

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 320
3226679

BETWEEN CHAOJIE YANG
Applicant

AND AUTO TALENT LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: David Prisk, advocate for the Applicant
Ailun (Allen) Sun, company director for the Respondent

Investigation Meeting: 20 February 2024 in Auckland

Submissions and information received: 23 February 2024 from the Applicant
20 February and 5 March 2024 from the Respondent

Determination: 30 May 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Chaojie Yang, a citizen of China and a former car wash cleaner for Auto Talent Limited (ATL, the company or the employer), has approached the Authority to investigate his claims of unjustified constructive dismissal and unjustified disadvantage.

[2] Concerning the disadvantage claims, it was alleged that ATL failed to provide an employment agreement as required by the Employment Relations Act 2000 (the Act), unlawfully withheld Mr Yang's wages for his last week of work and failed to provide meal and rest breaks as required by Part 6D of the Act. Consequently there have been (allegedly) breaches of the Act, the Wages Protection Act 1983 (WPA), the Minimum Wages Act 1983 (MWA) and the Holidays Act 2003 (HA) for which Mr Yang seeks penalties.

How did the Authority investigate?

[3] As part of the Authority's investigation, a case management conference was held with Mr Yang's representative, David Prisk, and ATL's sole company director and majority shareholder, Ailun Sun. By agreement with the parties, the issues for investigation (set out below) were agreed upon and timetabling directions made by consent for the filing of written witness statements.

[4] Mr Yang's evidence comprised his statement of problem, its support documents and his signed witness statement (18 February 2024). ATL's case consisted of written statements from Mr Sun received 3 May and 4 October 2023 and two witnesses: Mr Yang's supervising manager Wang Xi and Yihao Zhou, the owner of an Audi A8 sedan that Mr Yang had a collision with on ATL's work premises.

[5] Having since returned to his country of origin, Mr Yang attended the investigation meeting on 20 February 2024 by audio-visual link (AVL). For that same reason, ATL's witness, Mr Zhou, also attended the investigation meeting by AVL. All witnesses answered questions under oath or affirmation and the representatives provided the Authority with written closing submissions.

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

What are the issues?

[7] The issues requiring investigation and determination were:

- (i) When was the applicant's personal grievance raised with the respondent?
- (ii) What was the total cost of repair for the vehicle and how much is there left to pay?
- (iii) Is the respondent vicariously liable for the applicant's car accident?
- (iv) Is the applicant owed wages and if so, how much is owed?
- (v) Was the applicant unjustifiably and constructively dismissed?
- (vi) Has the respondent breached the MWA by paying the applicant a below-minimum wage?

- (vii) Has the respondent breached s 64 of the Act by not providing an employment agreement and if so how has this affected the applicant?
- (viii) Did the respondent breach the HA by failing to pay the applicant his holiday pay?
- (ix) Depending on what comes out of these issues, what remedies should be awarded, if any?
- (x) If any remedies are awarded, should this be reduced (under s 124 of the Act) for blameworthy conduct by the applicant that contributed to his own grievance?
- (xi) Should either party contribute to the costs of representation of the other?

What do the parties say happened?

[8] Mr Yang arrived in New Zealand on 15 January 2023 as the holder of a working holiday visa. After a job search on Skykiwi, a large media website in New Zealand for the Chinese community, Mr Yang discovered a job vacancy at ATL for which he applied and was successful. He commenced working for the company on 26 January 2023 as a member of its car wash staff during which time he received training from his supervising manager, Mr Xi.

[9] As this was Mr Yang's first job in New Zealand, he said he was not aware that his employer was obligated to provide him with an employment agreement. The effect this had according to Mr Yang was him not appreciating that he was entitled to two paid rest breaks which he claimed he never received during his employment with ATL, which came to an end on or about 17 February 2023 following his resignation.

[10] In an undated written statement from the company's director, Allen Sun, it was accepted that not providing an employment agreement was a "shortcoming". However, even so, there were concerns with Mr Yang's work performance namely his "bad work attitude" and the dissatisfaction by other employees towards him such that Mr Sun felt "prevented" from providing Mr Yang with his employment agreement.

[11] Mr Yang's payslips reveal that he was paid \$21.20 per hour which was the minimum wage at that time. He worked eight hours a day but stated that he was not allowed to take a break which meant that he was only paid for 7.5 hours meaning his

hourly rate was actually \$19.87 which was below the minimum wage and in breach of the MWA.

[12] On 6 February 2023, Mr Yang stated that he attended work not knowing that the business had closed for Waitangi Day. While there, he washed his car which was something that Mr Sun allowed his employees to do. After he had cleaned his car, Mr Yang was exiting the car wash area when he accidentally reversed into a stationary parked Audi which was then owned by Yihao Zhou. The towbar of Mr Yang's vehicle impacted the other vehicle's front bumper causing some plastic to break off.

[13] Mr Yang stated that his car had 'bumped' the other and that the damage caused was minor and not severe. Mr Zhou was sitting in his car when the collision occurred and had purportedly said to Mr Yang that there was no need for him to pay for damages. Mr Yang further stated that by chance he met Mr Zhou in Christchurch later that same year on or about 23 November 2023 and that Mr Zhou had told him that he had since sold his car and mentioned nothing about requiring Mr Yang to compensate him for damaging his vehicle.

[14] It is common ground that Mr Yang's employment ended not long after the accident and that he is owed wages and holiday pay from ATL. However, payment of the arrears have been withheld pending a determination by the Authority as Mr Sun believes that Mr Yang owes him \$2,000 being the amount ATL subsequently paid Mr Zhou in compensation for the damage caused to his vehicle by a company employee.

[15] Mr Yang claims that because of the poor working conditions and not being provided with an employment agreement, he was forced to resign and that he was constructively dismissed. It took him three days to find alternative employment which was with a storage business that remunerated him at \$23 per hour and provided 40 hours' work per week. Although he does not seek lost wages as a remedy, Mr Yang is seeking compensation for hurt and humiliation for his unjustified dismissal, payment of wage arrears, and a share of any penalties ordered against ATL for breaches of the MWA, WPA, HA and the Act.

[16] During the investigation meeting, I put to Mr Yang for further comment, an email from Mr Zhou (20 April 2023) that referred to a loss of \$3,700 for his Audi and

an insurance excess of \$750. In response, Mr Yang maintained that when he met Mr Zhou again, he did not require him to pay for any damages to his vehicle. In any event, Mr Yang stated that the accident was a private matter between them and that it had nothing to do with his employment at ATL.

[17] Mr Yang's supervising manager, Mr Xi, was present at the time of the car accident and had opened the closed gate for Mr Zhou so that he could park his vehicle inside while he waited for his now former wife to finish her work that day which was nearby. There was no cleaning of Mr Zhou's vehicle while it was onsite.

[18] After Mr Yang had given his evidence, I made the decision to have Mr Zhou attend the investigation meeting by AVL. He confirmed that Mr Xi had opened the gate for him and that he and Mr Yang were washing their cars at the time. He recalled Mr Yang reversing into him and that the tow bar of his vehicle had hit the front bumper of the Audi causing damage.

[19] The force of the collision was sufficient to crack the Audi's front bumper and that a front indicator was damaged. Mr Zhou further stated that Mr Yang had said he had third-party vehicle insurance. Mr Zhou advised him that he had arranged a third party to purchase his vehicle but did not know whether they would do so now that the car had been damaged and that it may need to be repaired first.

[20] While driving back to his home in Hamilton, Mr Zhou noticed that his automatic cruise control and reversing camera were not working properly. Because of that damage, he later went back to ATL where Mr Yang happened to be working that day. He asked him for his insurer but Mr Yang did not provide that information and continued working. When Mr Zhou returned to the car wash a few days later, he learnt that Mr Yang was no longer working for ATL. It was then that he approached Mr Sun for compensation.

[21] Mr Zhou explained that because he and his ex-wife had recently separated, he was returning to China and rather than have his car fixed first, the prospective buyer, an engineer, was prepared to purchase it in its present damaged condition but at a reduced price. Mr Zhou agreed to the sale which was \$3,700 less than his original

asking price. After discussing the loss with Mr Sun, Mr Zhou received \$2,000 in cash from the company before he departed New Zealand.

[22] Mr Zhou explained that when he met Mr Yang again in Christchurch, he told him that he had sold his vehicle. However, because they were at a mutual friend's house, Mr Zhou did not feel that he could raise his voice against Mr Yang for not paying him compensation himself.

What to make of the issues?

When was the applicant's personal grievance raised with the respondent?

[23] A personal grievance can be raised in a statement of problem but raising a grievance this way runs the risk that service may occur outside the 90-day period stipulated under s 114 of the Act.¹ While I was not provided with a copy of Mr Yang's personal grievance letter, he resigned on 17 February 2023 and therefore had until 18 May 2023 to raise his personal grievance with his employer.

[24] Mr Yang's statement of problem was lodged with the Authority on 28 April 2023. On 2 May 2023, the Authority Officer served a copy of the pleading to Mr Sun by email which he acknowledged. I find that the statement of problem which contains Mr Yang's personal grievance of unjustified constructive dismissal was raised with his employer in time.

What was the total costs of repair for the vehicle and how much is there left to pay?

[25] This issue is no longer relevant in light of the fact that the Audi was sold to a third party before it was repaired.

Was the respondent vicariously liable for the applicant's car accident?

[26] As a general rule, employers are vicariously liable for the damage caused by the wrongful or negligent acts or omissions of their employees provided this occurs in the course of their employment and is connected to their role. While the accident involving Mr Yang occurred on company property, this is not of itself determinative of vicarious liability for the following reasons. First, ATL was not open for business at the time Mr Yang had his unfortunate car accident with Mr Zhao's vehicle. Second, Mr Yang

¹ *Premier Events Group Ltd v Beattie (No 3)* [2012] ERNZ 257 at [11]-[13].

was not working at the time of the accident but was using his employer's car wash to wash his own vehicle which he and other employees like Mr Xi were permitted to do by their employer. Third, Mr Zhao was not present at the time as a paying customer but was essentially waiting inside his vehicle for his ex-wife to finish work.

[27] Considered cumulatively, I find that ATL cannot be said to be vicariously liable for Mr Yang's accident which did not occur during the ordinary course of his employment. However, this was a gratuitous bailment which arises where a bailee (a person who takes lawful possession of goods and assumes responsibility for those goods as a consequence) accepts the goods of another — the bailor. Mr Xi was responsible for allowing Mr Zhao to park his car on the premises that day and with its gate otherwise closed, the business was not open to the public. Having allowed Mr Xi to enter the premises to park his vehicle, as the bailee, ATL, owed a duty of care towards Mr Zhou's vehicle that it not be damaged.

[28] The responsibility falls on the company as bailee to Mr Zhou. It may be, as a business transaction to preserve goodwill to a customer, it made sense for Mr Sun to compensate Mr Zhou for some of his losses. However, in terms of employment law, ATL could not turn to Mr Yang for reimbursement which would require some express provision in an employment agreement (which he never had) to allow for such a payment. Even if the parties had an employment agreement that contained such a provision, Judge Inglis (as she then was) in *George v Auckland Council* expressed reservations about exposing employees to such a liability:²

... it is strongly arguable that in the modern context of employment relationships in New Zealand, and in light of the mutual obligations conferred on the parties under the Act, an employer may not seek to recover damages from an employee arising from acts of negligence committed during the course of their duties. If it were otherwise it would likely have a chilling effect on the way in which employees undertake their duties, could lead to reactive claims or threats of claims against those taking personal grievances which would undermine the statutory framework for resolving employment relationship issues, and expose employees to significant potential financial liability for a breach even in circumstances that could never justify a dismissal. It also raises policy concerns about the fair allocation of risk and which party is best placed to mitigate potential liability.

[29] Had ATL chosen instead not to compensate Mr Zhou, which was an option reasonably available to it, the question of compensation could then have become a

² *George v Auckland Council* [2013] NZEmpC 179 at [147].

private matter between Mr Yang and Mr Zhao because the car accident had nothing to do with Mr Yang's and ATL's employment relationship.

[30] While I empathise with Mr Sun, whichever way I look at matters, the Authority does not have jurisdiction to order Mr Yang to reimburse the company for what it has paid to Mr Zhou in compensation. This is because for the Authority to have jurisdiction, the problem or controversy must arise during the course of the employment relationship and in a work context.³ However, for the reasons given above, that cannot be said here. The correct forum is the Disputes Tribunal where Mr Sun would be able to raise a quasi-contractual claim against Mr Yang for unjust enrichment.⁴

Is the applicant owed wages and if so, how much is owed?

[31] Mr Sun does not deny that his company owes Mr Yang wages. In a memorandum from Mr Prisk dated 18 February 2024, Mr Yang seeks payment of all outstanding wages and holiday pay amounting to \$506.92 (gross). He also seeks a penalty under the WPA for a breach of that Act and he requests that any penalty payment be applied to him personally.⁵

[32] Under s 13(2) of the WPA, a penalty can be sought where any employer or any person on that employer's behalf contravenes or fails to comply with any of the provisions of the WPA. Mr Yang seeks a penalty against ATL for any unlawful deduction from his wages. There has been no unlawful deduction from Mr Yang's wages but rather a mistaken belief on Mr Sun's behalf that he is entitled to withhold wages until Mr Yang compensates him first for the \$2,000 in compensation that was paid to Mr Zhao.

[33] There is no basis for Mr Sun to withhold payment of Mr Yang's wages. Section 4 of the WPA makes clear that when wages become payable to a worker, the employer is to pay the entire amount of those wages to the worker without deduction. Mr Sun does not dispute that he owes Mr Yang outstanding wages. I therefore order ATL to pay Mr Yang \$506.92 (gross) within 28 days from the date of this determination.

³ *FMV v TZB* [2021] NZSC 102 at [93].

⁴ Disputes Tribunal Act 1988, s 10

⁵ The Act, s 136(2).

[34] As Mr Yang has been deprived of the use of his wages since his employment ended on or about 17 February 2023, he is entitled to interest for loss of use of monies for which there is an established entitlement. Clause 11 of the Second Schedule to the Act affords the Authority the discretion to award interest if it thinks fit to do so. I see no reason why interest should not be awarded especially given the effluxion of time. Accordingly, ATL is ordered to pay interest on \$506.92 from 17 February 2023 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator and payment of that amount is to be made within 28 days from the date of this determination.⁶

Was the applicant unjustifiably and constructively dismissed?

[35] Constructive dismissal is the resignation of an employee which is caused by an employer. For there to be a constructive dismissal, the employer must have initiated the process of termination. The onus is on the employee to establish the fact of dismissal. It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee.

[36] In examining whether a constructive dismissal has occurred two questions arise. First, has there been a breach of a duty by the employer which has caused the resignation? Second, if there was a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, was there a substantial risk of resignation?⁷

[37] Mr Prisk submitted that Mr Yang only resigned because of his employer's poor workplace practices of not providing an employment agreement and failing to provide him with two paid rest breaks per shift. However, I find Mr Zhao a credible witness because he did not expect to be called upon to give evidence as part of this investigation. It was his evidence that he had returned to ATL seeking compensation from Mr Yang for the accident but was effectively ignored by him. When Mr Zhao returned to ATL a few days later to speak to Mr Yang again, he discovered that Mr Yang had since resigned.

⁶ www.justice.govt.nz/fines/civil-debt-interest-calculator.

⁷ *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 1 ERNZ 168 at 172.

[38] I find Mr Yang's resignation had nothing to do with ATL and had everything to do with Mr Zhao wanting to hold him to account for the damage he caused by reversing into him. The claim of constructive dismissal is not made out.

Has the respondent breached the Minimum Wage Act 1983 by paying the applicant a below-minimum wage?

[39] Both Mr Sun and Mr Xi gave evidence under affirmation that Mr Yang was provided with meal breaks. Mr Yang's assertion that he was not provided with rest breaks is self-reported and is not corroborated by other evidence. On the balance of probabilities, I find it more likely than not that Mr Yang was provided with rest and meal breaks as required by Part 6D of the Act. This claim is also unsuccessful.

Has the respondent breached the Act by not providing the applicant with an employment agreement and if so, how has he been affected?

[40] It is common ground that ATL failed to provide Mr Yang with an employment agreement. While there were concerns with his performance, this was not a reason not to provide him with an employment agreement which is a statutory requirement under ss 64 and 65 of the Act. For the breach, the company is potentially liable to a penalty not exceeding \$20,000.⁸

[41] The matters to which I must have regard to in determining the quantum of any penalty are provided for in s 133A of the Act which sets out a non-exhaustive list of mandatory factors. Having an employment agreement would have provided Mr Yang with important information about his rights and responsibilities with his work.⁹ As such, the absence of an employment agreement is a breach of a fundamental obligation on the part of an employer.

[42] ATL is understood to be a small to medium size business. It is not a large employer and a check of the Authority's records show that it has not previously appeared before it. The duration of Mr Yang's employment was relatively brief and he found employment shortly after resigning from the company and is therefore not seeking lost wages. I have had regard to penalties that have been awarded by the

⁸ The Act, s 135(2)(b).

⁹ See the Act, s 65(2)(a)(i)-(iv).

Authority for similar breaches and I consider, standing back, that an end penalty in the range of \$500 to \$1,000 is available on these facts.

[43] Section 133A constitutes an inclusive list of factors and to that end, I have considered whether Mr Sun's payment of compensation to Mr Zhao could reasonably be considered here. However, there is a lack of transparency concerning the settlement amount and the lack of an independent market valuation for the Audi before and after the accident. There is also the public interest in having fundamental obligations under the Act enforced rather than diluted or circumvented by such arrangements.

[44] The Authority orders ATL to pay a penalty of \$750 for its breach of ss 64 and 65 of the Act two thirds of which is to be paid to the Authority for transfer to a Crown Bank Account with the remaining one third to Mr Yang. Payment is to be made within 28 days from the date of this determination.

Did the respondent breach the HA by failing to pay the applicant his holiday pay?

[45] Mr Yang's payslips do not record payment for Auckland Anniversary and Waitangi Day which are days that are public holidays.¹⁰ It is important that ATL keep accurate wage and time records including payslip information. The respondent has not demonstrated that it paid Mr Yang his public holiday entitlement. It is therefore ordered to pay him \$339.20 (gross) (\$21.20 per/hour x 8 hours x 2 public holidays). Similarly, Mr Yang is entitled to an award of interest on this amount and the same methodology for calculating interest as described above applies. Payment is to be made within 28 days from the date of this determination.

[46] This is ATL's second breach and the purpose of penalties is to deter, not to compensate. The penalty imposed here is to bring home to the company the need to comply with all relevant employment legislation. The Authority orders ATL to pay a penalty of \$500 for its breach under s 75(2)(c) of the HA for its failure to pay an employee their public holiday pay entitlement. The entire amount is to be paid to the Authority for transfer to a Crown Bank Account. Payment is to be made within 28 days from the date of this determination.

¹⁰ Holidays Act 2003, s 44.

[47] ATL is also ordered to pay Mr Yang the filing fee of \$71.55 no later than 28 days following the date of this determination.

Summary of Orders

[48] The Authority orders Auto Talent Limited to pay the following amounts to Chaojie Yang within 28 days from the date of this determination:

- (i) wage arrears of \$506.92 (gross);
- (ii) interest on \$506.92 from 17 February 2023 to the date of payment using the civil debt interest calculator;
- (iii) public holiday pay arrears of \$339.20 (gross);
- (iv) interest on \$339.20 from 17 February 2023 to the date of payment using the civil debt interest calculator;
- (v) \$250 being Mr Yang's share of the penalty imposed against the company for breaching ss 64 and 65 of the Act; and
- (vi) the filing fee of \$71.55.

[49] Mr Yang's claims of unjustified constructive dismissal and a breach of the rest and meal breaks provisions of the Act are dismissed. However, no later than 28 days after the date of this determination, ATL is to pay a total penalty of \$1,000 to the Authority for transfer to the Crown for breaches of the Act and the HA.

What about costs?

[50] Costs are reserved.

[51] If Mr Yang seeks costs he may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum ATL would then have 14 days to lodge any reply memorandum.

[52] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff. For more information as to how costs are awarded in the Authority the parties are referred to the Practice Direction of the

Employment Relations Authority, Te Ratonga Ahumana Taimahi, effective 1 February 2024.¹¹

Peter Fuiava
Member of the Employment Relations Authority

¹¹ <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>