

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 271
3022958

BETWEEN QI ZUO
 Applicant

A N D 123 CASINO LIMITED
 TRADING AS 123 PALM BAR
 & RESTAURANT & FUNCTION
 CENTRE
 Respondent

Member of Authority: Nicola Craig

Representatives: May Moncur for the Applicant
 Kenn Hew for the Respondent

Investigation Meeting: 17 May 2018

Submissions Received: At the investigation meeting from Applicant
 At investigation meeting and 22 and 24 May 2018 from
 Respondent

Date of Determination: 23 August 2018

**DETERMINATION OF THE
AUTHORITY**

- A. 123 Casino Limited is ordered to pay Qi Zuo the sum of \$297.50 gross as wage arrears, within 21 days of the date of this determination.**
- B. 123 Casino Limited unjustifiably dismissed Ms Zuo.**
- C. After a reduction for Ms Zuo's contribution, 123 Casino Limited is ordered to pay Ms Zuo, within 21 days of the date of this determination, the following remedies:**

- (a) \$5,569.20 gross as lost wages; and**
- (b) \$5,600.00 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**

- D. 123 Casino Limited is ordered to pay Ms Zuo the sum of \$152.28 gross as holiday pay within 21 days of the date of this determination.**
- E. 123 Casino Limited is ordered to pay a penalty of \$1,000.00 to the Employment Relations Authority, for transfer to the Crown account, within 21 days of the date of this determination, for breaching the Holidays Act 2003.**
- F. Costs are reserved and a timetable for submissions set in the event that the parties are not able to resolve the issue themselves.**

Employment Relationship Problem

[1] Qi Zuo worked for 123 Casino Limited trading as 123 Palm Bar & Restaurant & Function Centre (“Palm Bar or the company”) from August to September 2017 as a chef.

[2] Ms Zuo claims that she is owed wages and holiday pay, and was subject to an unjustified disadvantage and unjustified dismissal. The Palm Bar opposes Ms Zuo’s claims.

[3] I held an investigation meeting on 17 May 2018. Although the sole director of the company, Amy Guan, represented it before and after the investigation meeting, she informed the Authority that she was away on business at the time of the meeting. She therefore sent her administration manager Kenn Hew to represent her at the investigation meeting.

[4] At the investigation meeting I heard evidence in person from Ms Zuo, her partner Jerry Liu and Daniel Zhou (general manager of the Palm Bar). I also heard evidence by telephone from two head chefs from the Palm Bar restaurant, who I refer to by their anglicised names of Tina and Cher. I was also assisted at the meeting by

an interpreter of the Mandarin language and by documents translated into English by an accredited interpreter, filed earlier on Ms Quo's behalf.

[5] As there was new material raised at the investigation meeting and Ms Guan was not present, I gave the Palm Bar additional time to consider and file on those issues. Ms Guan took this opportunity, filing her conclusion and statutory declarations from Tina and Cher, which contained the same evidence as was in their previously filed witness statements.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

The issues

[7] The issues for investigation and determination are:

- (a) Whether Ms Zuo is owed arrears of wages for 16 to 19 August 2017, or was unjustifiably disadvantaged by the actions of the Palm Bar in not paying her for this training period?
- (b) Was Ms Zuo unjustifiably dismissed?
- (c) If a personal grievance is established what remedies, if any, should Ms Zuo receive?
- (d) Did the Palm Bar breach the Minimum Wage Act 1983 and if so, should it be liable to a penalty?
- (e) Did the Palm Bar breach the Holidays Act 2003 and if so, should it be liable for a penalty, and are there any arrears of holiday pay owing?

[8] Ms Zuo is not claiming payment for some hours she did over two days as a trial prior to 16 August 2017. She accepts that she agreed to do that time unpaid.

How did Ms Zuo start at the Palm Bar?

[9] Ms Zuo is a trained and qualified chef with relatively limited work experience. She was trying to find work cooking European style food. At this stage she was on an open work visa, not linked to an individual employer. The Palm Bar has a restaurant, with a kitchen staffed by three people at its busiest time in the evening. At quieter times only one staff member works in the kitchen.

[10] On 28 July 2017 Ms Zuo learned from a WeChat¹ message that the Palm Bar had a chef vacancy. She later saw an ad on the Skykiwi website for the same full time chef role. The Palm Bar accepts that the advertisements were for a full time role.

[11] Ms Zuo contacted the Palm Bar's general manager Daniel Zhou via WeChat and expressed her interest in the full time chef position. She was invited to come in to meet Mr Zhou on 30 July 2017. Ms Zuo says Mr Zhou talked about the position being full time. They had further communications via WeChat.

[12] On 8 August 2017 Ms Zuo contacted Mr Zhou again and was asked to come in to the restaurant for a period. She says this was a work trial but the Palm Bar described it as a voluntary observation.

What information did the Palm Bar provide?

[13] The Palm Bar filed an undated form which was headed "123 Palm Bar Kitchen Staff Application Information". It is not addressed to anyone nor is it from any individual, being concluded with "123 Palm Bar". The form sets out an option for applicants to come to observe the kitchen, with the head chef after a week conducting a test of technical knowledge and skill.

[14] Palm Bar says that it was provided to applicants on their first day on the premises. Mr Zhou thought that he had given Ms Zuo one on 11 August 2017. Ms Zuo denied ever having been given this sheet.

[15] The form provides some background. However, ultimately I am not satisfied that the form is of much significance to the present claims as Ms Zuo is not claiming payment of wages for the period when she was on trial. The Palm Bar says that this was an observation period for her to see how the kitchen worked.

When was Ms Zuo's first time in the Palm Bar kitchen?

[16] Ms Zuo completed what she describes as a two hour work trial on 11 August 2017. She was asked to come back for a further two hours on 12 August, which she did. She says the work included food presentation, making salads, deep frying and cleaning.

¹ Chinese messaging and social media app

What was then offered?

[17] On 13 August 2017 Mr Zhou contacted Ms Zuo by phone and asked her to do a trial of two to three days on pay. Mr Liu was sitting next to Ms Zuo while she was on this call and confirms his understanding from what Ms Zuo told him at the time. Ms Zuo refused to do any further trials.

[18] Later that day Ms Zuo was contacted by one of the head chefs, Tina, via WeChat. Tina asked why Ms Zuo did not want to come (to work at the restaurant). Ms Zuo replied that Mr Zhou wanted her to “try” for two or three times, five hours each time. She did not think it was proper to be working on trial. Tina replied that maybe Ms Zuo had the wrong understanding, and to let her work again is to get her more familiar so she can start (working). Tina continued, noting that it would be paid. She offered to talk to the boss, meaning Ms Guan.

[19] Tina contacted Ms Zuo by message on 15 August 2017, saying:

...you can come to work tomorrow, right? I've talked to the boss about your situation. The boss says everything will follow the normal procedure. If you learn well and work well, he can offer you work visa as well. The precondition is that you are competent for this job.

If ok, he will talk with you about the details.

[20] Ms Zuo replied ok, and Tina messaged “tomorrow you come in at 6 o'clock and finish at half past ten”.

[21] Ms Zuo notified Mr Zhou by message:

Tina has contacted me. She has explained to me and wants me to continue training in the kitchen. I have agreed. She has arranged the shifts for me. I'll go to work at 6 this evening. Just to let you know.

[22] Mr Zhou asked Ms Zuo to call him. She told him on the phone what Tina had said. Mr Zhou said he would check with Tina. It was not clear whether this happened. Mr Zhou did not know whether Ms Zuo had then worked from the 16th to the 19th of August.

Is Ms Zuo owed wages for 16 to 19 August 2017?

[23] Ms Zuo claims wages for the training period between 16 and 19 August 2017. There was also reference in the statement of problem to a disadvantage grievance

claim regarding the same matter. However, only one sum of compensation for humiliation, loss of dignity and injury to feelings was sought, presumably as the dismissal claim also related to the non-payment of wages for this period. I deal with this as a wage arrears claim, rather than a disadvantage grievance.

[24] Ms Zuo claims she should be paid for this training period as both Mr Zhou and Tina told her that this work was on pay, although the former referred to a trial and the latter to training. Ms Zuo says that she would not have come back to the restaurant to work if it was not on pay. Both Mr Zhou and Tina agree that Ms Zuo was told that she would be paid but then Ms Guan did not agree to do so.

[25] According to the Palm Bar's records Ms Zuo was paid only for work from 20 August 2017 onwards. Palm Bar disputes that Ms Zuo should have been paid for this period, although it was not always clear whether this was on the basis that Ms Zuo was not present at the restaurant in that period, or had been present, but only for observations. There was some evidence of staff undertaking unpaid trials or training of up of two or three weeks.

[26] Ms Zuo says that she worked from 6.30pm to 10.30pm on the 16th, 17th and 18th of August 2017, then from 6.30pm to 11.30pm on 19 August. This is consistent with the messages from Tina asking her to come in on 16 August 2017, talking about training and the time being paid.

[27] Although Tina could not clearly remember the dates which Ms Zuo worked, she confirmed that she had misunderstood what the manager (Ms Guan)² had told her about pay for the training period. The other head chef, Cher's recollection was of Ms Zuo undertaking simple jobs prior to 20 August, such as deep-frying chips.

[28] Mr Zhou understood that at some point before 20 August 2018 Ms Zuo had passed the head chef's test to assess her technical knowledge and skill. He was uncertain about when she was in the restaurant to be tested, but thought it must have been sometime between 16 and 19 August 2017. He does not know whether she was present in this period for observation or training. Mr Zhou denies knowing about Ms Zuo spending 17 hours in the restaurant during that period. He could not remember whether he was present during this period.

² The reference in the translation of the messages to 'he' rather than "she" in relation to Ms Guan was explained by the Mandarin use of pronouns.

[29] Mr Zhou accepted that Ms Zuo was misled into thinking she would be paid for 16 to 19 August, by the head chef.

[30] The Palm Bar produced some evidence to suggest that Ms Zuo had not worked during this period, or at least not on the basis of payment being required. There was a timesheet form which did not refer to the 16 to 19 August 2017 period, starting on 20 August. However, Ms Zuo had not seen that form and it appears to have been filled out and signed off by the head chef Tina.

[31] The Palm Bar relied on a handwritten note of hours made by Ms Zuo later on Mr Zhou's request on behalf of Ms Guan. The note starts with what appears to be "20th" with no reference to August. However, the hours recorded for that day do not match the roster of 20 August 2017 or the hours which Tina recorded for Ms Zuo on the timesheet. It was not clear whether Ms Zuo had been asked to note down all her hours or just the ones starting from 20 August.

[32] The evidence on the issue of what hours, if any, Ms Zuo worked between 16 and 19 August, is not straightforward. However, I am influenced by the evidence of Palm Bar witnesses that Ms Zuo was told that she would be paid for something which Ms Guan later said she would not be. Considering the evidence overall I am satisfied on the balance of probability that Ms Zuo did undertake 17 hours' work in the period from 16 to 19 August 2017 on the basis that she had been told that it would be paid. The head chef had at least ostensible authority to offer work on pay, and Ms Zuo accepted that offer.

[33] I order 123 Casino Ltd to, within 21 days of the date of this determination, pay Ms Zuo the sum of \$297.50 gross, being 17.5 hours at \$17 per hour.³

What happened after the training period?

[34] Ms Zuo was on the Palm Bar's roster and worked from 20 August 2017 onwards. Within a few days the issue about the payment for 16 to 19 August arose. However, before detailing those later events I need to consider the nature of Ms Zuo's employment and whether she was employed on a valid trial period.

³ This is the rate set out in Ms Zuo's employment agreement

When was the employment agreement supplied?

[35] Although it was not entirely clear whether the Palm Bar is relying on the trial period in the employment agreement, to be cautious I have assumed that it is. In order to determine whether Ms Zuo is able to bring an unjustified dismissal claim, I need to consider whether she was subject to a valid trial provision.

[36] The parties do not agree when Ms Zuo was given an employment agreement document. The parties have dated their signatures to the agreement as 20 August 2017. Mr Zhou initially referred to Chinese and English versions but later said there was only one contract. No Chinese version was filed in the Authority. I therefore proceed on the basis of the English agreement being the only agreement.

[37] Ms Zuo says that she was given the agreement after her shift starting on 28 August 2017, which was rostered to finish at 1.30am the following day. She describes how when she was finishing work, Mr Zhou asked her to see him. He printed out the contract and said she needed to sign it. They spoke for around five or ten minutes. She says that Mr Zhou told her that they needed to date it 20 August as she had been working at the Palm Bar since then.

[38] Ms Zuo was not certain whether she had signed the contract at that point or later in the day, possibly at home.

[39] Mr Zhou says that on 20 August 2017 he called Ms Zuo into his office and presented the employment agreement to her. He signed both copies and left her to read it. He says that he followed up about three or four days later about bringing it back. She says that she brought it back on the 28th or 29th of August 2017. Ms Zuo's signature being dated 20 August would still not be accurate on this version of events.

[40] Neither Ms Zuo, nor Mr Zhou seemed certain regarding events about the employment agreement. I look at other evidence for assistance. On 24 August 2018 Tina messaged Ms Zuo and included the statement:

She [Ms Guan] will sign contract with you and ask you for your IRD number. I just tell you that in advance.

[41] On the same day Mr Zhou messaged Ms Zuo:

when you have time, send me your personal information. I need the information to **set up a new contract with you**, and also for payments in the future. Full name, phone number, address, email, IRD No, and bank account (*emphasis added*)

[42] After further messages, Ms Zuo messaged:

...I'm familiar with everything and don't want to change the job any longer. So let's sign the contract first.

[43] She then included her personal information. Mr Zhou replied including the following:

Are you working this evening? **I'll get it ready for you this evening** (*emphasis added*)

Was Ms Zuo employed on a valid trial period?

[44] The messages between Mr Zhou and Ms Zuo, and from Tina are consistent with the written agreement not being provided until 28 or 29 August 2017. This is over a week after Ms Zuo started work according to the roster, regardless of the 16 to 19 August training period.

[45] I am satisfied that the employment agreement was presented and signed by the parties after Ms Zuo started work at the Palm Bar and therefore the trial period is not effective.⁴

What else did the agreement provide?

[46] In addition to the 90 day trial period clause, the agreement provided that it was a causal "as required" employment agreement⁵, with this provision:

The parties agree that because the Employee is being employed on an as required basis, the Employee has no fixed hours of work, or any minimum number of hours of work. ...⁶

[47] By contrast, although there is reference to 8% holiday pay in the hourly rate⁷, there is also a provision for four weeks' annual leave per year.⁸ Likewise the redundancy provisions do not suggest a casual arrangement.⁹

⁴ *Blackmore v Honick Properties Ltd* [2011] ERNZ 445 EC

⁵ Clause 3.1 of the employment agreement

⁶ Clause 6.1 of the employment agreement

⁷ Clause 7.1 of the employment agreement

⁸ Clause 8.1 of the employment agreement

⁹ Clause 12 of the employment agreement

What was the employment arrangement?

[48] The picture is more complicated when other evidence is considered.

[49] Ms Zuo considered that she had been appointed to a full time permanent job. The job advertisements in both WeChat and Skykiwi state a full time position. She says there was no mention of casual work at the interview.

[50] Mr Zhou says that the Palm Bar tries to offer a casual contract for three months to see if applicants are qualified for the roles. His recall was that he had told Ms Zuo on 11 August 2017 that there was a three-month trial and casual contract. He says that she was good with that. I find it unlikely that Ms Zuo, having seen an ad for a full-time role and having had what appears to have been permanent employment previously, would have been accepting of a casual contract. I do not accept that, before she started in the role, she was told that it was a casual one.

[51] There was also a suggestion that the hours were part time. Mr Zhou says that Ms Zuo was employed to take over from a part time chef who was rostered on two days and two nights a week for less than twenty hours work. However, other evidence was that that chef was working what would usually be described as full time hours. I do not accept that a part time arrangement was agreed upon.

[52] A casual arrangement would not usually be in keeping with a 90 day trial, which is to assess suitability for on-going employment. When asked about his understanding of a casual arrangement Mr Zhou said that the employee was on call if the Palm Bar needed them. However, when asked about how a trial period would work, Mr Zhou said that the employee would be rostered on for a certain amount of time to complete the trial. He also made reference to training being for the first month of the three month trial. He says that he spoke to Ms Zuo about the one month's training but accepted that there was no mention of that in the agreement.

[53] I found the total picture confusing, given the following apparent stages or elements:

- (a) the advertisement for a full time position;
- (b) the information sheet referring to an optional observation period with guidance from staff about the kitchen's processes, the assumption being that this was unpaid;

- (c) the sheet also referring to “after a week” the Head Chef conducting a test to assess the applicant’s technical knowledge and skill, with a contract provided after that before moving on to more formal training;
- (d) Mr Zhou offering a paid trial to Ms Zuo;
- (c) a one-month training period after appointment, paid at the minimum wage. Tina offering pay for a training period;
- (d) a “casual, as required” clause in the agreement, although other provisions suggesting a more permanent arrangement;
- (e) a 90 day trial period in the agreement, which requires assessment and involved the employee being rostered so they could be assessed; and
- (f) being offered a full-time agreement if the 90-day trial worked out, at a higher pay rate.

[54] At the very least it would not be surprising if there were different understandings as to what was being discussed and agreed to. I am not certain that all the stages actually occurred with Ms Zuo. For example, Tina was not aware of applicants having to undertake a practical test before starting work. Ms Zuo did not undertake such a test, at least in a formal sense envisaged by the information sheet.

[55] Having advertised the position as full time and with Ms Zuo being rostered in advance for six shifts a week, I do not accept that this was a casual arrangement. I am satisfied that Ms Zuo was employed in a permanent position.

What happened about the Palm Bar paying for the training period?

[56] On 24 August 2018 Tina messaged Ms Zuo about the payment for the training period:

Today, the boss talked to me about you. Tomorrow, she may ask somebody else to talk with you. For the payment of the training in the few days last week, it may not be the way I said. I don’t know why. May be I misunderstood what she said. Just to say sorry to you first ...The worst thing is I’ll try to make up the time for you for the week.

[57] On the same day Ms Zuo messaged Mr Zhou about the pay for the training. She mentions Tina’s message that the situation is not the way it had been agreed before, asking what the situation is now. He replied:

Yes, it isn’t the way. Today, the boss just talked with me and I was speechless too. I want to talk with you face to face and tell you about the situation, may be they didn’t communicate with the boss well!

[58] Mr Zhou accepted that Tina had accidentally misled Ms Zuo regarding payment. He started to investigate, by talking to Tina who said she had apologised to Ms Zuo.

[59] The next day Ms Zuo sent a lengthy message to Mr Zhou, including an acknowledgement that she was not claiming for the two hour trials as she had agreed not to be paid, but was pursuing payment for the later period and noting that the issue was not whether the boss (Ms Guan) wanted to pay but whether she should pay. She wanted Mr Zhou to leave a message for Ms Guan.

[60] On 28 August 2017 Ms Zuo provided her IRD number and bank account details to Mr Zhou. She was told that the company's standard practice was not to pay new workers who were on trial and training. According to Ms Guan it was unfair to the company if it had to pay for training time.

What was said between Mr Zhou and Mr Liu?

[61] Ms Zuo continued to raise her concerns about non-payment with Tina, but appears not to have pursued them further with Mr Zhou or Ms Guan during the next week or so.

[62] The issue came to a head on 8 September 2017. Ms Zuo went in to work. She was rostered to start at 11 am. Her partner Mr Liu wanted to solve the pay problem and decided to come in to the Palm Bar to confront the manager.

[63] Mr Zhou was working in the restaurant. He had not expected a meeting and had not met Mr Liu before. Mr Liu said that he was here to talk about his partner's wage problem. Mr Zhou was concerned that he was speaking about an employee with someone he had not met before who did not have any formal indication of his representation.

[64] Mr Zhou asked Mr Liu to come outside so they could talk. He says it was because Mr Liu was yelling in the bar and disturbing customers. There is a dispute about the loudness of the discussion or argument between the two men. Mr Liu denied yelling but accepted speaking in a loud voice. His behaviour was described as crazy by Mr Zhou.

[65] From a heated discussion it is not surprising that there are different recollections as to what was said. Mr Liu recalls saying if we can't solve this we'll go on strike, whereas Mr Zhou does not recall mention of a strike.

[66] However, the wages issue was not news to Mr Zhou. Ms Zuo had indicated strongly a fortnight before, on 25 August 2017, that she was most unhappy with outstanding pay issue. However, Mr Liu coming in unexpectedly with no indication to Mr Zhou of what he wanted to talk about was not ideal. Mr Zhou not surprisingly had some reluctance to talk to someone whose identity and authority to represent was not well established. Mr Liu was incensed that payment had not been made.

[67] Ms Zuo was entitled to be represented in the wages issue by anyone she chose.¹⁰ This includes her partner. However, there is a requirement that the person purporting to represent establishes their authority to do so.¹¹ It is unfortunate that the representation issue blew up and distracted from resolving the issue of the wages claim.

When happened when Ms Zuo departed from the restaurant?

[68] Mr Liu came into the kitchen and asked or told Ms Zuo to go on strike. Ms Zuo says that she told another chef, Cher that she was going to leave. She thought that Cher understood what the issue was, namely the pay issue. Cher says that she thought Ms Zuo was leaving the job altogether.

[69] Ms Zuo took her things. She thought that she told Mr Zhou she was leaving. Mr Zhou's recollection was that he asked her why she was leaving and she did not reply. Ms Zuo left the premises sometime prior to noon. Mr Zhou found the sudden departure weird and says that he was pretty shocked. There was no reference to a strike at this point.

[70] Ms Zuo's explanation to the Authority for leaving was that she was disappointed and frustrated that she was unable to resolve the pay issue. She felt that she had to deliver a clear message to the company and felt that she effectively had no other option. She did not articulate this to Mr Zhou when she left. She was at this point being paid for the work she had been doing, but was unable to get payment for the training days.

¹⁰ S 236(1) of the Act

¹¹ S 236(3) of the Act

What communications occurred after Ms Zuo's departure?

[71] There was some concern amongst Palm Bar staff about Ms Zuo's safety due to her sudden departure and the heated exchange involving Mr Liu. Mr Zhou tried to call Ms Zuo shortly after she left but she did not answer so he sent a message shortly after noon. He said that he wanted to know what the current situation was and the following message exchange occurred:

Mr Zhou: ...Because I need to get the confirmation from you as well as your decision. Your boyfriend cannot represent you legally. ...

Ms Zuo: You discuss with Tina. Pay me the salary in arrears first, then we can discuss other things.

Mr Zhou: That's not the issue. If you are absent like this without any notice, it is neglecting the work. If you don't want to work here any longer, you'd better send us a resignation notice, thus we can terminate the contract in 2 weeks!

Ms Zuo: It should be called strike. I didn't do this without any notice. I've told you that if you don't pay me the salary in arrears, I would go on strike.

Mr Zhou: You didn't tell me that. If you had talked to me in person and the situation were still like this I could do nothing, I would have sent you a formal email explaining the current situation. And there were legal responsibilities!

Mr Zhou: That's it. Thanks. The rest is for the boss to contact you!

Ms Zuo: My boyfriend told you that on behalf of me.

Mr Zhou: He can't represent you. The contract is between you and the company! However, that doesn't matter. Now that you have decided not to come to work, let's take the formal legal procedures! Thanks! Take care.

Mr Zhou: The rest will be followed by and resolved by our employer! Thanks. ...

[72] Although Mr Zhou indicted twice in that message chain that the boss (Ms Guan) would be dealing with this matter, Ms Guan did not contact Ms Zuo. Ms Guan says she decided to allow Mr Zhou to manage the matter.

[73] Then shortly after 2pm Mr Zhou emailed Ms Zuo:

We are sending this email to notify you that you have resigned from work without notice. According to the contract you have signed you must give two weeks' notice before leaving and in the event that you do leave without notice we reserve the right to sue for Loss suffered as a result of the breach, and seek a penalty for your breach.

[74] Ms Zuo messaged Tina on 8 September 2017 including saying that she had not resigned, although it was not evident whether this was passed on to Mr Zhou.

[75] Mr Zhou emailed Ms Zuo just before 7pm, saying:

In accordance with the agreed contract, in the event that no official notice of resignation is registered with the company you are still an employee. Your actions today goes against the agreed contract and your absence is uncalled for. Your unscheduled absence causes unforeseen loss to the company in areas such as additional expenditure to search for a new employee and revenue lost from lack of hands in the kitchen. This expenditure will need to be compensated by you. If you wish to resign please follow company procedure and organize a time to come to the office and fill out he prescribed resignation documents.

[76] Mr Liu emailed and messaged a lengthy message, including a reference to Ms Zuo not having resigned, but rather being on strike for unpaid wages. However, the email addresses which were supposed to be Mr Zhou's, were not the ones used by Mr Zhou on other occasions. There was also an indication from the Palm Bar that messages from someone claiming to be Ms Zuo's boyfriend were ignored and not responded to, as they would not legitimately identify who the sender was.

[77] Ms Zuo was not rostered to work on 9 September 2017. On 10 September she did not turn up to work despite being rostered on.

[78] On Monday 11 September 2017 Ms Zuo sought advice. She was rostered to start work that night at 7pm.

[79] Shortly after 5pm, Ms Zuo emailed Mr Zhou saying that she was prepared to return to work the following day while the parties continued attempts to resolve the wage issue. She got no response although there was no suggestion that Mr Zhou had not received this email.

[80] Around the same time Ms Zuo also messaged Mr Zhou saying that she had talked to her lawyer, who had advised her to go back to work and asking for a shift to be arranged for her from tomorrow. She then asked that if she was not wanted at work any longer to please send her a written notice about terminating. Ms Zuo then copied her email into the message. Again no reply was received from Mr Zhou although it was not suggested that he did not get the message.

[81] Around the same time Ms Zuo sent a message to a man she believed to be an owner of the Palm Bar. No reply was received but the Palm Bar indicted that the

message was received by Ms Guan's husband, who is not an owner, but passed the message on to Mr Zhou.

[82] Ms Zuo was not put back on the roster and considers that she was in effect dismissed after 11 September 2017.

Was Ms Zuo dismissed?

[83] Having established that Ms Zuo's employment was not covered by a valid trial period, I now examine the termination of her employment. She argues that she was dismissed because her offer to return to work was not acted upon by the Palm Bar. The Palm Bar suggests that Ms Zuo abandoned her employment.

[84] Clause 13.6 of the employment agreement provides that:

In the event that the Employee has been absent from work for three consecutive working days without any notification to the Employer, and the Employer has made reasonable efforts to contact the Employee, the agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

[85] I look firstly at whether Ms Zuo was absent from the workplace for three consecutive working days. The reference is to working days rather than calendar days.

[86] Ms Zuo left the workplace within an hour or so of starting on 8 September 2017. It cannot be said she was entirely absent on that day. She was not rostered to work the following day. She was rostered for 10 and 11 September 2017. She emailed and messaged Mr Zhou about two hours before she was due to start work on 11 September, that she wanted to return to work from the following day and asking for a shift. She received no reply. I am not satisfied that there was three consecutive working days' absence.

[87] There is also a requirement that those days be without notification to the employer. Mr Zhou emphasised the lack of contact from Ms Zuo, who did not respond to Mr Zhou's email of 8 September until 11 September. However, there was an extensive messaging exchange between the two on 8 September after Ms Zuo left the workplace. There were also Ms Zuo's email and messages on 11 September before her shift was to start that day, indicating her willingness to return to work the following day.

[88] Ms Zuo cannot be said to have been absent from work for three consecutive working days without any notification to the Palm Bar. The Palm Bar cannot rely on the abandonment provision in the employment agreement.

[89] There was no formal or written communication of a dismissal to Ms Zuo from the Palm Bar, nor likewise of a resignation from Ms Zuo to the Palm Bar. The Palm Bar in its second 8 September 2017 email indicated that Ms Zuo was still an employee as no official notice of resignation had been received. Ms Zuo had not resigned, nor at that point abandoned her employment. On 11 September 2017 she indicated her willingness to return to work. The Palm Bar did not indicate any willingness to have her back. At this point it effectively sent her away, thus dismissing her.

Was Ms Zuo unjustifiably dismissed?

[90] Did the Palm Bar act as a fair and reasonable employer could have done in all the circumstances?¹² Did the employer satisfactorily investigate, raise its concerns with the employee, give her a reasonable opportunity to respond and consider her explanations?¹³

[91] Ms Zuo walked out during her shift on Friday morning. The Palm Bar was entitled to be concerned about that, as it was inconvenienced. Ms Zuo did not make it clear on departure why she was leaving. However, within an hour or so of leaving, she put the company on notice by written message that she regarded her previously articulated claim for unpaid wages as justifying her departure as a strike.

[92] On Monday 11 September 2017 she sought advice and then communicated promptly to the Palm Bar that she would return to work. The Palm Bar did not accept her return to work. This is not the action of a fair and reasonable employer. I find that the Palm Bar unjustifiably dismissed Ms Zuo.

What remedies should Ms Zuo receive?

Lost wages

[93] Ms Zuo seeks reimbursement of lost wages at the rate of her average earnings whilst she worked at the Palm Bar, namely 31.5 hours per week. This amounts to gross earnings of \$535.50 per week.

¹² S 103A(2) of the Act

¹³ S 103A(3) of the Act

[94] Under s 128(2) of the Act I must order reimbursement of three months' lost wages. That amounts to \$6961.50 gross¹⁴, before consideration of any contribution by Ms Zuo.

[95] Ms Zuo seeks longer than the three month period, under s 128(3) of the Act as she was unable to find employment until into 2018. However, I am not satisfied that I should exercise my discretion in that regard. Her continued employment at the Palm Bar does not seem to have been sufficiently certain.

[96] Between late September 2017 and February 2018 Ms Zuo applied for over 100 jobs. She eventually started a part time job in early March 2018. I am satisfied that she attempted to mitigate her loss.

Compensation

[97] Ms Zuo claims \$15,000 for humiliation, loss of dignity and injury to feelings. She says there has been a very negative impact on herself, both financially and mentally after the dismissal. She was very upset and distressed. She stresses that the impact on her lasted for a very long time. No other supporting evidence was offered.

[98] I consider that an award of \$7,000 would be appropriate, before considering contribution.

Contribution and awards

[99] I have considered whether Ms Zuo contributed to the situation leading to her dismissal. She did absent herself from work which no doubt caused inconvenience for the Palm Bar.

[100] Although the reference is made to a strike, Ms Zuo's actions were not of a collective nature as envisaged by the strike definition in the Act.¹⁵ She was entitled to pursue payment for wages which she was thought she was entitled to. However, she had been paid on 1 and 7 September 2017 for all of her work since 20 August 2017, so this was not a situation of continuing failure to pay for on-going work.

[101] Ms Zuo was not immediately communicative to Mr Zhou at the time she left. However, she subsequently promptly messaged Mr Zhou when he attempted to call

¹⁴ 13 weeks at \$535.50 per week

¹⁵ S 81 of the Act

her. A prompter response to Mr Zhou's emails of 8 September 2017 would have been wise although Ms Zuo may well have been relying on the detailed email which her partner at least attempted to send to Mr Zhou. She sensibly sought advice on the next business day and then asked to return to work.

[102] I consider that a reduction for contribution should be made as Ms Zuo's actions, in dealing with a legitimate issue but in an unsatisfactory manner, can be seen as blameworthy and did contribute to the decision to dismiss.¹⁶ A deduction of 20% should be made.

[103] I therefore order the Palm Bar to pay Ms Zuo the following sums within 21 days of the date of this determination:

- (a) \$5,569.20 gross as reimbursement of lost wages; and
- (b) \$5,600.00 as compensation under s 123(1)(c)(i) of the Act.

Is Ms Zuo owed any holiday pay?

[104] Ms Zuo claims that she was not paid holiday pay. The Palm Bar says that no holiday pay is owing because Ms Zuo's pay included a holiday pay component. Ms Zuo's employment agreement specified that she would be paid an hourly rate of "\$17 per hour (included 8% holiday pay)".

[105] At the investigation meeting the Authority identified to the parties that the minimum wage at the relevant time was \$15.75 and with an 8% loading for holiday pay, takes the amount to \$17.01, slightly more than the pay specified in the employment agreement and what was paid to Ms Zuo.

[106] In Ms Guan's conclusion filed after the investigation meeting, an explanation was provided for failure to pay the one cent per hour, which related to the IRD. It was that the IRD's gross pay unit is calculated in a dollar and so one cent could not be paid for each hour, but that after Ms Zuo had worked 100 hours, she would have been paid an extra dollar.

[107] No evidence was offered to this effect at the investigation meeting. In addition, this explanation does not deal with the fact that the employment agreement

¹⁶ *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 at [175]

specified \$17.00. According to that document Ms Zuo was not entitled to an extra cent per hour. I do not accept the Palm Bar's explanation.

[108] Was the Palm Bar able to pay holiday pay in this way, sometimes referred to as pay as you go holiday pay, rather than allow her paid holidays during her employment?

[109] Under the Holidays Act 2003, section 28 sets out when an employee may be paid annual holiday pay with their pay. The first requirement in subs (1)(a) is that the employee must either be:

- (i) Employed on a fixed term agreement to work for less than 12 months;
or
- (ii) Work so intermittently or irregularly that is impracticable for the employer to provide four weeks annual leave.

[110] Ms Zuo was not on a fixed term agreement. Under clause 6.1 of her agreement, she is said to be employed as a casual employee with no minimum number of hours of work. However, I have found that Ms Zuo was not a casual employee and was rostered to work six shifts a week.

[111] I therefore do not consider that the Palm Bar meets the test in s 28(1)(a) of the Holidays Act and thus was not entitled to pay holiday pay with Ms Zuo's pay.

[112] For the sake of completeness, I record that I am also not satisfied that the Palm Bar can satisfy the other requirements of s 28 of the Holidays Act. The second requirement is that the employee must agree to the arrangement in his or her employment agreement.¹⁷

[113] Although clause 7.1 of the agreement states that the hourly rate includes 8% holiday pay, clause 8.1 of the agreement says that Ms Zuo will be entitled to be paid annual annual leave of four weeks per year after twelve months' continuous employment. In the agreement the parties have, on the face of it, agreed to two arrangements; one for inclusion of 8% pay for annual leave and one of four weeks' leave on pay a year.

¹⁷ S 28(1)(b) of the Holidays Act 2003

[114] The third requirement under s 28(1) of the Holidays Act is that the annual holiday pay must be paid as an identifiable component of the employee's pay.¹⁸ Neither the employment agreement nor the company's pay records show an identifiable component of the pay as being for holiday pay. Ms Zuo did not receive any payslips and worked a variable number of hours, meaning that her weekly pay was changeable. I do not consider that the holiday pay component can be said to be an identifiable component of her pay in those circumstances.

[115] The fourth requirement under s 28 of the Holidays Act is that the annual holiday pay must be paid at a rate not less than 8% of the employee's gross wages. As noted above, the minimum wage rate at the time was \$15.75. Adding 8% on top of that takes the pay to \$17.01, a cent more than Ms Zuo received. As Ms Zuo could not be paid below the minimum wage I am not satisfied that her holiday pay was being paid at the rate of 8% on top of her wages.

[116] The Palm Bar has not met the requirements of s 28(1) of the Holidays Act and cannot establish that Ms Zuo was lawfully paid holiday pay with her pay. The consequence under s 28(4) is that, despite payments made, the employee becomes entitled to annual holidays and to be paid for them. Ms Zuo is thus entitled to payment under s 25 of the Holidays Act.

[117] Ms Zuo is entitled to holiday pay calculated at the rate of 8% on \$1903.50, being the total gross wages paid to her during her employment (\$1606.00) and the amount ordered to be paid to her for the training period (\$297.50). The Palm Bar is ordered to pay Ms Zuo the sum of \$152.28 gross as holiday pay within 21 days of the date of this determination.

Should the Palm Bar be penalised?

[118] Ms Zuo seeks that penalties be awarded against the Palm Bar for breach of the Holidays Act and the Minimum Wage Act. Given the complexity of some of the evidence, it was not always consistently argued which actions or failures, penalties were sought in relation to.

[119] The first prospect I consider is regarding the failure to pay Ms Zuo for the training period from 16 to 19 August 2017. Concern was expressed in submissions

¹⁸ S 28(1)(c) of the Holidays Act

for Ms Zuo that, at least some, Chinese restaurants appear to be requiring lengthy trial periods without pay. There was some limited evidence that that had occurred at the Palm Bar, which is concerning, however, it did not involve Ms Zuo.

[120] Ms Zuo attended for four hours which she accepted would not be on pay. After that, probably due to her objections to unpaid trials, she was offered pay for a trial, which she did not accept, then offered pay for training. I have found that she was entitled to that money. I am not satisfied that in those circumstances a penalty should be awarded.

[121] The next penalty issue concerns whether Ms Zuo was paid the minimum wage when she was paid, and whether she was properly paid holiday pay. As is evident from the discussion regarding holiday pay above, the Palm Bar paid Ms Zuo an amount which was above the minimum wage, if it did not include a holiday pay component. It came very close to reaching the minimum wage plus an 8% holiday pay component, although was under by one cent per hour. In any event I have found that holiday pay could not be paid in this manner.

[122] In those circumstances, it seems excessive to consider penalties under both the Minimum Wage Act and the Holidays Act. I have ordered the Palm Bar to pay Ms Zuo holiday pay. She will therefore receive a payment for holiday pay on top of what she was paid, which if looked at solely as her hourly pay, was above the minimum wage. I therefore will not impose a penalty under the Minimum Wage Act.

[123] I do consider that a penalty should be imposed under the Holidays Act for the failure to pay Ms Zuo 8% of her gross earnings on her employment coming to an end, as required by s 23 of the Holidays Act.

What is the appropriate penalty?

[124] Undertaking the first step of the *Borsboom v Preet PVT Ltd*¹⁹ (*Preet*) test, companies who fail to comply with Holidays Act provisions are liable to a penalty of up to \$20,000.²⁰ There is only one breach, making the maximum total penalty \$20,000.

¹⁹ [2016] NZEmpC 143

²⁰ S 75 of the Holidays Act 2003

[125] Moving on to the second *Preet* step, I consider that this failure as supporting a level of 20% of the total penalty, namely \$4,000. I regard this breach as inadvertent or, at worst, negligent, as the Palm Bar considered that it was lawfully paying holiday pay on an as you go basis. Ms Zuo only worked for a short period at the restaurant. She was on an open work visa at the time, rather than being dependent on the Palm Bar for her immigration status. There was no evidence of any effect on her of not being paid holiday pay.

[126] At the end of the investigation meeting, given Ms Guan's absence and the apparent failure to appreciate prior to the investigation meeting that amount paid was not sufficient to satisfy the minimum wage plus 8% holiday pay requirement, the Palm Bar was given additional time to provide further information. This was a time when an offer or payment of reparation or restitution could have been made, but the Palm Bar did not take that step. Rather it provided the IRD explanation.

[127] I consider that a reduction of 75% should be made taking into account the mitigating factors. This gives a total of \$1,000.

[128] The third *Preet* consideration is the ability to pay. No evidence was provided in this regard.

[129] I turn to the final step being a consideration of proportionality. I take into account that the amount of holiday pay not paid. I do consider that a reduction is required. A final penalty of \$1000.00 is sufficient to punish and deter the Palm Bar from any such non-compliance with its obligations and to deter other employers from similar behaviour.

[130] I order 123 Casino Ltd to pay a penalty of \$1,000.00 to the Employment Relations Authority, for transfer to the Crown account, within 21 days of the date of this determination. Ms Zuo sought payment to the Crown, rather than to herself saying that she wanted to draw the attention of employers to the legal requirements, which are not always met.

Costs

[131] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Zuo shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Palm Bar shall have a

further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[132] The parties could expect the Authority to determine costs, if asked to do so, on its usual ‘daily tariff’ basis unless particular circumstances or factors require an adjustment upwards or downwards.

Nicola Craig

Member of the Employment Relations Authority