

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 64
3276919

BETWEEN

MINGWEI YU
Applicant

AND

SYNERGY NUTRITION
LIMITED
First Respondent

MING GONG
Second Respondent

Member of Authority: Marija Urlich

Representatives: Amy De-La Cruz, advocate for the Applicant
Gary Pollak, counsel for the Respondents

Investigation Meeting: 19 September 2024

Submissions and further information received: 14 and 30 October 2024, from the Applicant
30 September, 22 October 2024 and 24 January 2025,
from the Respondents

Determination: 12 February 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mingwei Yu was employed by Synergy Nutrition Limited (SNL) from 16 March until 6 November 2023 as a machine operator. SNL operates a business processing powdered milk product.

[2] Mr Yu says the actions of SNL in issuing a written warning unjustifiably disadvantaged him in his employment and that he was unjustifiably dismissed. He seeks remedies to compensate lost income and injury to feeling suffered consequent to his personal grievances and a contribution to costs. He accepts SNL has paid all wage and

holiday pay arrears claimed but seeks findings of breach of the employment agreement and statutory duty with respect to wages, hours of work and payment of annual leave and an award of penalties.¹ In addition Mr Yu seeks findings that SNL breached the statutory duty of good faith and sought a premium for which penalties are sought. Mr Yu also seeks an award of interest on wage arrears and any award of lost wages.

[3] SNL accepts in respect of Mr Yu and this employment relationship problem, that it should have adopted a better degree of formality rather than leave matters to WeChat communications and personal discussions. However, it denies Mr Yu was unjustifiably disadvantaged or unjustifiably dismissed in his employment. It says the employment relationship could not continue because Mr Yu did not enjoy working in the factory and he could not work night shifts as he was required. It also says the written warning was entirely justified and that SNL acted in good faith at all times, has paid all wage and holiday arrears as claimed without question, did not seek a premium and that the matters raised in this employment relationship problem are not matters for which penalties should be awarded.

The Authority's investigation

[4] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Yu, Haotiang Zhang, a former employee of SNL, Mr Gong, SNL's owner and Andrew Lin, the factory manager. The Authority was assisted by an interpreter of the Mandarin language. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues identified for investigation and determination are:

- i. Mr Yu was unjustifiably disadvantaged by way of written warning and/or unjustifiably dismissed from his employment?
- ii. If so, is Mr Yu entitled to a consideration of remedies sought including:

¹ Given SNL has paid Mr Yu all minimum entitlements there is no basis for the s 142Y leave application to proceed. No penalty is sought against Mr Gong.

- a. reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000 (the Act);
 - b. compensation for the unjustified action and the unjustified dismissal under s 123(1)(c)(i) of the Act.
- iii. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Yu which contributed to the circumstances which gave rise to his grievance/s?
- iv. Whether SNL breached obligations owed to Mr Yu under the employment agreement or in statute including:
 - a. providing guaranteed hours of work to Mr Yu;
 - b. paying wages when due and owing;
 - c. complying with the statutory obligation of good faith; and
 - d. seeking a premium from Mr Yu?
- v. If any breaches are established should penalties be awarded and a portion of such to Mr Yu for:
 - a. breach of good faith obligations under s 4 of the Act;
 - b. breach of the employment agreement;
 - c. breach of s 4 of the Wages Protection Act 1983;
 - d. breach of s 130 of the Act for failure to provide wage and time records;
 - e. breach of s 81 Holidays Act 2003 for failure to pay accurate holiday entitlements;
 - f. breach of s 120 of the Act for failing to provide reasons for the dismissal; and
 - g. breach of s 12A Wages Protection Act 1983 for seeking a premium.
- vi. Is either party entitled to an award of costs?

Relevant law

The test for justification

[6] When the Authority considers justification for the actions of SNL including the dismissal decision it does so by applying the test of justification in s 103A of the Act. In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of SNL and how it acted were what a fair and reasonable employer could have done in all the circumstances including at the time of the alleged disadvantage and dismissal.

[7] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations set out in s 4 of the Act. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action “because a fair and reasonable employer will comply with the law”.²

Key documents – the parties’ employment agreement and SNL’s policies

[8] On 16 March 2023 Mr Yu and SNL entered a written individual employment agreement (the employment agreement) for a machine operator position. The employment agreement included:

- (i) Schedule 1 Remuneration “Your ordinary rate of pay will be \$29.66 per hour...up to 35 hours minimum...”;
- (ii) Schedule 2 Hours of Work:
 - ...
 - b. The ordinary hours for this role will equal a minimum of 40 hours per week;
 - c. Normal business hours are 7.30am to 4.00pm Monday to Friday, however operations...will have 10hr days 4 days/week (or equivalent) depending on the production forecast requirements including being able to work night shifts when required.
 - ...
 - e. The Employer may amend the hours of work to meet operational requirements as required.

² *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

(iii) Schedule 3 Resolving Employment Relationship Problems includes:

...

- The Company's Human Resources Policy and Procedures Manual contains policies and procedures for dealing with disciplinary matters in the workplace. Your Supervisor or Manager can provide access to this manual.

(iv) A detailed job description is attached to the employment agreement. It includes under educational qualifications "Training will be provided, so prior work experience is not required but would be an advantage."

[9] SNL's policies dealing with phone use, disciplinary matters and poor performance relevant to this determination provide:

(i) IT and Internet Policy – includes "Personal use of phone (including personal phone/computer devices), email, and Internet is to be only (sic) during the Employee's break times";

(ii) Discipline Policy – includes the following procedure to be applied:

Procedure

The Company requires the following standards to be adhered to:

Employees must be:

- Reminded of the policies and the standards expected of them in their employment.
- Advised in a reasonable time in writing about the issue being investigated and/or the allegations against them made.
- Given an opportunity and reasonable time to prepare and present their response, including supporting material.
- Provided with relevant information.
- Given an opportunity to have personal representation and who will be attending the meetings.
- Allowed to present material or information to support their case.
- Advised to present material or information to support their case.
- Advised of the consequences or possible consequences arising out of an investigation and/or non-compliance with any remedial action determined at the end of such investigation.
- Given an opportunity to comment on any new information that comes out of those further investigations.
- Be given written confirmation of the outcome of the disciplinary investigation.

Managers or Supervisors, acting as The Company's representatives must:

- Act fairly and reasonably in conducting any preliminary investigation or formal disciplinary investigation and in taking any subsequent action.

- Ensure that any disciplinary is fully investigated and actions are consistent with principles of fairness, reasonableness, and consistency.
- Ensure that detailed records are kept of the formal disciplinary investigation.
- Consider what action they should take, if any and any matters that could be relevant to what action is taken.
- Understand and properly exercise their right to discipline or dismiss an employee for misconduct of for any other act that justifies such disciplinary action and/or dismissal.

(iii) Poor Performance Policy – includes:

...

Process

...

The Company encourages all employees to work to the very best of their abilities and its primary approach to poor performance is to:

- Encourage and coach employees to improve their performance;
- Ensure the employee is aware of and understands the performance standards and how these are measured for the performance period;
- Be as specific as possible in outlining their concerns with regard to the employee's performance;
- Ensure the employee has a clear understanding of the performance gap, the timeline, assistance offered and the poor performance management process;
- Provide counselling: establish the cause, offer support, remedial assistance, training, redefine the required performance standard, allow reasonable time for improvement and set measurable targets and clear timeframes;
- Set up regular meetings and develop a performance improvement plan;
- Ensure the employee is fully aware of the implications if improvement does not occur;
- Keep a written record of all counselling sessions and provide a written summary of this to the employee;
- Review the employee's progress (or lack thereof) via further counselling.

If after counselling, there has been insufficient improvement, a formal performance investigation may be held under the disciplinary process.

...

Background

[10] Mr Yu came to New Zealand in February 2023 on an accredited employer work visa to work as an assistant tiler. He had completed a tiling course but had not worked in such a role before. He has tertiary qualifications and is a qualified pilot in his home country.

[11] In early March Mr Yu and Mr Gong met socially at a local aero club. They got on and came to discuss Mr Yu working at SNL as a machine operator in its milk powder packaging factory. Again, this was not a role Mr Yu had worked in before. He discussed this with Mr Gong who felt, given his background that Mr Yu could learn the role for which training would be provided. They also discussed Mr Yu starting on a training rate and Mr Yu understood after one month of employment his pay would move to the hourly rate as recorded in the employment agreement. The payment of a training rate is not recorded in the employment agreement.

[12] On 20 March Mr Yu's visa was transferred to SNL and he commenced work in the factory.

[13] Within a month the parties were experiencing difficulties in the employment relationship and by the end of the year Mr Yu's employment with SNL had ended.

Discussion

Wage arrears

[14] SNL accepts, under the terms of the parties' employment agreement that Mr Yu was entitled to be paid \$29.66 per hour and entitled to minimum hours of 35 per week.³ Throughout his employment he was paid \$24.70 per hour. The evidence shows Mr Liu asked to be paid the employment agreement rate a month into his employment, was told he had not made adequate progress, that he asked again in early June and was told no on the same grounds. SNL has paid Mr Yu the wage arrears of pay rate and hours claimed subsequent to his raising an employment relationship problem. SNL does not assert a collateral agreement for the training rate. In my view this is proper given the training rate is inconsistent with the details of Mr Yu's visa transfer and inconsistent with the written terms of the employment agreement which in addition to the document rate includes training will be provided.

[15] SNL failed to pay Mr Yu the hourly rate for the number of hours per week as agreed in breach of the parties' employment agreement.

³ The employment agreement provides for minimum hours of both 35 and 40 per week. Mr Yu told the Authority his minimum weekly hours were 35 per week. His evidence is accepted.

Was Mr Yu unjustifiably disadvantaged in his employment by way of written warning?

[16] On 27 August Mr Yu was issued with a written warning under the name of the general manager:

Dear Mingwei

It has been brought to my attention that you continue to use despite being told numerous times about that the use of your mobile phone while working on the production line is not allowed. If you continue to not adhere to the companies' policies and procedures your employment with the company will be terminated.

If you have issues, that we are not aware of and want clarification of about use using your mobile phone at work then please discuss it with Frank.

Can you please acknowledge receipt (sic) this letter by confirming receipt of my email.

Many thanks

[17] The parties' employment agreement includes reference to policies and procedures with which Mr Yu was required to be familiar and comply with at all times.⁴ The workplace policies provide personal phones are only to be used in breaks. I am satisfied Mr Yu was aware of the policy – he signed the policy documents, including the page dealing with personal use of phones and his completed employee induction sheet includes "Internet, phone-use, photos and email policy explained". The policies also deal with how disciplinary matters are to be dealt with including a procedure with detailed steps and requires the company's actions to be fair, reasonable and consistent.⁵

[18] Mr Yu says the issuing of the warning was unfair because he was treated differently to other employees in respect of phone use and on the few occasions he took a call at work it was not in a production area. He also says the warning was unfair because he was not given a fair opportunity to respond to the allegation and he was treated differently to other staff.

[19] Mr Gong says the matter had informally been raised with Mr Yu, he was reminded of the policy, the phone use continued in breach of the policy, he raised it with Mr Yu, who accepted he had breached the policy and the written warning followed.

⁴ The parties' written employment agreement clause 5 "Company Policies".

⁵ Above [9].

[20] The written warning issued to Mr Yu was disciplinary in nature following an inquiry into his conduct – the letter states Mr Yu’s employment may be terminated if he continues not to follow SNL’s policies and procedures. Looking at the procedure to be followed in a disciplinary setting in the policy and procedure handbook SNL is unable to establish it has followed it – the matters under investigation were not advised in writing to Mr Yu, there is no supporting material to suggest he was given time to consider and respond to the matters of concern or to seek representation. The warning letter does not record an explanation was sought from Mr Yu or considered. The warning letter does not record the decision maker considered the disciplinary policy when it undertook the disciplinary investigation and issued the warning to Mr Yu about his phone use during work time.

[21] SNL’s submission is the written warning was clearly justified – the policy about phone use is clear, it was known to Mr Yu and he appears to have accepted in his evidence to the Authority that he used his phone in breach of the policy despite being reminded not to. While this is accepted, SNL agreed in the employment agreement entered with Mr Yu that the policies and procedures it put in place were to be followed and promulgated a disciplinary policy with a required procedure with the purpose of ensuring the subject employee would be treated fairly in any disciplinary setting.

[22] Compliance with a policy should not be performative or optional. If SNL had complied with its disciplinary policy even to a modest degree it would likely have been an important step to ensuring Mr Yu’s meaningful participation in the disciplinary process which resulted in the written warning. Further, SNL would have been in a better position to demonstrate to the Authority it had discharged the obligations of fairness and reasonableness it owed Mr Yu in a disciplinary setting.

[23] Given SNL’s failure to follow its own disciplinary procedure to the significant degree described above it is unable to establish the written warning was fair and reasonable. The warning caused Mr Yu disadvantage in his employment – he was on notice any further breach of policy could result in his dismissal. This disadvantage was unjustified because SNL’s failure to follow the policy significantly undermines its decision to take disciplinary action against Mr Yu.

Directed annual leave

[24] On 2, 3 and 4 October Mr Yu did not attend work and was paid annual leave for those days. He had taken sick leave on 28 and 29 September.

[25] SNL has reimbursed Mr Yu three days annual leave. I have reviewed the WeChat exchange that led to the payment of annual leave. SNL advised Mr Yu on 30 September there would be no work for the next three working days, and he should take “leave”. Mr Yu has asked if he had any further sick leave entitlement, was told he would have to provide a medical certificate and the discussion turned to annual leave. The exchange ends with Mr Yu – “I really have no choice. It’s not that I don’t want to work. I also don’t want to take this kind of sick leave [sad face emoji]. Just approve one or two days this week”. His wage and time record show those three days were paid as annual leave.

[26] When SNL advised Mr Yu on 30 September work would not be available 2–4 October and he would have to take leave the effect was to direct him to take three days annual leave. The alternative was he would not be paid or get a medical certificate, with the associated cost, when it appears he was not sick. As he said, he had no choice.

[27] SNL has not met the statutory requirements when directing Mr Yu to take annual leave on the above days.⁶

Premium

[28] On 6 October Mr Yu and Mr Gong had a phone conversation. Mr Yu recorded the call. A certified translation of the call transcript has been provided to the Authority. During call the Mr Gong raised Mr Yu’s employment ending, including:

...

[Mr Gong] I’ve been thinking you can be like him [a reference to another employee who was waiting for his visa to be approved to start working for SNL]. Your visa will remain valid. You will also receive your salary. Don’t worry, just listen to me to the end.

[Mr Yu] Termination?

[Mr Gong] Termination! It is also known as notice. Because once I give it to you, the immigration department will have a document, and you’ll have a gap afterwards. Your visa can only be valid when you find another job...So I’ve

⁶ Holidays Act 2003, s 19(2).

decided to give you termination because currently [the other employee] hasn't formally taken up your position. In this case, your salary will still be paid and after you deduct that tax, give me the cash. Then you don't have to come to work. You don't need money, right?

[Mr Yu] Who says I don't need money? My whole family's here. Why don't I need money?

[Mr Gong] Your problem is you can't work the night shift, so you're probably the only one who can't work the night shift right now.

[29] The conversation continued for some time – they discussed Mr Yu's inability to work night shift which SNL required at that time, Mr Gong's understanding of how employment could end on notice or otherwise and staffing issues facing SNL including staff on work visas. The wage cash-back was not discussed further. Mr Yu was clear by the end of the conversation his employment with SNL would soon be ending which is what occurred on 9 October.

[30] On 10 October Mr Yu sent Mr Gong the following message on WeChat to which Mr Gong did not respond:

Tony, now you've fired me, I can't find an employer to transfer my visa to at the moment. Is it ok for me to put my visa under your company first? I'll transfer it once I find a suitable employer.

[31] Section 12A of the Wages Protection Act 1983 provides no person or person engaged by the employer must seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[32] Mr Gong's proposal of a cash back was seeking a premium – if Mr Yu entered the proposed payment arrangement, he could keep his job at SNL until he found another to which he could transfer his work visa and the proposal was made to him by a representative of SNL. SNL says it would have received no benefit if the proposal had been accepted. If a benefit is a required feature of a received premium, SNL would likely have received a benefit from the cash-back arrangement. It would have resolved or gone some way to resolving its employment relationship problem with Mr Yu by providing an agreed pathway to the employment ending. It would likely also have resulted in a notional benefit to SNL by creating a situation akin to a debt or favour Mr

Yu owed it so amplifying the imbalance of power in this employment relationship with its existing known characteristic of Mr Yu's migrant worker status.

[33] SNL has emphasised Mr Yu's 10 October proposal. It does not minimise SNL's actions – the statutory obligation is that of the employer.

Was Mr Yu unjustifiably dismissed?

[34] On the morning of 9 October Mr Gong told Mr Yu he was dismissed. Mr Gong said the discussion was in the context of a number he and Mr Yu had had in the preceding months as to Mr Yu's lack of suitability for the role and Mr Yu's progress (or lack thereof) in finding another job including gaining a heavy vehicle license so he could apply for truck driving work. Mr Gong said matters had come to a head because work in the factory had declined, Mr Yu's productivity was not improving and he could not work night shifts due to his family circumstances. He said he gave Mr Yu an option to resign or be dismissed. Later that day Mr Yu received a dismissal letter under the name of the general manager dated 6 October 2023 giving him a month's notice of dismissal:

Dear Mingwei

This to confirm your discussion with Mr Tony Gong today and his advice that your employment with us will be terminated on the 6th November 2023 having commenced work with us on the 20th March 2023. The length of notice is as per your employment agreement with Synergy Nutrition Limited and during this period you are free to find alternative employment.

I thank you for all your loyalty, support and hard work during your employment with us and I wish you good health and all the best for the future whatever you do or where your career path takes you.

Can you please acknowledge this letter by signing copy of it.

Yours faithfully

[35] Though it is accepted Mr Gong and Mr Yu had had a number of discussions about Mr Yu's progress in the role and that Mr Yu's inability to work night shift was causing some difficulties with the shift roster I am satisfied SNL initiated the end of the employment relationship and that this occurred at the 9 October meeting. The letter is confirmation in writing of the dismissal and includes four weeks' notice of SNL's decision, which is the period required under the employment agreement.⁷ This approach

⁷ Mr Yu's individual employment agreement clause 24.1.

is explained somewhat by Mr Gong's understanding of how notice periods may work as recorded in the 6 October conversation.

[36] The dismissal was not justified. The circumstances of the dismissal, which include the discussion of 6 October as well as the meeting of 9 October, do not meet the justification test set out at s 103A of Act or the disciplinary process requirements contained in SNL's policy handbook. SNL cannot establish it has fairly put its concerns about either Mr Yu's performance or his compliance with the employment agreement with respect to the night shift work to him to understand those concerns and respond to them. Aside from the written warning, which has been found to be unjustified, there was no performance improvement plan put in place for Mr Yu, as described in the policy handbook or written notice to him that SNL was concerned his refusal to work night shift may put him in breach of the employment agreement. Having put such detailed policies in place SNL was obliged to follow them. It has not established that it has.

[37] While there are a number of references in the evidence to discussions between Mr Yu and Mr Gong about Mr Yu's suitability for the role and other employment Mr Yu might be more suited to such as truck driving, I am not satisfied the evidence establishes the parties had reached a mutual agreement the employment would end. I accept the 9 October dismissal would have come as no surprise to Mr Yu but that is not the same as his agreeing to the employment ending or his having agreed the parties were not bound to the obligations freely entered under the employment agreement.

[38] Given the evidence before the Authority of SNL's comprehensive induction and training documentation and its adherence to the strict regulatory requirements of a food processor and exporter, it is difficult to understand why the concerns about Mr Yu's performance could not have been dealt with in an equally systematic way informed by the parties' employment agreement and the significant requirements, both procedural and substantive, under the policy handbook.

[39] SNL was responsible for and in control of the process which resulted in Mr Yu's dismissal. The deficiencies outlined about are not minor or technical and mean SNL cannot demonstrate it acted fairly and reasonably in dismissing Mr Yu. On the evidence before the Authority Mr Yu's dismissal by notice dated 9 October 2023 was unjustified.

Good faith

[40] Mr Yu brings a claim for breach of the statutory obligation of good faith. In particular, he says SNL has failed to be honest, active and constructive in maintaining the employment relationship. He has established these failures under the established personal grievances above.

Section 120 – statement of reasons for dismissal

[41] I am not satisfied SNL failed to comply with s 120 reasons for dismissal requirement. Within a month of Mr Yu's employment ending the parties' representatives were actively engaged in this employment relationship problem.

Section 130 – wage and time record

[42] The claim here is also not established. The evidence shows wage and time records were provided on request. They may have led to further questions being raised and the subsequent exchange of documents, but this does not establish a s 130 breach.

Section 81 – holiday and leave record

[43] Again, the claim here is also not established. The evidence shows the holiday and leave records were provided on request. As above they may have led to further questions being raised and the subsequent exchange of documents, but this does not establish a s 81 breach.

Failure to pay wages when due and owing

[44] This claim under the Wages Protection Act 1983 is addressed by way of the found breaches of the employment agreement regarding pay rate and weekly hours.

Remedies

[45] Mr Yu has established personal grievances for unjustified disadvantage and unjustified dismissal. He is entitled to a consideration of the remedies sought.

Reimbursement of lost wages

[46] Mr Yu's employment ended with SNL on 6 November and he started new employment on 11 December 2023. SNL says it has paid all the arrears claimed by Mr

Yu and this must cover the period in question. The arrears paid do not meet the post-employment lost Mr Yu claims. After reviewing the evidence of loss and Mr Yu's attempts to mitigate that loss the Authority is satisfied, he is entitled to an award of lost wages of 5 weeks being \$5,932 (gross).⁸ Holiday pay of \$474.56 (gross) is to be paid on that sum.⁹

Compensation for humiliation, loss of dignity and injury to feelings

[47] The circumstances of Mr Yu's personal grievances have caused him stress, made him feel hopeless and negatively affected his health for which he has provided supporting information. With respect to the warning – he said it made him feel worried about his employment and that he had been treated differently to and unfairly from other employees. With respect to his dismissal, Mr Yu experienced difficulties meeting the financial needs of his young family following his employment ending and before he secured a new job. This caused uncertainty and stress to himself and his family. Mr Yu said it was difficult finding another job given his visa status and he feels this has tainted his reputation. It is accepted this has had an ongoing negative impact on Mr Yu. He is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$5,000 for the unjustified disadvantage and \$14,000.00 for the unjustified dismissal.

Contribution

[48] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[49] In *Maddigan v Director-General of Conservation* the court held a reduction of 50% is to be reserved for exceptional circumstances and care should be taken before imposing a reduction of 25%.¹⁰

⁸ Mr Yu's hourly rate of \$29.66 x 35 (minimum guaranteed hours of work per week) x 5 weeks = \$5,932 (gross).

⁹ Holidays Act 2003, s 23.

¹⁰ *Maddigan v Director-General of Conservation* [2019] ERNZ 550 at 564.

[50] Mr Yu's accepted actions in using his phone in the factory was a breach of a policy which I am satisfied he knew and understood. His knowing actions contributed directly to the circumstances of this personal grievance and because of the nature of those actions a reduction in remedies is warranted. A reduction of 30% of the remedy awarded under s 123(1)(i)(c) for the unjustified disadvantage personal grievance established in relation to the written warning is appropriate to reflect this contributory conduct.

[51] With respect to his dismissal, while it is accepted Mr Yu had not settled into the role as expected by SNL, the evidence has not established he agreed to his employment ending as it did – indeed the evidence shows Mr Yu wished to keep his job with SNL because he needed his wages to support his family. The issue concerning his advised inability to work night shift is a factor which has contributed to the circumstances of his dismissal and I find, given he had agreed in the employment agreement to work night shift as required, was a blameworthy factor. A reduction of 20% of the remedy awarded under s 123(1)(i)(c) for the personal grievance established in relation to Mr Yu's dismissal is appropriate to reflect this contributory conduct.

Interest

Should interest be ordered on the arrears?

[52] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[53] It is appropriate where a person has been deprived of the use of money to make an award for interest. Mr Yu is entitled to an award of interest on the wage arrears awarded including the holiday pay component.

[54] SNL is ordered to pay interest, using the civil debt interest calculator, within 28 days of this determination, as follows:¹¹

¹¹ www.justice.govt.nz/fines/civil-debt-interest-calculator.

- (i) Interest on the total arrears paid calculated from 6 November 2023, being Mr Yu's last day of employment, until the date payment was made.

[55] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Penalty

[56] In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, and further factors identified in case law on such penalties.¹²

[57] Where a breach is not a minor or a technical breach, the question of whether a penalty is warranted turns to whether the conduct was deliberate or negligent, warranting the imposition of a penalty.¹³ The level of harm occasioned by the breach is also relevant.¹⁴ The maximum penalty against a company is \$20,000 per breach.¹⁵

Is SNL liable for penalty – breach of employment agreement

[58] SNL failed to pay Mr Yu at the agreed rate and failed to provide minimum hours of work per week as required under the parties' employment agreement. These failures breached the parties' employment agreement.¹⁶ Grounds have been established to consider whether a penalty should be ordered. Given the related nature of the breaches they are to be globalised. The starting point for consideration of the penalty for breach of the employment agreement is therefore \$20,000.

[59] SNL's actions in failing to pay wages as agreed must be seen as intentional and its culpability high. As the employer it was its obligation and responsibility to pay wages when they became due. The failure to do so is, in all the circumstances of this employment relationship problem is a serious breach. SNL has paid the wage arrears as

¹² *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151]; *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]

¹³ See *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151, [2019] ERNZ 438 at [169]; *Xu v McIntosh* [2004] 2 ERNZ 448.

¹⁴ *Xu*, *ibid*.

¹⁵ Employment Relations Act 2000, s 135.

¹⁶ Employment Relations Act 2000, s 134.

claimed but it is unable to claim a credit for complying with obligations freely entered with Mr Yu. Mr Yu, even factoring the imbalance of bargaining power, was party to the arrangement to pay him differently from the written pay rate for the first month of his employment. This is a relevant factor in the assessment of penalty.

[60] There is evidence of direct loss suffered by Mr Yu as a result of SNL's breach – he has been underpaid and spent time and resources seeking to enforce these obligations.

[61] There is no specific evidence before the Authority of any financial difficulty SNL may have in paying any penalty. There was no information SNL has previously been penalised for breaches of employment standards, this is a factor weighing in favour of a reduction.

[62] Standing back and including comparison to other cases and the relevant matters listed in s 133A of the Act, a fair penalty is \$4,000. Mr Yu in seeking an award of penalties, seeks all or a portion of any paid to him. SNL is ordered to pay half the total penalty to Mr Yu to compensate him for the inconvenience and resources expended in pursuing these statutory entitlements. SNL is to pay the penalty within 28 days of the date of this determination.

Is SNL liable for penalty – breach of statutory duty

[54] SNL has failed to comply with statutory obligations of good faith and in respect to the prohibition against seeking a premium. Grounds have been established to consider whether a penalty should be ordered.

Breach of good faith

[55] The established breaches of good faith have been addressed by way of the remedies for personal grievance.

Seeking a premium

[56] For its breaches of s 12A of the Wages Protection Act 1983 SNL is liable for a penalty.

[57] SNL's action in proposing the premium was intentional and a serious breach of employment standards. Having regard to the objects of the Act, including addressing the inherent inequality of power in employment relationships, a penalty is appropriate. As above, there is no information SNL has previously been penalised for breaches of employment standards, a factor weighing in favour of a reduction. Also, as above there is no information SNL is not able to pay a penalty. Balancing all relevant factors, including Mr Yu's vulnerable status as a migrant worker and giving weight to the need to deter both this employer and all employers from seeking such premiums, \$6,000 is an appropriate penalty to impose.

[58] SNL must pay this penalty of \$6,000 for breach of s 12A of the WPA within 28 days of the date of this determination. A part of any penalty imposed is to be paid to Mr Yu of half and the balance paid to the Crown.

Summary

[59] Within 28 days of the date of determination Synergy Nutrition Limited is to make the following payments to Mingwei Yu:

- i) \$5,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 less 30%;
- ii) \$14,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 less 20%;
- iii) \$6,406.56 (gross) pursuant to section 123(1)(b) of the Employment Relations Act 2000; and
- iv) \$10,000 in penalty half to be paid to Mr Yu and half to the Crown.

Costs

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Yu may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum Synergy Nutrition Limited will then have 14 days to lodge any reply memorandum.

[61] On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment.

Marija Urlich
Member of the Employment Relations Authority