

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 57
3175522

BETWEEN ZHANGYING ZHUANG
Applicant

AND DRAPAC LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Marshall Quan Shu for the Respondent

Investigation Meeting: 3 February 2023

Determination: 7 February 2023

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination, Drapac Limited must pay Zhangying Zhuang the following amounts:**
- (i) \$1,700 (less any applicable income tax) as arrears of wages for time deducted from her hours of work; and**
 - (ii) Interest on the net amount, calculated using the civil debt interest calculator, for the period from 1 October 2021 to the date that amount due is paid; and**
 - (iii) \$71.56 in reimbursement of the sum Ms Zhuang paid to lodge her application in the Authority.**

Employment relationship problem

[1] Zhangying Zhuang applied to the Authority for an order seeking payment of wages for time Drapac Limited (Drapac) had deducted from her hours of work.

[2] Drapac employed Ms Zhuang in 2020 to work in a park and ride business operated by the company. Her work included driving a shuttle bus. Ms Zhuang was

required to apply a divisor of 1.125 to the hours of work she reported being at work each week so that 7.5 minutes was deducted from each of those hours. Her weekly pay was calculated on the total of hours after that deduction.

[3] In correspondence to the Authority Drapac's manager Marshall Quan Shu said the 7.5 minutes deducted by use of the 1.125 calculation was a "requested unpaid break time" to ensure health and safety for Ms Zhuang and customers while she was driving the shuttle bus.

The Authority's investigation

[4] A Notice of Investigation Meeting for 3 February 2023 was issued after a case management conference held by telephone with Ms Zhuang and Mr Shu on 15 November 2022.

[5] On the day of the investigation meeting Mr Shu did not attend. Instead he sent an employee of Drapac, Carol Ling, to represent him. She said Mr Shu was "too busy" with work elsewhere to come to the investigation meeting.

[6] Ms Zhuang was not present at the appointed time either. When contacted by telephone by an Authority Officer, Ms Zhuang advised that she was on delayed flight to Auckland. I then heard briefly from Ms Ling who referred to an email statement Mr Shu has sent the Authority on 20 January and some time records Ms Zhuang had submitted to the company. Those records showed she had applied the 1.125 divisor to the hours she reported working each week. Ms Ling, on Mr Shu's behalf, said Ms Zhuang's use of the divisor showed she had accepted and agreed with it as the basis of calculating her pay.

[7] Following the meeting I had an email message sent to Ms Zhuang and Mr Shu advising that the Authority would complete its investigation 'on the papers'. The email referred to the information from Ms Ling and stated that I was concerned the use of the 1.125 divisor to deduct a compulsory unpaid break from hours of work was not legal. The parties were provided an opportunity to provide any further comment by email. Ms Zhuang and Mr Shu both responded by email by the end of the day.

[8] Ms Zhuang said she had not agreed to use of the divisor. She said its use by Drapac meant she was paid for just over 683 hours but her total hours of work for the company had been just over 768 hours.

[9] Mr Shu said Ms Zhuang was “paid a normal break” of 15 minutes every four hours so the 7.5 minutes deducted from each hour was for an “additional break”.

[10] This matter has now been determined after considering that information along with the statement of problem, the statement in reply and pay records provided by the parties.

[11] 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.

Arrears of wages are due

[12] Drapac was not entitled to deduct 7.5 minutes an hour from the payments due to Ms Zhuang for the hours she was at work, even if it had her supposed agreement to do so.

[13] The unpaid break Mr Shu said was the reason for the deduction was not a break of the type authorised by Part 6D of the Act which provides for paid rest breaks and unpaid meal breaks.

[14] If Ms Zhuang’s driving work did require a break for health and safety reasons, that time was part of the hours she was attending the workplace for work purposes and when she was able and willing to work. She was entitled to be paid for that time.

[15] Drapac had not provided Ms Zhuang with a written employment agreement. She said she had not agreed to the deduction made, which would not have been lawful even if she had agreed.¹ Time records she submitted which applied the divisor formula to her total hours of work did not indicate any agreement freely given. Rather, submitting her time record in that way was required if she wanted to get paid.

[16] Drapac must pay Ms Zhuang for the minutes deducted as supposed health and safety breaks from her total hours of work. The minutes deducted amounted to a total of a little over 85 hours for the period she was employed. Rounding the relevant figures, the amount due to her, at the rate of \$20 an hour she was paid, was \$1,700. This is the

¹ Employment Relations Act 2000, s 131(2).

amount, less any applicable income tax, Drapac must pay Ms Zhuang as arrears of wages within 28 days of the date of this determination.²

Interest to be paid on the amount due

[17] Because Drapac unlawfully deducted time for which she should have been paid, Ms Zhuang was denied the use of money she should have had. In those circumstances an order for payment of interest of that money was appropriate.³ The period for calculation of that interest is to be taken as running from 1 October 2021 until the date that the arrears are paid to her under the order made in this determination.

[18] Interest is to be calculated by use of the civil debt interest calculator, accessible through the Ministry of Justice website.⁴

[19] The interest must also be paid within 28 days of the date of this determination.

[20] If Drapac does not pay the amounts due for wages and interest required by the date set in this determination, Ms Zhuang may ask the Authority for a certificate of determination to file in the District Court where the orders are enforceable in the same manner as an order of the court.⁵

Costs

[21] As Ms Zhuang represented herself in pursuing her claim in the Authority, the issue of costs for representation did not arise but she was entitled to have Drapac reimburse her for the fee of \$71.56 she had to pay to lodge her application in the Authority. This amount must also be paid within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority

² Employment Relations Act 2000, s 131.

³ Employment Relations Act 2000, Schedule 2, clause 11.

⁴ www.justice.govt.nz/fines/civil-debt-interest-calculator.

⁵ Employment Relations Act 2000, s 141(1).