IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 692
3059581

	BETWEEN	LIZHENG ZHEN Applicant
	AND	ADVANCED COMPUTERS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Young Sun, advocate for the applicant Thelma French, advocate for the respondent
Investigation Meeting:	2 December 2019
Determination:	4 December 2019

DETERMINATION OF THE AUTHORITY

A. Lizheng Zhen was in an employment relationship with Advanced Computers Limited (ACL) during the time he worked for the company.

B. Mr Zhen's employment ended by way of constructive dismissal.

C. In settlement of his claim for wage arrears and his personal grievance for unjustified dismissal, ACL must pay Mr Zhen the following amounts within 28 days of the date of this determination:

(i) $2,401.92 (less any applicable tax) as arrears of wages and holiday pay;

(ii) $812.43 (less any applicable tax) as lost remuneration; and

(iii) $5,000 (without deduction) as compensation for humiliation, loss of dignity and injury to his feelings.

D. ACL must also pay a penalty of $3,000 for a breach of the Wages Protection Act 1983 s 4 and a penalty of $2,000 for breach of the Employment Relations Act s 63A. The penalties must be paid to the Authority within 28 days of the date of this determination. On recovery of the penalties the Authority must transfer the whole of those penalties to the Crown Bank Account.

E. ACL must also pay Mr Zhen the further sum of $2,000 as a contribution to his costs of representation and expenses.

Employment Relationship Problem

[1] Between 22 March and 26 April 2019 Lizheng Zhen carried out various tasks repairing electronic equipment at the premises of Advance Computers Limited. (ACL). Mr Zhen had answered an advertisement he found on a New Zealand-based Chinese language media website, Skykiwi. The advertisement, according to a translation into English provided at the request of the Authority, was published under the category of situations vacant. It sought applications for a full-time role with ACL as an electronic technician on a salary of "more than New Zealand minimum wage".

[2] On 20 March Mr Zhen had attended an interview with ACL's director Nancy Zhang and carried out an "initial technical assessment", fixing two faulty items over a five hour period. Ms Zhang called him back to the shop on Friday 22 March where Mr Zhen fixed some more items and, according to him, Ms Zhang said he was to start working on a full time basis from Monday 25 March. He began work that day and worked on ACL premises repairing various devices over the following three weeks. At the end of each of the first two weeks he sent Ms Zhang a list of the devices worked on, the time taken and whether the repair was completed. During those weeks Mr Zhen also asked Ms Zhang several times about confirming his wage rate and providing a written employment agreement.

[3] On 15 April Ms Zhang told him that she would offer him only ongoing part-time work for four hours a week at the rate of $20 an hour. She also told him that ACL might offer him full-time employment in the future if his skills improved. After considering that offer Mr Zhen sent Ms Zhang an email on 17 April saying he could not accept those conditions. Instead he wrote: "I will not go to your company

anymore but please pay me for what I worked for as we agreed before". When ACL did not pay him the wages he sought, Mr Zhen lodged an application in the Authority seeking orders for payment of arrears for 129 hours work and for a finding that how his work from ACL ended was a constructive dismissal for which he should be paid lost wages and distress compensation. He also sought penalties against ACL for a breach of good faith, failure to provide a written employment agreement and, because he was not paid wages for work he did, a breach of the Wages Protection Act 1983 (the WPA).

[4] ACL denied Mr Zhen was offered full-time employment or had worked as its employee at any time between 22 March and 15 April. Its statement in reply said Mr Zhen had not passed its initial technical assessment for repairing devices conducted on 21 March. Ms Zhang's evidence was that, after being told so on 22 March, Mr Zhen suggested he work on a small project to prove his talent. She said he suggested he repair disposed audio devices in the workshop and then, once ACL sold the repaired items, he would be paid half of the proceeds. Ms Zhang said she had only agreed to that arrangement for Mr Zhen to keep working at ACL's workshop on an independent contracting basis, not as ACL's employee. She had then, on 15 April, offered him part-time employment, for 20 hours a week at $20 an hour plus commission and bonus, but he declined that offer.

[5] ACL considered that the only money owed to Mr Zhen was as part of the arrangement to share proceeds for sale of repaired devices, not wages as an employee. When he declined the part-time job offer and ask for payment for the hours he worked, Ms Zhang suggested Mr Zhen could pay ACL $945 for the items he repaired and could then sell them himself, keeping whatever proceeds he made.

Issues for investigation

[6] The issues requiring investigation and determination were:

(i) Was Mr Zhen an employee or an independent contractor when doing work for ACL?

(ii) If he was an employee, what wages was he owed for time worked between 21 March and 15 April 2019 (with 129 hours claimed)?

(iii) Did Mr Zhen's employment end by constructive dismissal, that is resulting from breaches of express or implied terms of his employment?

(iv) If Mr Zhen was found to have been an employee whose employment ended by unjustified constructive dismissal, what remedies should be awarded to him, considering:
   (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
   (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
(v) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Zhen that contributed to the situation giving rise to his grievance?
(vi) Is ACL liable to any penalty for a breach of good faith or failure to observe provisions of the Act and s 4 of the WPA; and, if so, of what amount?
(vii) Should either party contribute to the expenses and any costs of representation of the other party?

[7] For the Authority investigation Mr Zhen and Ms Zhang each provided a written witness statements and relevant background documents. These included the ACL employment application form Mr Zhen had completed in response to the job advertisement and the email correspondence between him and Ms Zhang. Under oath or affirmation both answered questions at the investigation meeting from me and the parties' representatives. The representatives also had the opportunity to make closing submissions on the issues for determination.

[8] 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.

Nature of the relationship

[9] Where parties dispute the nature or status of the relationship between them, the Authority considers what the evidence shows about "the real nature" of the relationship between them.[1] Whatever the parties may say or have said about the nature of their relationship is not treated as determining the matter. Rather the

[1] Employment Relations Act 2000, s 6(2).

Authority must consider all relevant matters, including any matters that indicate the intentions of the people involved.

[10] In Mr Zhen's case the first question was whether, in the work he carried out for ACL, he was an employee or an independent contractor. If he was an employee, the second question concerned the basis or nature of his employment – whether it was for some temporary, fixed purpose or was or had become ongoing or permanent in nature.

[11] The first indication of the intention of the parties was found in ACL's advertisement for an electronic technician to be employed on a full-time basis on "more than New Zealand minimum wage". This was what ACL was looking for and this was the position for which Mr Zhen understood, and intended, he was being considered. There is considerable dispute and difference in the evidence of Mr Zhen and Ms Zhang over whether that prospect changed, and to what degree, as a result of their discussion on 22 March.

[12] Ms Zhang insisted that having told Mr Zhen his initial assessment on 20 March, based on working to repair two items, was unsuccessful, he then proposed the scheme for him to work on repairing disposed items as a means of showing his skills. She said she only agreed to that plan to give him work experience as a new migrant in order to improve his job prospects. Mr Zhen had moved to New Zealand with his wife and daughter in 2017 as an international student. He had recently completed a diploma of electronic engineering and was seeking his first job in New Zealand.

[13] Ms Zhang said she told him that he would not be paid an hourly rate and he had agreed to do the repair work on the basis of getting a 50:50 split of proceeds from any sales of the repaired items. In her view this was an independent contracting arrangement.

[14] Mr Zhen, in his evidence, accepted he had agreed to work on the basis of being paid from sales proceeds but thought he would be paid at least the minimum wage. He said that, based on what he was told by classmates in his diploma course, he knew he had to be paid at least at that level. He said he relied on Ms Zhang's business experience and knowledge of labour law to make sure that happened.

[15] As there was no written employment agreement, or some otherwise clearly established terms, the next step was to consider whether what happened in practice amounted to an independent contracting arrangement. Mr Zhen accepted, when questioned at the investigation meeting, that he was not told what times to attend work. The reality was, however, that he did attend work at ACL's premises on most of the working days over the following three weeks. He also provided reports to Ms Zhang about his work and accepted directions about which of ACL's premises he was to work at. This included spending a day working at its North Shore office where his work was observed by a senior technician who later provided Ms Zhang with an assessment of Mr Zhen's skills. He also relied on ACL providing him with the broken devices to work on and used its tools and premises to carry out the repairs. Broadly assessed, Mr Zhen's work and how it was carried out was under the control of ACL and integrated into its business. This included instances where he worked not just on disposed items but other items which customers had left for repair. He did not work for any other entity or person during this period and submitted no invoices for this work so could not, realistically, be described as being in business on his own account.

[16] On an objective assessment the real nature of Mr Zhen's relationship with ACL was as an employee, carrying out repair work under its control and direction. If he had agreed to work on what amounted to a 'piece work' basis, that is payment for the value of each item repaired, this was still a form of employment for which he was entitled to be paid at least the minimum wage. However that arrangement also clearly had another purpose. This was to continue and extend the period during which Mr Zhen was under assessment of his skills and suitability for permanent and on-going work. While it was not arranged in the way contemplated by s 67A and s 67B of the Act, this period of work was clearly intended to be a trial. Although contrary to Ms Zhang's statements about her intention at the time, the real nature of the relationship during this period of trial or assessment was one of employment. However it was employment that was subject to a condition.

[17] Informal and ad hoc arrangements regarding employment, or the prospect of employment, made without regard to the exact letter of the law, can prove challenging to categorise. In its decision in *The Salad Bowl Limited v Howe-Thornley* the Employment Court described one such instance that has some applicability to the

circumstances of Mr Zhen.[2] In that case the Court found the period of trial or assessment meant the employee was engaged on a permanent, ongoing basis but that employment was subject to certain conditions being met. Those conditions included the successful completion of the period of assessment, although in the *Salad Bowl* case the trial comprised only three hours, not three weeks.

[18] Throughout those three weeks there was a continual exchange of Mr Zhen's time and effort in return for expected payment in circumstances that amounted to a contract of service between him and ACL. He was, throughout that time, an employee and not an independent contractor.

[19] Following the Court's analysis in the *Salad Bowl* case, the arrangement with Mr Zhen could be treated as a fixed term employment agreement under s 66 of Act, which was to end at the period of assessment. However such agreements may not be lawfully made for the purpose of establishing the suitability of an employee for permanent employment. In such circumstances the employment is then deemed to have become ongoing employment.[3] This does not mean the employment cannot be terminated, or its terms changed, if the employer finds the worker's performance is unsatisfactory. But it does mean any such termination or change must be done fairly, following consultation and discussion with the worker. The employer's actions must meet the requirements of the test of justification set by s 103A of the Act. Those actions are considered further later on in this determination in relation to Mr Zhen's claim of constructive dismissal.

What work was done and what was owed for it?

[20] Mr Zhen said he worked 129 hours for ACL during the period from 22 March to 15 April 2019. Ms Zhang disputed this tally, saying that Mr Zhen's own account of hours worked totalled 122 hours. In reaching that figure Ms Zhang had deducted a notional period of 30 minutes, as a lunch break, from the span of hours that Mr Zhen said he worked each day. Typically Mr Zhen said he worked from 9.30am to 6pm, which were ACL's office hours.

[21] Because of the circumstances of what happened, and Ms Zhang's view of the arrangements, there were no time records. In that situation the Authority may accept

[2] [2013] NZEmpC 152 at [79].
[3] At [87-[89].

as proven the employee's claims about hours worked, unless the employer can prove those claims are incorrect.[4] ACL has not proved the hours that Mr Zhen claimed he worked were incorrect or that he had taken the breaks that Ms Zhang suggested should be deducted from the total hours said to have been worked.

[22] Mr Zhen was entitled to an award of wage arrears. However there was no agreed pay rate for the 129 hours worked between 22 March and 15 April. The first time that any pay rate was mentioned was when Ms Zhang offered him the part-time job on 15 April. She said the pay would be $20 an hour and Mr Zhen asked for $22. In the absence of any agreed rate for the earlier work, Mr Zhen must be paid at least the statutory minimum wage for the hours worked. The minimum wage was $16.50 an hour for the 49 hours he worked between 22 and 29 March (that is $808) and $17.70 for the remaining 80 hours up to 15 April (that is $1,416). The total amount of $2,224 is also subject to holiday pay at the rate of eight percent.

[23] Adding the holiday pay of $177.92, the gross amount of arrears due to Mr Zhen as wages and holiday pay is $2,401.92. ACL must pay him this amount, less any applicable tax, within 28 days of the date of this determination.

The end of the relationship – a resignation or really a constructive dismissal?

[24] ACL did not terminate Mr Zhen's employment. Rather, during a period of assessment or trial, he was told that if he wished to continue working for ACL his employment would be on a part-time rather than, as he understood was intended, a full-time basis.

[25] By 15 April, when Ms Zhang communicated that decision to him, he had also repeatedly asked to be paid, without success. With, from his point of view, a sudden and unexpected change in the nature of the ongoing job on offer and the failure to pay him, Mr Zhen resigned on 17 April.

[26] Such resignations may be deemed in law to amount to a dismissal by the employer. This is because, depending on the facts of each situation, the resignation may really be caused by actions of the employer, not the worker. One example of such a situation is where the worker resigned because the employer was breaching the worker's terms or conditions of employment. If those breaches were sufficiently

[4] Employment Relations Act 2000, s 132.

serious that it was reasonably foreseeable the worker would resign rather than tolerate such breaches, the resignation is treated as a constructive dismissal.[5]

[27] The circumstances of Mr Zhen's resignation clearly fell within this category of constructive dismissal. ACL had breached his terms of employment by not paying him for his work and misleading him about the nature of his ongoing work. In the face of the non-payment and the offer of only part-time ongoing work, it was reasonably foreseeable he would resign rather than tolerate such breaches. Both breaches were sufficiently serious to found a claim of constructive dismissal. Being paid for one's work is fundamental to any employment relationship. Having the basis of any ongoing employment changed from full-time to part-time could not reasonably and fairly be done without any proper prior consultation. Those actions of ACL caused Mr Zhen's resignation so that he had a personal grievance for unjustified dismissal on the grounds of constructive dismissal.

Remedies

Lost wages

[28] Mr Zhen lost one weeks' wages between his resignation and starting a new job. ACL must reimburse him for that lost remuneration.[6]

[29] Calculated on the basis of 8.5 hours a day for five days a week at the statutory minimum hourly rate of $17.70, the lost wages were $752.25. Adding a further eight percent holiday pay to that amount, ACL must pay Mr Zhen $812.43 (less any applicable tax) as lost remuneration by no later than 28 days from the date of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[30] Mr Zhen was embarrassed and upset by his treatment during his first experience of employment in New Zealand. He found it humiliating to be misled about his job prospects with ACL and having to explain to family and friends what had happened. As Mr Zhen quickly found a new, better paid job in his chosen field, the effects of that experience were not long lasting. In those circumstances $5,000

[5] *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cases 95 at 104 and *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415 (CA) at 419.
[6] Employment Relations Act 2000, s 132(1)(b) and s 128(2).

was an appropriate sum to order ACL pay him as compensation for the loss of dignity and injury to his feelings caused by its actions.

No reduction of remedies

[31] There was no evidence of any blameworthy conduct by Mr Zhen contributing to the situation giving rise to his grievance. He had diligently carried out his work and ACL had sufficient confidence in his skills and ability to offer him further work, albeit only on a part-time basis. As a result no reduction of remedies was required.[7]

Liability to penalty

[32] Mr Zhen sought penalties against ACL for breach of good faith, failure to provide a written employment agreement and failure to pay wages when due. The relevant conduct in respect of those breaches overlapped so, in order to avoid any element of double penalty, penalties in this case are awarded only in relation to two specific statutory breaches.

[33] ACL's failure to provide Mr Zhen with a written copy of any intended employment agreement – including whether this might be for fixed term employment, a probationary period or a trial period – was a breach of s 63A of the Act. It was liable for a penalty for that failure.[8]

[34] ACL's failure to pay Mr Zhen anything for his work was a breach of the WPA. It was liable for a penalty for that failure.[9]

[35] Total provisional liability for those two breaches was a maximum of $40,000.[10] Factors set in s 133A of the Act, applied through a methodology developed by the Employment Court, guide determination of the appropriate level of penalty in the circumstances of each case.[11]

[36] The objects of the Act concerning the promotion of good faith behaviour, addressing inequality of power in employment relationships and promoting enforcement of employment standards supported the need for penalties to be imposed

[7] Employment Relations Act 2000, s 124.
[8] Employment Relations Act 2000, s 63A(3).
[9] Wages Protection Act 1983, s 4 and s 13
[10] Employment Relations Act 2000, s 135(2)(b).
[11] *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].

in this case. The breaches related to a single worker but the failure to pay Mr Zhen and to provide him with a written employment agreement were the result of deliberate decisions made about the arrangements for his work. The effect of the failure to provide him with a written employment agreement denied him a level of security and information about his rights that a worker is entitled to have. Mr Zhen was in a relatively vulnerable position as a migrant who relied on ACL to treat him lawfully. There were no attempts to mitigate any adverse effects of those breaches on him because ACL did not accept it had acted wrongfully in any way.

[37] Adjusting the provisional penalty for those various factors, a penalty of $5,000 could be imposed for each breach. Three further factors required further consideration.

[38] Firstly, in respect of the breach of the WPA by not paying wages due, ACL was not a first offender. In 2015 the Authority found ACL breached s 4 of the WPA by not paying a technician the entire amount of wages due to him.[12] No penalty was sought or imposed in that case. If not for that prior conduct, the penalty on that count in this present case could reasonably have been set at $2,000. However, taking the previous instance into account, a penalty of $3,000 was appropriate.

[39] Secondly, there was no information or evidence that ACL lacked the ability to pay a penalty. No adjustment of provisional levels of penalty was required on that score.

[40] Thirdly, proportionality of the penalties to the nature and severity of the breaches had to be considered.

[41] While the wages not paid in breach of the WPA amounted to $2,401.92, a penalty of $3,000 was proportionate given the prior instance of a breach.

[42] A penalty of $5,000 for the failure to provide a written employment agreement was, however, disproportionate in these particular circumstances. ACL has been in business for more than 15 years and has standard employment practices that meant it had the means and experience to readily provide Mr Zhen with a written employment agreement. It could have provided an employment agreement with the standard statutory trial provision that would have enabled ACL to have him carry out repair

[12] *Shi v Advanced Computers Limited* [2015] NZERA Auckland 23 at [24]-[25].

tasks and assess his skills. It failed to follow this fundamental requirement of all businesses to provide a written employment agreement. A penalty of $2,000 was a sufficient and proportionate amount to punish ACL for its failure and to deter other employers from committing such breaches.

[43] Mr Zhen's statement of problem referred to any penalties being payable to the Crown. The wrongs he suffered have been remedied by awards of arrears, lost wages and compensation. ACL must pay the whole of the penalties imposed to the Authority within 28 days of the date of this determination. Once paid, the Authority must transfer those sums to the Crown Bank Account.

Costs

[44] Given Mr Zhen's success in pursuing his claim he was entitled to an award requiring ACL to contribute to his costs of representation. The investigation meeting took less than three hours. Applying the Authority's usual daily tariff to that time, ACL must pay Mr Zhen a further $2,000 as a contribution to his costs and expenses of representation.

Robin Arthur
Member of the Employment Relations Authority