

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 404
5376244

BETWEEN HONG (ALEX) ZHOU
Applicant

A N D HARBIT INTERNATIONAL
LTD
First Respondent

BEN WONG
Second Respondent

YING HUI (TONY) ZHENG
Third Respondent

Member of Authority: Rachel Larmer

Representatives: May Moncur, Advocate for Applicant
Ying Hui (Tony) Zheng in person and as Director of
First Respondent
Ben Wong in person

Investigation Meeting: 17 September 2012 at Auckland

Submissions Received: 20 September 2012 from Applicant
27 September 2012 from First and Third Respondents
27 September 2012 from Second Respondent

Date of Determination: 16 November 2012

DETERMINATION OF THE AUTHORITY

- A. Harbit International Ltd (Harbit) breached s.12A(1) of the Wages Protection Act 1983 (WPA) by charging Mr Zhou a premium in respect of his employment.**
- B. Harbit is ordered to repay Mr Zhou \$13,849.60 being the illegal employment premium it received from him.**
- C. A penalty of \$7,000 is imposed on Harbit for its breach of the WPA.**

- D. Harbit breached Mr Zhou's employment agreement by failing to pay his wages regularly. A penalty of \$2,000 is imposed on Harbit for this breach.**
- E. Harbit is ordered to pay Mr Zhou:**
- (a) \$15,251 wage arrears;**
 - (b) \$1,587.40 unpaid holiday pay.**
- F. Harbit breached s.130 of the Employment Relations Act 2000 (the Act) because it failed to keep wage and time records and failed to provide them upon demand. A penalty of \$5,000 is imposed on Harbit for these breaches.**
- G. Harbit unjustifiably dismissed Mr Zhou from his employment. It is ordered to pay Mr Zhou:**
- (a) \$640 lost remuneration; and**
 - (b) \$1,000 distress compensation.**
- H. The Authority does not have jurisdiction to hear any of the claims made against the second and third respondents, so both of these parties are dismissed from these proceedings.**

Employment relationship problem

[1] Mr Zhou came to New Zealand as an international student. He completed a cookery course and in June 2011 saw an advertisement on a Chinese website by Harbit for a chef to work in its Chinese restaurant which traded under the name China Grill Café and Restaurant (the restaurant).

[2] Mr Zhou responded to the advertisement and was interviewed by the third respondent, Mr Ying Hui (Tony) Zheng, who was managing the restaurant. At that time the second respondent Mr Ben Wong was Harbit's sole director and shareholder.

[3] On 2 May 2012 Mr Zheng filed a Notice of a Change of Director with the Companies Office which recorded him as Harbit's sole director and shareholder from that date. Mr Wong remained involved in the business as a cook for the restaurant and he also provided chef training to Mr Zhou after he was employed as a chef.

[4] Mr Zheng said that he found a sample individual employment agreement (IEA) template when he started the restaurant which he took to his immigration lawyer to have amended to suit Mr Zhou. Mr Zheng told me that although he does

not read English very well he knew what was in the IEA because both Mr Wong and the immigration lawyer had told him what it said. Harbit and Mr Zhou both signed the IEA on 22 June 2011.

[5] Under the terms of the IEA Mr Zhou was employed as a chef for up to 40 hours per week Monday to Saturday, with the hours being flexible to accommodate the business needs. His hours of work were to be set by roster. Mr Zhou's location of work was at the restaurant located at 49 Glenmall Place, Glen Eden, Auckland. Mr Zhou's employment was stated to commence on 4 July 2011 and he was paid a wage of \$16 per hour.

[6] Based on the offer of employment and IEA Mr Zhou was issued with a work visa by Immigration New Zealand (INZ) for a position as a chef at Harbit, so he could not work for other employers under the terms of his work visa.

[7] Mr Zhou says he started work on 04 July 2011. Mr Zheng denies that and says Mr Zheng undertook unpaid training from 20 July 2011 so did not receive wages until mid September 2011.

[8] Mr Zhou claims when Mr Zheng offered him the job in June 2011 he said he was a shareholder of the company and he asked Mr Zhou to *give him \$8,000 to help with the business*. Mr Zhou said that he felt he had to pay this money to Mr Zheng in order to secure the job otherwise the offer would be withdrawn.

[9] Mr Zheng claims *it is quite common among some migrant employers to ask for money from students when offering jobs to them so I was not really surprised and I was pressured to do the same*. I note no evidence was provided in support of this claim.

[10] Mr Zheng admitted receiving \$8,000 from Mr Zhou but he gave different accounts of why that had occurred, namely:

- (a) Mr Zheng said he asked for money from Mr Zhou on behalf of Mr Wong because the restaurant was not doing very well and the intention was that Mr Zhou's money would inject cashflow to assist the restaurant;

- (b) Mr Zheng says Mr Zhou offered to *sponsor the restaurant \$8,000 if Mr Zheng helped him apply for a work permit*;
- (c) Mr Zheng said Mr Zhou begged him for a job and when told the restaurant could not afford to employ full time staff Mr Zhou *told me he can donate \$8,000* so he could get a work permit before 01 July 2011 when he believed the immigration rules would be changing.

[11] Mr Zheng told me he was not sure whether there was any obligation to repay the \$8,000 but thought that if Harbit's income increased then he would probably return the money to Mr Zhou, which is why he gave him a receipt for it.

[12] Mr Zhou claims that a few weeks after commencing employment Mr Wong returned from China and asked for \$5,000 to *help with the business as it was facing hard trading conditions*. Mr Zhou says Mr Wong indicated he could lose his job and his work visa could be affected if he did not give Mr Wong the money he had requested.

[13] Mr Zhou's evidence was that he did not have enough money to pay Mr Wong \$5,000 after having just paid Mr Zheng \$8,000. Mr Zhou discussed the situation with his girlfriend and she agreed to help him by lending the money to pay to Mr Wong.

[14] Mr Zhou's girlfriend, Ms Yiling Zheng (no relation to Tony Zheng) gave evidence to the Authority. She also produced her bank statement which showed that she had withdrawn \$5,000 on 25 July 2011. Ms Zheng says that she accompanied Mr Zhou to Westfield's St Lukes Mall on 25 July 2011 and she gave him the \$5,000 she had withdrawn from her bank. She says Mr Zhou met Mr Wong at the St Lukes Mall foodcourt on 25 July 2011 and gave him \$5,000.

[15] Mr Wong denies he asked for or received any money from Mr Zhou. I have resolved this conflict in the evidence on the balance of probabilities in favour of Mr Zhou. I consider his evidence was corroborated by Ms Zheng and by her bank statement.

[16] Mr Zhou says that he did not receive any wages for the first three months of his employment and for the following months he was not paid on a regularly basis. He says his wages were often delayed and most of the time he was not paid at all. Mr Zhou said that although he raised his concerns with Harbit he found that if he

complained too much they would threaten him with his work permit which could be compromised if he lost his job.

[17] Mr Zhou says that he worked on average 60-70 hours per week. Mr Zhou said he would start at 10am in the morning and would not finish until 10pm. He also says he also worked on public holidays but did not receive any statutory entitlements.

[18] Mr Zhou raised concerns with Mr Zheng on 19 September 2011 about Harbit's failure to pay PAYE tax. Mr Zhou claims Mr Zheng asked for \$849.60 because Harbit did not have the money to pay his tax. He says Mr Zheng gave him a Westpac bank account and he made the payment directly into that account. Mr Zheng provided a signed receipt for \$849.60.

[19] Mr Zheng said that Mr Zhou offered to pay \$849.60 PAYE to Inland Revenue Department so he could show INZ he was employed. Mr Zheng says he gave Mr Zhou a receipt for that amount because he was prepared to pay him back if the business started doing well.

[20] Mr Zhou says he received his first wage payment on 04 October 2011. He says he worked for Harbit for 33 weeks but only received wage payments on the following dates: 4, 14, 21 October and 18 November 2011 and 25 January 2012.

[21] Mr Zhou claims that on 06 February 2012 Mr Zheng told him to take some time off and not to return to work until further notice. Mr Zhou claims that when he went back to the premises because he had not heard anything from Harbit he found the business had been closed. Mr Zheng says he tried to contact Mr Zhou to get him to come back to work but was unable to speak to him.

Applicant's claims

[22] Mr Zhou claims Harbit:

- (a) Sought and received illegal employment premiums in breach of s.12A(1) of the WPA. He seeks recovery of \$13,849.60 being the employment premiums he claims he paid. He also seeks a penalty be imposed on Harbit for its breach of the WPA;
- (b) Breached his employment agreement by failing to pay his wages. He seeks wage arrears of \$16,838.40 (\$15,251 wage arrears plus \$1587

unpaid holiday pay). He seeks a penalty be imposed on Harbit for its breach of his employment agreement;

- (c) Failed to keep wage and time records in breach of s.130(1) of the Act. He seeks a penalty be imposed on Harbit under s.130(4) of the Act for that breach;
- (d) Failed to produce wage and time records upon request in breach of s.130(2) of the Act. He seeks a penalty be imposed under s.130(4) of the Act for that breach.

[23] Mr Zhou claims the second and third respondents:

- (a) Breached s.12A(1) of the WPA by demanding an illegal premium from him for his employment;
- (b) Aided and abetted Harbit to breach his employment agreement;
- (c) Disadvantaged Mr Zhou in his employment by unjustified action by failing to pay his wages regularly;
- (d) Aided and abetted Harbit's failure to keep wage and time records and to produce those on request.

Jurisdiction

[24] The parties all agreed Harbit was Mr Zhou's employer. There was no suggestion Mr Zheng or Mr Wong had ever personally employed him. Mr Zhou was therefore not in an employment relationship, as defined by s.4(2) of the Act, with either Mr Zheng or Mr Wong.

[25] Because there is no employment relationship between Mr Zhou and the second or third respondents, the Authority only has jurisdiction to hear a penalty claim against Mr Zheng and/or Mr Wong for inciting, instigating, aiding, or abetting a breach of an employment agreement.

[26] Although Mr Zhou has made a number of claims against Mr Zheng and Mr Wong he has not claimed a penalty against either of them for allegedly aiding and abetting a breach of his employment agreement.

[27] A penalty is a highly punitive claim which must be specifically pleaded. Mr Zhou has failed to do so, despite the Authority putting him on notice after he filed his Statement of Problem that it had to have a legitimate claim against Mr Zheng and Mr Wong personally or they would be struck out from the proceedings.

[28] Because Mr Zhou has not claimed a penalty against either Mr Wong or Mr Zheng, the Authority has no jurisdiction to hear claims against them personally. Mr Wong and Mr Zheng are therefore struck out as respondents in these proceedings.

Issues

[29] The following issues need to be determined:

- (a) Did Harbit seek or receive a premium in respect of Mr Zhou's employment?
- (b) If so, should Harbit be ordered to repay any premiums Mr Zhou paid?
- (c) Should a penalty be imposed on Harbit if it breached s.12A(1) of the WPA?
- (e) Did Harbit breach Mr Zhou's IEA by failing to pay his wages regularly?
- (f) If so, should a penalty be imposed?
- (f) Is Mr Zhou owed outstanding wages and holiday pay by Harbit?
- (g) Did Harbit fail to keep wage and time records and/or did it fail to produce Mr Zhou's wage and time records on demand?
- (h) If so, should a penalty be imposed?
- (i) Did Harbit dismiss Mr Zhou?
- (j) Is so, was dismissal justified under s.103A of the Act?
- (k) If not, what remedies should be awarded?

Did Harbit seek or receive a premium in respect of Mr Zhou's employment?

[30] Mr Zheng admits he received \$8,000 from Mr Zhou on 1 July 2011. This was three days before the parties signed the IEA. There was no prior relationship between Mr Zheng or Harbit and Mr Zhou which would explain this transfer of money. I find Mr Zhou paid Harbit \$8,000 in order to secure his employment and that this constitutes the payment of an employment premium, in breach of s.12A(1) of the WPA.

[31] Mr Zheng also admits he received \$849.60 from Mr Zhou which was used to pay Mr Zhou's PAYE. Although it was Harbit's responsibility to pay Mr Zhou's PAYE, Mr Zhou paid his own tax directly to the Inland Revenue Department out of his own resources. I find that his own tax payment was an illegal premium for employment in breach of s.12A(1) WPA because it was paid by Mr Zhou in order to secure ongoing employment with Harbit.

[32] Although Mr Wong denies seeking or receiving \$5,000 from Mr Zhou, I have preferred the evidence of Mr Zhou and his girlfriend about that. I consider it likely Mr Zhou paid Mr Wong \$5,000 on 25 July 2011 to use for Harbit because the business was facing financial difficulties and Mr Zhou was worried he would lose his job and possibly jeopardise his work visa if he did not pay up. I find this payment is an illegal employment premium in breach of s.12A(1) of the WPA.

[33] I find that these three payments totalling \$13,849.60 paid on 1 and 25 July and 19 September 2011 are premiums Harbit received in respect of Mr Zhou's employment and which therefore breached s.12A(1) of the WPA.

Should Harbit be ordered to repay the employment premium paid by Mr Zhou?

[34] Under s.12A(2) of the WPA Harbit is ordered to repay to Mr Zhou \$13,849.60 which is the total amount of the illegal employment premiums it has received in breach of s.12A(1) WPA.

Should a penalty be imposed on Harbit for its breach of s.12A of the WPA?

[35] Under s.13 of the WPA the Authority may award a penalty against an employer for breaching s.12A(1) WPA.

[36] Pursuant to s.161(1)(m)(v) of the Act, the Authority has jurisdiction to make determinations about actions for recovery of penalties under s.13 of the WPA. The maximum penalty under s.135(2) of the Act is to not exceed \$20,000 for a company such as Harbit.

[37] I am concerned that Harbit (via Mr Wong as director and shareholder and Mr Zheng as Manager of the business) appears to have exploited Mr Zhou because of his immigration status. I therefore consider a penalty is appropriate to punish Harbit and to act as a deterrent to other employers who may be inclined to engage in such actions.

[38] Harbit is ordered to pay a penalty of \$7,000 in respect of its breach of s.12A(1) of the WPA. Harbit is ordered to pay \$4,000 of the penalty into the Authority for subsequent payment to the Crown bank account with the remaining \$3,000 to be paid directly by Harbit to Mr Zhou.

Did Harbit breach Mr Zhou's employment agreement by failing to pay his wages?

[39] I accept Mr Zhou's evidence that he was not paid his wages regularly during the 33 weeks he was employed. I therefore find that Harbit has breached clause 5a of Mr Zhou's IEA by failing to pay him regularly and by failing to pay his all of the wages he was due as and when they fell due.

Should a penalty be imposed on Harbit for breaching Mr Zhou's employment agreement?

[40] The failure to pay an employee wages they have earned by working in accordance with the provisions of their IEA is a serious breach which warrants the imposition of a penalty in order to act as a deterrent to other employers. I am satisfied this penalty claim was commenced within 12 months after the date on which the cause of action became known or should reasonably have become known to Mr Zhou.

[41] A penalty of \$2,000 is imposed on Harbit. It is ordered to pay \$1,000 of the penalty into the Authority for subsequent payment to the Crown bank account and the remaining \$1,000 is to be paid directly to Mr Zhou.

Is Mr Zhou owed outstanding wages and holiday pay by Harbit?

[42] Mr Zhou claimed wages arrears of \$15,251.00 gross which was based on 32 weeks employment for 40 hours per week at \$16 per hour, as per the terms of his IEA less what he had already been paid during his employment. He also claims holiday pay on his wage arrears of \$1,587.40 being 8% of his total gross earnings over the course of his employment.

[43] Harbit is ordered to pay Mr Zhou \$16,838.40 for wage arrears and holiday pay.

Did Harbit fail to keep wage and time records and/or to produce them on demand?

[44] Under s.130(1) of the Act Harbit was required to keep wage and time records for Mr Zhou, which had to include all of the information required by s.130(1)(a)–(i) of the Act.

[45] Section 130(2) of the Act requires an employer, if requested by an employee or their authorised representative, to provide access to an employee's wage and time records.

[46] Mr Zheng told me he had kept wage and time records but could not produce them because the landlord locked Harbit out of its premises on 15 February 2012. The Authority made inquiries with the landlord via its solicitor who informed the Authority there was no employment related documentation in the premises when the landlord took possession.

[47] Mr Zheng was unable to correctly identify the matters which would have been recorded in the wage and time records, so I consider it unlikely that he kept the information that is required to be recorded by an employer in an employee's wage and time record.

[48] I therefore consider on the balance of probabilities that Harbit did not keep wage and time records as it was required to do in breach of s.130(1) of the Act.

[49] It is also clear that Mr Zhou and his representative requested more than once Mr Zhou's wage and time records after his employment ended. The Authority also reiterated this request prior to its investigation meeting.

[50] I therefore find Harbit failed to produce Mr Zhou's wage and time records upon request in breach of its obligation under s.130(2) of the Act to do so.

Should a penalty be imposed?

[51] Under s.130(4) an employer who fails to comply with the requirements of s.130 is liable to a penalty of up to \$20,000 in the case of a company. I consider that a penalty of \$5,000 is appropriate, which is to be paid by Harbit to the Authority to be paid into the Crown bank account.

Did Harbit dismiss Mr Zhou?

[52] Mr Zhou says his employment ended when Mr Zheng sent him home on 06 February 2012 and told him not to come to work until further notice. Mr Zhou says he never heard anything more and when he went back to the premises he found they had been locked and the business closed.

[53] Mr Zheng disputes sending Mr Zhou home. He says he called Mr Zhou a number of times between 07-15 February 2012 but could not get hold of him. He did not provide the dates or times of these alleged calls.

[54] This conflict has to be resolved on the balance of probabilities. I consider it more likely that Mr Zhou was available to work but that he was not contacted by Harbit. I consider Mr Zhou wanted to return to work and would have done so had he been given the opportunity based on his actions in attempting to return to work when he did not hear from his employer.

[55] I find Mr Zhou's employment ended on 06 February 2012 when he was told to leave work because Harbit sent him away. I find that Harbit's sending away of Mr Zhou amounted to a dismissal because it occurred at Harbit's sole initiative. I do not consider Mr Zhou abandoned his employment or that he resigned.

Was dismissal justified?

[56] Justification falls to be determined in light of the s.103A justification test as it applies from 1 April 2011. Section 103A(3) of the Act sets out four tests which involve well established natural justice and procedural fairness requirements.

[57] The full Court of the Employment Court in *Angus and McKeen v. Ports of Auckland Limited*¹ held that an employer's failure to comply with any one of the four tests would render a dismissal unjustified.

[58] Harbit did not comply with any of the tests in s.103A(3) so I find that it is unable to justify Mr Zhou's dismissal.

What remedies should be awarded?

Lost remuneration

[59] Mr Zhou obviously managed to mitigate his loss because he was only out of work for nine weeks. He claims nine weeks' lost remuneration of \$5,760.00. I find that Mr Zhou is only entitled to compensation for the period 07–15 February (i.e. one week).

[60] Harbit ceased trading when it was locked out of its premises. There were no alternative jobs available which Mr Zhou could have been re-deployed into so even if Harbit had not dismissed Mr Zhou on 06 February it would not have made any difference as his employment would have ended anyway on 15 February 2012 when the landlord took over possession of the premises and the restaurant closed.

[61] Harbit is ordered to pay Mr Zhou \$640 under s.128(2) of the Act, being one week's lost remuneration for the period 07-15 February 2012.

Distress compensation

[62] Mr Zhou claims \$10,000 compensation for the distress and humiliation he says his unjustified dismissal caused him. The evidence in support of such a claim was minimal and consisted solely of Mr Zhou's claim *I have suffered a lot of distress because of the dismissal and the unfair treatment.*

[63] Distress compensation must reflect the actual humiliation, loss of dignity, and injury to feelings suffered by the employee. There is simply not evidence before the Authority to support more than a minimal award of distress compensation.

¹ [2011] NZEmpC 160.

[64] Harbit is ordered to pay Mr Zhou \$1,000 pursuant to s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he suffered as a result of his unjustified dismissal.

Orders

[65] Harbit is ordered to pay Mr Zhou:

- \$13,849.60 to reimburse him for the illegal employment premiums he paid;
- \$3,000 being part of the penalty awarded under s.13 of the WPA;
- \$1,000 being part of the penalty awarded under s.134 of the Act for a breach of his employment agreement;
- \$15,251 wage arrears;
- \$1,587.40 holiday pay;
- \$640.00 pursuant to s.128(2) of the Act;
- \$1,000 pursuant to s.123(1)(c)(i) of the Act.

[66] Harbit is ordered to pay to the Authority for payment into the Crown bank account:

- \$4,000 as part of the penalty imposed under s.13 of the WPA for a breach of s.12A(1) WPA;
- \$1,000 being part of a penalty awarded under s.134(1) of the Act for a breach of Mr Zhou's employment agreement;
- \$5,000 as a penalty under s.130(4) of the Act for failure to keep wage and time records and for failure to produce wage and time records upon demand.

Costs

[67] The parties are encouraged to resolve costs by agreement. If that is not possible then Mr Zhou may file a costs memorandum within 14 days of the date of

this determination with Harbit having 14 days within which to respond. This timetable will be strictly enforced and submissions will not be accepted outside of this timetable without the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority