.20 gross. A cash payment of \$300.00 net was \$428.57 gross. A cash payment of \$21.00 an hour net was \$24.62 gross. A cash payment of \$25.00 net an hour was \$30.07 gross. The Authority relied on this evidence, in the absence of any other evidence contradicting it.

The issues

[16] The following issues required determination:

- (a) Who was Mr Wei's employer?
- (b) What were Mr Wei's agreed terms and conditions of employment?

- (c) Were the correct legally required deductions made from Mr Wei's wages and remitted to IRD?
- (d) Did Mr Wei's employer keep the legally required employment documentation for him?
- (e) Was Mr Wei owed wage arrears?
- (f) If so, should he be awarded interest on his wage arrears?
- (g) Was Mr Wei verbally abused by Ms Gong in November 2023?
- (h) What occurred during the workplace altercation on 13 December 2023?
- (i) Was Mr Wei dismissed from his employment?
- (j) If so, was his dismissal justified?
- (k) If not, what remedies should Mr Wei be awarded?
- (l) Should any remedies Mr Wei is awarded be reduced on the grounds of contribution, under s 124 of the Employment Relations Act 2000 (the Act)?
- (m) What costs and disbursements should be awarded?

Who was Mr Wei's employer?

[17] Mr Wei, in his statement of problem (SoP) identified Mr Liu as his employer. The statement in reply (SIR) lodged by counsel on behalf of Mr Liu did not dispute that. Mr Liu attended the Case Management Conference (CMC) as an observer, but he and his counsel did not dispute the identity of the employer during the CMC.

[18] On 27 May 2024 Mr Liu's counsel emailed the Authority stating that LH Star was Mr Wei's employer. No documentation was provided to support that new position.

[19] The Authority issued Directions of the Authority (DoA) dated 27 May 2024 recording that it appeared the "doctrine of the undisclosed principal" could apply to Mr Wei's employment. If it did, then Mr Liu could still be held liable as Mr Wei's employer, even if he had been communicating with Mr Wei on behalf of LH Star. The parties were therefore on notice that their evidence needed to address that, as it would be an issue that would be determined.

[20] In order to ensure the Authority had all of Mr Wei's possible employers as named respondents during its investigation, and to ensure that all relevant evidence was

obtained and assessed, the Authority exercised its power under s 221 of the Act to direct LH Star be joined as the second respondent in this matter.

[21] Mr Liu did not advise Mr Wei until May 2024 that he (Mr Liu) was not Mr Wei's employer, but that his employer was in fact LH Star. This was not a legal entity that Mr Wei had known about or been told about prior to then. There were no employment documents given to Mr Wei before he started work that would have put him on notice his employer was LH Star, not Mr Liu.

[22] If Mr Liu had been acting as an agent for LH Star, and not in his own personal capacity, then Mr Liu was required to disclose that to Mr Wei before an employment relationship was entered into. However, he failed to do that. Mr Wei therefore had no way of knowing that he was entering into an employment relationship with someone other than Mr Liu, because that was never discussed with him. Mr Liu was the only person Mr Wei had contact with, and it was Mr Liu who employed him, without reference to any other entity.

[23] The "doctrine of the undisclosed principal" therefore applied to Mr Wei's employment. An agent's disclosure of agency on behalf of another entity must occur before a contract is entered into, and that did not occur here. Mr Liu failed to put Mr Wei on notice that Mr Liu was acting as LH Star's agent only, and not in his personal capacity.

[24] The "doctrine of the undisclosed principal" meant Mr Liu was actually Mr Wei's employer, even though the work Mr Wei was doing was for the benefit of LH Star. As Mr Wei's employer it was Mr Liu personally, not LH Star, who was legally responsible for complying with the minimum code legislation and employment standards that applied to Mr Wei's employment.

[25] Accordingly, an application of the "doctrine of the undisclosed principal" established that Mr Liu personally was Mr Wei's employer.

What were Mr Wei's terms and conditions of employment?

[26] Mr Wei was not provided with a written employment agreement in breach of s 65 of the Act.

[27] The key terms and conditions of Mr Wei's employment were agreed in a series of text messages he had exchanged with Mr Liu before he (Mr Wei) started work.

[28] Mr Wei sent the first text message to Mr Liu on 21 June 2022 asking if he “was looking for someone to do roast meals?” and stating that he had experience in that area. Mr Wei said he was available to work on Fridays and Saturdays from 1.00pm to 9.00pm.

[29] Mr Liu responded saying he needed someone for Saturdays and Sundays and he would check for Fridays. Mr Liu asked Mr Wei if he could start work that week. Mr Wei responded in a text message on 22 June 2022 saying he would start the following week and he would work on Fridays, Saturdays and Sundays from 1.00pm to 9.00pm for \$21.00 cash per hour. It was subsequently agreed that Mr Wei would work for six hours a day on the days he worked. These were fixed hours of work.

[30] Mr Liu asked Mr Wei to take on an additional day or two of work but Mr Wei responded, “I could only work on Friday, Saturday and Sundays”.

[31] Mr Wei’s evidence that he started work in mid-April 2022 was not accepted, because it contradicted the text messages. Mr Wei’s evidence that he worked five days per week from mid-April 2022 was also not accepted, again because it contradicted the text messages the parties exchanged prior to the beginning of Mr Wei’s employment.

[32] Around 1 October 2022, the parties agreed Mr Wei would work for six hours a day for five days per week, instead of the previous three days he had been working up until then.

[33] Based on the evidence presented to the Authority, it was more likely than not Mr Wei’s terms and conditions of employment were as follows:

- (a) His start date was 24 June 2022;
- (b) He was initially employed to work for three days per week on Fridays, Saturdays and Sundays;
- (c) He worked for six hours per day (not the eight hours he said he was available);
- (d) He had a 30 minute paid break each day he worked (this was a combination of his two paid rest breaks, and this had occurred with the parties’ agreement);
- (e) He was initially paid \$21.00 cash per hour;

- (f) From around 1 October 2022 Mr Wei worked five days per week, for six hours per day, inclusive of a 30 minute paid break;
- (g) Mr Wei's hourly rate increased to \$25.00 per hour, probably around 1 October 2022;
- (h) The parties agreed Mr Liu would pay Mr Wei cash in an envelope every week.

Were the correct legally required deductions made from Mr Wei's wages and remitted to IRD?

[34] No PAYE, student loan deductions or ACC levy were deducted from Mr Wei's wages. Therefore none of these legally required deductions were remitted to IRD from Mr Wei's wages. IRD was unaware of the employment relationship between Mr Wei and Mr Liu.

[35] Mr Liu claimed that Mr Wei failed to provide his IRD number, which Mr Wei disputed. Mr Liu's evidence has been preferred because it was extremely difficult for the Authority to obtain Mr Wei's IRD number from him. He breached numerous directions and communications from the Authority to provide that information, before actually doing so. Had Mr Wei already given it to Mr Liu, then it should have been readily available.

[36] The failure to deduct and remit the legally required deductions to IRD occurred because the parties had agreed Mr Wei would be paid in cash. That financially mutually benefited Mr Liu and Mr Wei, and it is an issue the IRD may wish to further investigate. Mr Wei failed to disclose an IRD print out of his earnings from all sources, including other employers, when directed on multiple occasions by the Authority to do so.

[37] No employment documentation in terms of the wage and time records required by s 130 of the Act, or the holiday and leave records required by s 81 of the Holidays Act 2003 (the HA03), were kept by Mr Liu for Mr Wei's employment.

[38] Mr Liu is ordered to notify IRD that he employed Mr Wei from 24 June 2022 to 13 December 2023. Mr Liu must also make the necessary arrangements to pay IRD all of the correct deductions (for example but not limited to, PAYE, ACC levy and student loan deductions) that should have been remitted to IRD from Mr Wei's wages.

[39] Mr Liu is also responsible for ensuring the correct deductions are made from the wages Mr Wei has been awarded in this determination and that all legally required deductions are remitted to IRD. It is also Mr Wei's responsibility to pay any penalties IRD may impose.

Did Mr Liu keep the legally required employment documentation for him?

[40] Section 130 of the Act was breached because Mr Liu failed to keep wage and time records for Mr Wei. Section 81 of the HA03 was also breached because Mr Liu failed to keep holiday and leave records for Mr Wei.

Section 132 of the Act

[41] Pursuant to s 132 of the Act, the Authority can accept Mr Wei's evidence about his days and hours of work and amounts he was paid, unless that evidence was proven to be incorrect. Some of Mr Wei's evidence was proven to be incorrect, so it could not be relied on.

[42] The Authority did, however, rely on s 132 of the Act to accept Mr Wei's evidence that he was not paid time and a half for the six hours he worked on each of the two public holidays he identified. He was instead paid his normal hourly rate for the six hours he worked on each public holiday.

[43] Mr Liu still owed Mr Wei \$180.42 gross wage arrears due to the failure to pay him time and a half for the 12 hours he actually worked on the ANZAC and Matariki public holidays in 2023. This is based on a gross hourly rate of \$30.07 multiplied by six hours.

Was Mr Wei owed wage arrears?

Public holiday entitlements

(i) Time and a half for hours worked

[44] Mr Wei worked on two public holidays; ANZAC Day on Tuesday 25 April 2023 and Matariki on Friday 14 July 2023. Mr Wei claimed that when he worked on these two public holidays, instead of the time and a half he was entitled to under the HA03, he was only paid his normal pay.

[45] Mr Liu said Mr Wei was paid eighty percent of his normal salary for working on a public holiday. That evidence was not accepted because it was unsupported by any

documentation and it was also the incorrect amount in terms of public holiday entitlements.

[46] Mr Wei worked six hours on each of these two public holidays. He was underpaid by three hours each day, six hours in total, across both public holidays.

[47] Mr Liu is ordered to pay Mr Wei \$180.42 public holiday arrears, for the time and half he has not been paid.

(ii) Alternative day holiday

[48] Mr Wei's evidence that he did not receive an alternative day holiday was not accepted. The parties agreed Mr Wei was paid \$300.00 cash shortly after his employment ended which represented a net payment for two alternative day public holidays, which were based on a pay rate of \$150.00 net per day.

[49] Mr Liu has therefore paid Mr Wei for his two unused alternative day holidays after his employment ended, although the necessary IRD deductions had not been made from the cash he was paid for that. Mr Liu was therefore responsible for remedying that omission with IRD, by remitting the correct legally required deductions to IRD for the \$300.00 cash he paid Mr Wei in mid-December 2023.

Annual holiday entitlements

(i) Accrued annual holiday

[50] Mr Wei did not take any paid annual holiday while employed. He had some days off work as agreed unpaid leave, which meant it did not affect his annual holiday entitlement.

[51] Mr Liu paid Mr Wei \$1,500.00 cash on 19 December 2023 for "annual holiday pay". No IRD deductions were made from that amount, so Mr Liu is responsible for remedying that directly with IRD, by calculating and remitting all legally required deductions to IRD based on the \$1,500.00 cash paid in December 2023.

[52] Mr Wei was entitled to four weeks' paid annual holiday at the end of his first 12 months of employment. That meant Mr Wei had accrued an annual holiday entitlement of four weeks paid annual holiday, as at his anniversary date of 24 June 2023. This was to be calculated based on Mr Wei working five days a week, six hours

a day. His gross rate of pay at the time his employment ended was \$30.07 per hour so his weekly wages were \$902.10 gross per week (\$30.07 per hour x 6 hours x 5 days).

[53] Mr Liu is ordered to pay Mr Wei \$3,608.40 gross for four weeks accrued annual holiday pay.

(ii) Entitlement from last anniversary date

[54] Before his employment ended on 13 December 2023, Mr Wei worked a further 12 weeks from his leave anniversary date of 24 June 2023. He was therefore entitled to eight percent of his total gross earnings for the period 25 June 2023 to 13 December 2023.

[55] Mr Wei was paid \$16,500.00 cash in total over that period. The respondents said that amounted to \$19,865.78 gross, and Mr Wei did not dispute that. Eight percent of Mr Wei's total gross earnings since his anniversary leave date on 24 June 2023 was therefore \$1,589.26 gross.

[56] Mr Wei is owed \$1,589.26 annual holiday pay, as per s 25 of the HA03.

Outcome of the wage arrears claim

[57] Accordingly, Mr Wei was owed annual holiday pay on termination of \$5,197.66 (being \$3,608.40 gross for accrued annual holiday plus \$1,589.26 from his leave anniversary date).

[58] However, Mr Wei was only paid \$1,500.00 cash, which the respondents said amounted to \$1,804.20 gross. Mr Liu is therefore ordered to pay Mr Wei \$3,393.46 annual holiday pay arrears (being \$5,197.66 owed, less \$1,804.20 already paid to him).

Should interest be awarded on Mr Wei's wage arrears?

[59] Mr Liu has effectively had the benefit of the use of Mr Wei's money because he underpaid him. It is therefore appropriate for Mr Wei to be paid interest on his wage arrears.

[60] Mr Liu is ordered to pay Mr Wei interest on his total wage arrears of \$3,573.88 (being interest \$180.42 public holiday arrears plus \$3,393.46 annual holiday pay arrears).

[61] Interest runs from 14 December 2023 until 17 February 2025, being the date of this determination. Interest is to be calculated using the Civil Debt Interest Calculator on the Ministry of Justice website.

[62] Interest on Mr Wei's wage arrears to the date of this determination is \$242.20.

Was Mr Wei verbally abused by Ms Gong in November 2023?

[63] Mr Wei claimed that a new co-worker of his, Ms Hualing (Clair) Gong, who started work in the middle of November 2023 "verbally assaulted him". Mr Wei said he raised an issue about that with Mr Liu, who failed to deal with the matter appropriately. Ms Gong and Mr Liu denied Mr Wei's allegations.

[64] The evidence fell short of establishing that Mr Wei was "verbally assaulted" by Ms Gong in November 2023. Ms Gong was a new employee who had only just started work in mid-November 2023. It was inherently unlikely that on one of her first days in her new job she would verbally abuse or verbally assault another more long standing employee.

[65] The circumstances of this claim by Mr Wei was that he was annoyed Ms Gong was holding up customers because she was working too slowly. Mr Wei said he told Ms Gong to "follow Mr Liu's process" which he claimed Ms Gong said she refused to do. She denied this account of what had occurred. Mr Wei formed an adverse view of her as a result of that interaction.

[66] This was not an incident of "verbal violence" as Mr Wei claimed or of "verbal assault". Mr Liu's and Ms Gong's evidence on this incident was preferred on the basis it was more likely to be correct. Their account was supported by the text messages Mr Wei sent Mr Liu about that incident in December 2023. Mr Wei has been demonstratively wrong about some of the evidence he gave as it was contradicted by text messages.

[67] Mr Liu said he heard an exchange of voices at the front counter but then nothing more. Mr Wei did not raise an issue with Mr Liu or make a complaint at the time. This issue allegation arose for the first time as part of these Authority proceedings.

[68] Mr Wei's text complaint to Mr Liu in December 2023 about Ms Gong had focused on Mr Wei's subjective view that Ms Gong was working too slow which was

holding up customers. Mr Wei recorded in his December text message to Mr Liu that “I have asked you to tell the lady [Ms Gong] to improve her work efficiency”.

[69] It was therefore more likely than not that Mr Wei’s actual complaint about Ms Gong’s conduct in November 2023 related to the fact that as a new employee she was (in his view) working too slowly. There was no disclosure of violence or an assault or verbal abuse any other incident that could reasonably have been viewed as a health and safety issue that Mr Liu needed to address.

[70] Accordingly, Mr Wei was unable to establish that there was a health and safety incident that occurred in November 2023 that Mr Liu had failed to appropriately manage, or that Mr Liu disadvantaged Mr Wei regarding this November incident.

What occurred during the workplace altercation on 13 December 2023?

[71] Mr Wei claimed he was physically assaulted by Ms Gong in the workplace on 13 December 2023. The Authority was provided with CCTV footage of this incident. The CCTV footage did not have sound but it was in colour.

CCTV “tampering allegation”

[72] Mr Wei’s allegations that CCTV footage had been “tampered with” was not accepted.

[73] Mr Wei described that what he had called the “CCTV tampering” amounted to the failure of the CCTV footage to capture customers who were in the front of the Roast Shop around the time of the incident. That was not an example of the respondents’ tampering with the CCTV footage. It was just a reflection of the time period during which the CCTV footage captured the incident. The main part of the altercation was captured.

[74] The complaint Mr Wei made about customers not being visible on the CCTV footage was immaterial to that. You could see that customers were present at the front of the shop, but the main altercation took place in the small kitchen area. The CCTV was sufficient to be able to see what had occurred.

[75] Although the Authority acknowledged there was a further part of the incident on 13 December 2023 that had occurred while Ms Gong and Mr Wei were serving customers at the front counter, that part of the incident involved an allegation that

Mr Wei had threatened to cut Ms Gong with a knife (or words to that effect), which Mr Wei strongly denied. However, the CCTV footage would not have been able to capture that because it was without sound.

[76] The respondents' evidence that they provided the Authority with all available CCTV footage regarding this incident was accepted, on the basis it was more likely than not to be correct.

[77] The CCTV footage is overwritten every four weeks. The incident happened in 2023, so the previous recordings were not retained because Mr Liu only kept the parts of the CCTV footage that were relevant to this incident. That was understandable, and was not an example of "tampering" as Mr Wei had alleged.

What was said?

[78] There was a physical altercation that occurred between Mr Wei and Ms Gong that arose from a comment Ms Gong made to Mr Wei. Ms Gong explained that Mr Wei had physically pushed passed Mr Liu and Ms Gong, so she had complained to Mr Wei about that, saying "use your words you are not dumb".

[79] Mr Wei claimed that Ms Gong said, "you are a dumb person" and "you are so stupid and old I will not tolerate you". Ms Gong denied she had said that. Mr Wei spoke Cantonese and Ms Gong spoke Mandarin, so it is possible a miscommunication arose due to the language differences.

[80] Ms Gong's evidence was preferred on the basis it was more likely to be correct. Her account aligned with the problems that had arisen (namely Mr Wei physically pushing her out of the way when he could have simply asked her to move aside).

Where did this happen

[81] The CCTV footage focused on the kitchen area where the food preparation was occurring. There is a counter out the front to serve customers where you can see the back of the employees' heads as they move around serving customers. There is a wall about the height of a refrigerator, so you can see over the wall to notice that there are people in the shop being served. There was no front view of what was occurring in terms of interaction between the employees and customers.

[82] The CCTV footage started with Mr Wei moving across the front counter to serve a customer. Ms Gong approached him and said something. Mr Wei appeared angry and agitated as he advanced on Ms Gong with overly aggressive body language. Mr Wei flung his hand and fingers out into Ms Gong's face a number of times and he gestured in front of her in an agitated manner. There was clearly an angry exchange of words between them.

[83] In this situation Mr Wei can be seen to have advanced on Ms Gong, who immediately retreated. This occurred in a small, confined space. Mr Liu was present at the counter when this occurred and he moved back past Mr Wei to stand by the vats of hot oil in the cooking area. Ms Gong was preparing food on a counter near him, while Mr Wei was positioned between the kitchen and counter area.

[84] Mr Wei blocked the entrance area between the kitchen and the front counter. He again, acted in an aggressive and angry manner. He was hitting the fridge near where he was standing and pointing aggressively and repeatedly at Ms Gong, who stepped away from him. When she did that, Mr Wei advanced aggressively towards Ms Gong. Mr Liu responded by moving towards the two of them, in order to create some physical distance between them.

Was there an assault?

[85] Mr Wei assaulted Ms Gong, by pushing his body aggressively into hers. His upper body appeared to have contacted her and he pushed her with his chest while also pointing aggressively close to her face. It is likely he had poked his fingers into her face/forehead, but the point of contact was unclear on the CCTV footage.

[86] As Mr Wei pushed at Ms Gong with his upper body and side of his arm, he also moved his head into a head-butting gesture towards Ms Gong, which she leaned away from, so their heads did not connect. Mr Liu turned to face them and he put his arm out in an attempt to separate these two employees.

[87] Ms Gong's arm lashed out at Mr Wei as Mr Liu physically held him back. Ms Gong retreated about a metre backwards, so her back was up against a cupboard area. She then kicked Mr Wei. In retaliation, Mr Wei picked up a plastic bowl, as Mr Liu was trying to back him away from Ms Gong. Mr Wei threw the plastic bowl very aggressively in a hard downward movement (which had considerable momentum) at Ms Gong, and it hit her.

[88] Mr Wei moved towards the counter area and Mr Liu moved to stand beside him. Mr Liu then attempted to marshal Mr Wei to the back outside area and in doing so Mr Liu placed himself between Mr Wei and Ms Gong. Notwithstanding that, Mr Wei turned to face Ms Gong and lashed out at her again, although Mr Liu physically blocked Mr Wei from making contact with Ms Gong. This required Mr Liu to hold Mr Wei's arms down as he was thrashing out towards Ms Gong. Ms Gong appeared to be speaking angrily back to Mr Wei.

[89] Mr Wei and Ms Liu disappeared off the CCTV camera outside and it appeared that Ms Gong was speaking with some customers in the front area while she stood inside the kitchen while using her phone.

[90] A customer went next door to a neighbouring shop owner and asked them to call the Police. That next door shop owner also came into the Roast Shop and asked Ms Gong if she wanted the Police called, but Ms Gong said she did not. The neighbouring shop owner asked those at the Roast Shop to keep the noise down because it was upsetting her customers.

[91] Mr Liu entered back into the cooking area from outside and he waved away the customer. Mr Wei then re-entered the kitchen area and moved to the front of the shop where Ms Gong was serving a customer. Mr Liu followed him, so all three were in the narrow area with the counter and customers in front of them.

[92] Mr Liu followed Mr Wei out to the back area again and Mr Liu can be seen on video standing in a way that blocked Mr Wei from returning to the front counter. Mr Liu looked like he was speaking in an agitated and upset manner to Mr Wei. Mr Liu told the Authority he was trying to keep Mr Wei away from Ms Gong. The CCTV footage supported that evidence.

[93] Mr Wei walked back to the counter for the third time after the initial altercation. He was stood in the doorway, with Ms Gong at the counter to his right-hand side. Mr Liu circled around so he was standing to the right of Mr Wei and to the left of Ms Gong, thereby physically separating them. Mr Liu then moved back into the kitchen area and used his phone.

[94] Mr Liu and Ms Gong alleged that Mr Wei made a threat to Ms Gong along the lines that he would 'cut her with a knife'. Ms Gong alleged Mr Wei made a chopping movement with his hands at the time, but she said that but he did not have a knife or

anything in his hands when he did so. Mr Wei adamantly denied that he made any knife or cutting related threat.

[95] However, it was clear that Mr Wei acted in an aggressive and unreasonably confrontational manner. It was Mr Wei who had initiated the physical aggression towards Ms Gong.

[96] Mr Wei's actions were understandably frightening. He had physically assaulted Ms Gong, who kicked out at him in retaliation. Ms Gong's and Mr Liu's evidence that Mr Wei was the aggressor was supported by the CCTV footage and by the manner in which Mr Liu had to hold Mr Wei back from Ms Gong, and had to encourage Mr Wei to step outside to the back of the premises.

[97] Given Mr Wei's anger about this incident it was more likely than not that he made adverse comments to Ms Gong while they were both at the counter area. Mr Wei was excitable during the Authority's investigation meeting, pointing aggressively at the interpreter (who reported feeling afraid), jumping out of his seat more than once, and speaking in a loud agitated tone.

[98] A security guard was seated beside Mr Wei for the duration of the investigation meeting. I personally escorted Mr Wei in and out of the meeting room to avoid him coming in contact with the other participants. Ms Gong reported that she was still fearful of Mr Wei.

[99] Ms Gong and Mr Liu's evidence that Mr Wei made comments along the lines of threatening to cut Ms Gong with a knife was preferred over Mr Wei's denial, on the basis it was more likely than not to be correct.

Findings on the December altercation

[100] It was clear from the CCTV footage that Mr Wei lost his temper and physically lashed out at Ms Gong, so his cutting comment would have been consistent with the actions that were recorded on the CCTV footage. This incident was still frightening for Ms Gong.

[101] Ms Gong was visibly upset about Mr Wei's assault on her when she gave evidence to the Authority. Ms Gong said she was so upset that she left her shift on 13 December early and did not ever return to work. Ms Gong said she told Mr Liu she

was too frightened to come back to work. Based on the CCTV footage Ms Gong had good reason for feeling like that.

[102] Although it was evident Ms Gong kicked out at Mr Wei, that occurred after he had assaulted her, so it appeared to be a retaliatory move. Mr Wei was obviously the aggressor and acted in a very aggressive manner, which involved him assaulting a female co-worker in a small, confined kitchen area.

[103] Mr Liu described Mr Wei as hot tempered and said he lacked communication skills. Although Mr Liu had tried to calm the parties down, that had not worked for Mr Wei. He was larger and stronger and his actions were far more aggressive, and wide ranging than Ms Gong's. Mr Wei's physical aggression also lasted longer.

[104] Mr Liu's attempts to calm or divert Mr Wei were mostly unsuccessful. Mr Liu, on a number of occasions, physically blocked Mr Wei from Ms Gong by standing between them, but despite that, Mr Wei repeatedly returned into Ms Gong's physical space in a way that was threatening and intimidating.

[105] Despite Mr Liu having asked Mr Wei to have a time out outside the shop for a while, he did not listen. Mr Wei elected to return to the shop, and interact again with Ms Gong, in close proximity to her, which is when the knife threat occurred, after which Ms Gong left work. This occurred after Ms Gong had only been working for LH Star for approximately four weeks.

Was Mr Wei dismissed?

[106] On 13 December 2023 Mr Wei completed his normal shift but Ms Gong went home early, distressed and fearful. Mr Liu sent Mr Wei a text message on 14 December 2023 that said he had shifted Mr Wei's Thursday and Friday shifts to Saturday and Sunday. Mr Liu also told Mr Wei to "take some time to rest and get yourself ready before coming back to work".

[107] Mr Liu then followed up because he did not get a response from Mr Wei and the follow up message said "did you get my message? Only come back to work on the weekend".

[108] Mr Wei responded on 16 December 2023 saying he needed to take two days off. Mr Liu asked if he could call Mr Wei because "I have something to discuss with you". He also asked Mr Wei to call him (Mr Liu) when Mr Wei was free.

[109] Mr Liu sent Mr Wei another text message on 17 December 2023 that said he would transfer Mr Wei the money he (Mr Liu) had promised. Mr Liu told Mr Wei, “just take some time and rest, no need to come back next week. Thanks”.

[110] The parties had an in-person meeting on 19 December 2023. Mr Wei asked to see the CCTV footage but Mr Liu said that he needed to speak to his lawyer about that, because he was concerned there were privacy issues because of other people that were captured on the CCTV footage.

[111] A dismissal occurs if there is a sending away by the employer. A dismissal may occur even if the employer did not intend to end the employment relationship. Mr Liu, as Mr Wei’s employer, would have been substantively justified in suspending Mr Wei from the workplace for engaging in an assault on a petite female co-worker. Instead, Mr Liu dealt with it by giving Mr Wei a cooling off period, which Mr Wei did not object to at the time.

[112] However, when the incident occurred on 13 December 2023 Mr Wei had a regular work pattern of five days a week, six hours a day. He was therefore ready, willing and available to continue working on that basis from the time that he sent the text message to Mr Liu on 21 December 2023 asking when he was going to be starting work again.

[113] Mr Liu’s failure to respond to that text message and the failure to allocate Mr Wei, who was a permanent fulltime employee, any more work to do amounted to a dismissal because it had effectively ended the employment relationship.

Was Mr Wei’s dismissal justified?

[114] Mr Liu had good reasons for concluding that Mr Wei had engaged in serious misconduct by physically assaulting a female co-worker in a small confined and therefore potentially dangerous, safety sensitive, kitchen area.

[115] There was also sufficient evidence to establish that Mr Wei more likely than not made a threat about cutting Ms Gong with a knife, when they were both at the counter area serving customers after the initial physical altercations had occurred.

[116] Mr Wei’s behaviour, as caught on CCTV and reported by Ms Gong and Mr Liu, was conduct Mr Liu could reasonably have viewed as serious misconduct. It was

sufficiently serious that it had fundamentally undermined the trust and confidence inherent in the employment relationship.

[117] Mr Wei's aggression towards, physical assault on, and knife related threats to Ms Gong, particularly given the close and potentially dangerous work environment, were unacceptable. Particularly in such a confined space, where there were knives, boiling pots, a deep fryer in the immediate area where the altercation took place.

[118] However, even where serious misconduct has obviously occurred there was still a legal obligation on the employer to act in a fair and proper manner.

[119] Section 4(1A)(c)(i) of the Act requires an employer who is proposing to make a decision that could adversely affect an employee's employment, to provide the employee with access to information and an opportunity to comment on it. That did not occur.

[120] This statutory good faith obligation required Mr Liu to have provided Mr Wei with a copy of the CCTV footage, a statement from Ms Gong, specific disciplinary allegations regarding the assault Mr Liu had witnessed by Mr Wei on Ms Gong, and any other relevant information such as statements by customers who were present and/or from the neighbouring store holder who came over because of the noise and because her customer had asked her to call the police. However, none of that investigation occurred.

[121] Mr Liu also failed to comply with any of the four procedural fairness tests in s 103A(3) of the Act, which set out minimum standards of procedural fairness that needed to be observed by an employer in order to justify an employee's dismissal.

[122] These failures by Mr Liu fundamentally undermined his ability to justify Mr Wei's constructive dismissal, which occurred as a result of his decision not to allocate Mr Wei any more work to do.

[123] Section 103(5) of the Act did not preclude a finding of unjustified dismissal because the procedural defects that occurred were not minor and they resulted in Mr Wei being treated unfairly.

[124] Accordingly, Mr Liu's dismissal of Mr Wei was substantively justified but conducted in a procedurally unfair manner. It was therefore procedurally unjustified.

What remedies should Mr Wei be awarded?

[125] Because Mr Liu's constructive dismissal of Mr Wei for assaulting a female co-worker was substantively justified, he was not entitled to an award of lost remuneration because a fair and proper process would have resulted in a justified dismissal on the grounds he had engaged in serious misconduct that in all the circumstances would have warranted summary dismissal.

[126] However, Mr Wei was entitled to an award of distress compensation because the manner in which his employment ended was contrary to good faith and procedural fairness requirement, which was unfair to him.

[127] Mr Liu did not formally investigate the incident. He did not put disciplinary allegations to Mr Wei to respond to. He did not obtain written statements from Mr Wei and/or Ms Gong or any of the customers that were present at the time of the incident, or from the neighbouring shop owner who had come in to the roast shop as a result of the incident. Nor did Mr Liu provide Mr Wei with the CCTV footage, meaning Mr Wei only saw that as part of the preparation for these Authority proceedings. The defects adversely affected Mr Wei.

[128] Mr Liu is ordered to pay Mr Wei \$15,000 distress compensation under s 123(1)(c)(i) of the Act to recognise the hurt, humiliation and distress the procedural unfairness of his dismissal has caused him.

Should remedies be reduced on the grounds of contribution?

[129] Section 124 of the Act requires the Authority to assess the extent to which Mr Wei's actions contributed to his unjustified dismissal grievance, and to reduce remedies accordingly.

[130] In this case Mr Wei was clearly the aggressor. He assaulted his female co-worker in a way that posed a serious health and safety issue because of the confined and potentially dangerous space the altercation had occurred in.

[131] Mr Wei repeatedly advanced back towards Ms Gong in a threatening and intimidating manner, despite Mr Liu's attempts to calm the situation by moving Mr Wei outside or standing between him and Ms Gong. Mr Wei also likely made a verbal threat involving using a knife against Ms Gong.

[132] Mr Wei had engaged in a high level of blameworthy conduct, which the Authority assessed at eighty percent. Accordingly, Mr Wei's distress compensation of \$15,000.00 needed to be reduced by \$12,000.00 under s 124 of the Act, to reflect his contribution to the situation that resulted in his dismissal personal grievance claim.

[133] Accordingly, after s 124 of the Act has been applied, Mr Liu is ordered to pay Mr Wei \$3,000.00 distress compensation.

What costs and disbursements should be awarded?

[134] Mr Wei is entitled to recover his filing fee of \$71.55 from Mr Liu, but as a self-represented party he cannot be awarded costs.

[135] However, the respondents' counsel indicated at the end of the investigation meeting that there had been without prejudice except as to costs offers made to Mr Wei. That could change potentially the costs position.

[136] Mr Liu therefore has 14 days from the date of this determination to lodge a costs application, if he believed the without prejudice except as to costs offer(s) should affect the costs situation in this matter.

[137] If that occurred, then Mr Wei has 14 days from receipt of Mr Liu's costs submissions to lodge his costs response.

Summary of findings

[138] Mr Liu was Mr Wei's employer.

[139] Mr Liu owed Mr Wei wage arrears for unpaid public holiday entitlements and for annual holiday pay arrears.

[140] Mr Liu constructively dismissed Mr Wei by failing to provide him with any work after 13 December 2023.

[141] Although Mr Liu's dismissal of Mr Wei was substantively justified, it was carried out in a procedurally unfair manner. Accordingly, Mr Wei's dismissal was procedurally unjustified.

[142] Mr Wei engaged in a high level of contributory conduct because his actions largely contributed to the situation that gave rise to his dismissal.

Orders

[143] Within seven days of the date of this determination, Mr Wei must provide the respondents' counsel with his bank account number. That was required in order to facilitate Mr Liu to pay Mr Wei the money he has been awarded in this determination. The respondents' counsel's contact details are on the communications the Authority has sent the parties.

[144] Within 60 days of this determination, Mr Liu is ordered to:

- (a) Inform IRD that he personally employed Mr Wei from 24 June 2022 until 13 December 2023;
- (b) Calculate and remit all of the legally required deductions from Mr Wei's total gross earnings while employed by him (Mr Liu) to IRD and that arise from the amounts he has been awarded in this determination.

[145] Mr Liu is legally responsible for any penalties or other charges IRD may impose due to deductions from Mr Wei's wages being received after his employment had ended.

[146] Within 28 days of Mr Liu's counsel receiving Mr Wei's bank account details, Mr Liu is ordered to pay Mr Wei \$6,887.63, consisting of:

- (a) \$180.42 as unpaid time and a half for the two public holidays he worked;
- (b) \$3,393.46 annual holiday pay arrears;
- (c) \$242.20 interest from 14 December 2023 until 17 February 2025, being the date of this determination, as calculated using the Civil Debt Calculator on the Ministry of Justice website;
- (d) \$3,000.00 distress compensation, without deduction, under s123(1)(c)(i) of the Act for his procedurally unjustified dismissal;
- (e) \$71.55 to reimburse his filing fee.