

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 88
EMPC 285/2018
EMPC 391/2018**

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
BETWEEN	123 CASINO LIMITED T/A 123 PALM BAR & RESTAURANT & FUNCTION CENTRE Plaintiff
AND	QI ZUO Defendant

Hearing: 24, 25 and 26 September 2019 and 29 November 2019
(Heard at Auckland)

Appearances: M Lewis, counsel for plaintiff
M Moncur, advocate for defendant

Judgment: 19 June 2020

JUDGMENT OF JUDGE K G SMITH

[1] In early August 2017 Qi Zuo applied for a job as a chef at 123 Casino Ltd, trading as 123 Palm Bar & Restaurant & Function Centre. By agreement she completed an observation period in Palm Bar’s kitchen followed by four days of a work trial conducted on 16–19 August 2017.

[2] The work trial was satisfactorily completed and thereafter an employment agreement was signed. Ms Zuo’s name was added to Palm Bar’s staff roster and she was allocated shifts. She worked at Palm Bar until abruptly leaving the kitchen on 8 September 2017, in protest at not having been paid for the work trial completed in mid-August. Eventually Ms Zuo offered to return to work while the problem was

resolved, but Palm Bar did not respond to her. Ms Zuo considered she had been unjustifiably dismissed and raised a personal grievance.

[3] When the personal grievance was investigated by the Employment Relations Authority it rejected Palm Bar's claims that Ms Zuo was a casual employee, working only when required, or that her employment was subject to a 90-day trial.¹

[4] Ms Zuo's personal grievance succeeded and the Authority ordered Palm Bar to pay her \$5,569.20 gross for lost wages and \$5,600 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Those awards made an allowance for Ms Zuo's conduct that contributed to her dismissal. Palm Bar was also ordered to pay \$297.50 as wage arrears, \$152.28 for holiday pay and a penalty of \$1,000 for breaching the Holidays Act 2003. In a subsequent determination Palm Bar was ordered to pay costs.²

The challenges

[5] Palm Bar challenged the determinations and, initially at least, sought to place in issue all of the Authority's findings. The company subsequently elected not to continue its challenge to the Authority's conclusion that Ms Zuo was entitled to be paid for the work trial period of 16–19 August 2017 and accepted it owed her arrears of holiday pay. Before this concession was made it argued that the work trial was to be without pay, as will be discussed later in this decision. It also accepted that reliance could not be placed on the 90-day trial provision in the employment agreement.

[6] Palm Bar continued its challenge to the balance of the Authority's determinations. Its case was that it did not unjustifiably dismiss Ms Zuo because she was a casual employee who ended employment by abruptly leaving work in September 2017. It had two alternative arguments if the Court held that she was a permanent employee; that she repudiated the employment agreement by leaving when she did, or had abandoned her employment.

¹ *Zuo v 123 Casino Ltd t/a 123 Palm Bar & Restaurant & Function Centre* [2018] NZERA Auckland 271 (Member Craig) (substantive determination).

² *Zuo v 123 Casino Ltd t/a 123 Palm Bar & Restaurant & Function Centre* [2018] NZERA Auckland 292 (Member Craig).

The issues

[7] The issues in this proceeding are:

- (a) When was Ms Zuo employed by Palm Bar?
- (b) What was the nature of her employment?
- (c) Was she dismissed by Palm Bar?
- (d) If the answer to (c) is yes, was that dismissal justified?
- (e) If the answer to (d) is no, what remedies, if any, is she entitled to?
- (f) Was a penalty appropriate and, if so, was the amount ordered justified?

When was Ms Zuo employed?

[8] This issue arose because of three periods of time when Ms Zuo was at Palm Bar. Her attention was drawn to an advertisement on a Chinese language website in late July 2017, where Palm Bar was seeking to fill vacancies for a full-time duty manager and a full-time chef. After exchanging messages with Palm Bar's restaurant manager, Yao Zhou, she agreed to undertake an unpaid period of work observation that eventually took place in two sessions, on 11 and 12 August 2017. Ms Zuo declined an invitation to return for a further unpaid period of work observation.

[9] On 13 August 2017 Ms Zuo exchanged messages on WeChat with Palm Bar's Duty Head Chef, Hongyun Liu, and she was invited back for a few more hours of work. The offer from Ms Liu was for a formal work trial but this time on pay. The proposed start date for this trial was 16 August 2017. There were said to be two inducements to this offer; the possibility of employment and future assistance with a visa. Ms Zuo worked from 16 August until 19 August 2017.

[10] After completing the work trial Ms Zuo was offered employment and signed an employment agreement but there is a dispute over when it was signed. Both parties agreed that it was dated 20 August 2017. However, Mr Zhou said that he handed the

agreement, already signed by him, to Ms Zuo on 20 August 2017 and she returned it on 28 August 2017. Ms Zuo said the agreement was signed by both of them at the end of her shift on 28 August 2017 and backdated to when she started work after the conclusion of the trial. It is not necessary to resolve this dispute because the agreement was signed and Ms Zuo did start work on 20 August 2017.

What was the nature of the employment?

[11] The parties agreed that Ms Zuo's work observation was not employment and she was not entitled to be paid for it. There was, however, a dispute about the status of her employment during the work trial. While a lot of evidence was directed at resolving this disagreement nothing material turns on it because of Palm Bar's concession that wages for this period are owed.

[12] Ms Lewis, counsel for Palm Bar, argued that from 20 August 2017 Ms Zuo was employed on a casual basis to work as and when required. If that proposition is accepted, it undermines Ms Zuo's claim and the remedies awarded by the Authority.

[13] Ms Lewis relied on what Mr Zhou said he offered Ms Zuo during discussions about the job and the terms of the agreement. Mr Zhou said that he explained Palm Bar's selection process during the interview with Ms Zuo. That process included an opportunity to observe in the kitchen followed by a work trial and assessment by the head chef. He said Ms Zuo was told that there would be no payment for the observation and work trial and that employment would be casual, initially, because she lacked relevant experience.

[14] Ms Zuo accepted that the interview covered an opportunity for her to observe and participate in a trial, but denied ever being told that the employment would be casual. As an aside, all of Palm Bar's witnesses described Ms Zuo's employment as casual, including its managing director, Amy Guan. That was surprising because, except for Mr Zhou, none of them was present at the job interview or when the agreement was signed.

[15] Turning to the employment agreement, it described the employment as casual in cl 3, the relevant part of which reads:

The parties to this agreement agree that the nature of the relationship is a casual “as required” employment relationship.

[16] The balance of cl 3 stated that the employer agreed to provide reasonable notice about when Ms Zuo would be requested to work and the duration of that work. Despite this clause, the agreement was described as continuing in force until it was terminated by either party in accordance with its terms.

[17] Casual employment was mentioned again in cl 6.1, dealing with the hours of work. It provided that, because employment was on an “as required basis”, there were no fixed hours of work or any minimum number of hours of work.

[18] While cls 3 and 6 referred to casual employment, there were other clauses that suggested something else. Clause 3.2 contained a 90-day trial, described as being to assess and confirm the employee’s suitability.³ Clause 8 provided for holiday and leave entitlements; four weeks paid leave per year after 12 months of continuous employment, leave in advance and public holidays. Clause 8.4 dealt with sick leave for “genuinely casual employees”. The entitlement was to five days sick leave if the employee had worked for six months at not less than a stated minimum number of hours per week. An entitlement to an additional five days sick leave was available for each 12-month period so long as certain criteria were established. Under cl 8.5 taking sick leave for an absence of at least three consecutive calendar days required a medical certificate. Bereavement leave, an ability to apply for unpaid leave and leave to undertake jury duty were all provided for as was an option to join KiwiSaver.

[19] Restructuring and redundancy were dealt with in cl 12. Redundancy was defined as a situation where the position held by the employee is, or will, become surplus to the requirements of the business. Where employment ended because of redundancy two weeks’ notice in writing was to be given.

[20] The agreement also contained clauses dealing with suspension, termination of employment for serious misconduct, termination for medical incapacity, and abandonment of employment. Aside from redundancy, termination of employment

³ By reference to Employment Relations Act 2000, ss 67A and 67B.

was to be on one week's notice where it was within the trial period and otherwise on two weeks' notice.

[21] In support of Ms Zuo being held to have been a casual employee Palm Bar place reliance on *Jinkinson v Oceana Gold (NZ) Ltd.*⁴ In *Jinkinson* the Court considered an employment agreement that described the employment relationship as casual before concluding that on-going employment had been created.⁵ The Court held that where the employment relationship is ongoing, statutory and contractual rights and duties apply until the relationship is terminated. In contrast, the essence of casual employment was that an employment relationship existed only during periods of work and the parties had no obligations to each other in between them.⁶

[22] In *Jinkinson* the Court inquired into the true nature of the relationship. It held that the agreement needed to be assessed as a whole and the label should not prevail over its substance.⁷ In that case the strongest indicator of ongoing employment was that the employer had an obligation to offer the employee further work that became available and the employee had an obligation to carry it out.⁸ I agree with *Jinkinson*.

[23] I consider that, taken as a whole, the employment agreement between Ms Zuo and Palm Bar is strongly redolent of ongoing employment. Although the relationship was described in places as casual, those clauses dealing with holidays, sick leave, termination of employment, and redundancy are more consistent with ongoing employment. There was no reason, for example, to provide for redundancy if Ms Zuo was employed as and when required. If no work was available Palm Bar could simply elect not to offer a further period of employment.

[24] There are other indicia of ongoing employment. The job advertised was for a full-time chef and that was what Ms Zuo applied for. She had been working in a permanent job as a chef at another restaurant before accepting the job at Palm Bar. I doubt she would have left the relative security of her previous job for the potential

⁴ *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 (EmpC).

⁵ At [7].

⁶ At [24].

⁷ At [37].

⁸ At [41].

uncertainties of employment on an as-and-when required basis. Furthermore, Palm Bar published a work roster to which it added Ms Zuo's name on 20 August 2017. Her name remained on it continuously and she had to give advance notice to alter the roster. That is inconsistent with the agreement stipulating that there were no fixed hours of work and suggests ongoing employment.

[25] Against those indicators, Palm Bar claimed that Ms Zuo realised she was a casual employee, because she asked Ms Liu to find out if the company would change her employment agreement to assist her immigration status. Ms Zuo denied making such a request. She said Palm Bar's help was not necessary because she held an open visa, entitling her to be in New Zealand, and her domestic relationship gave the necessary status to seek permanent residency. This evidence was equivocal. On balance, I am not persuaded that, if such a request was made, it indicated knowledge and acceptance by Ms Zuo that her employment was casual.

[26] I am satisfied that when Ms Zuo began work on 20 August 2017 she became a member of the permanent staff of Palm Bar and was not a casual employee.

Was Ms Zuo dismissed?

[27] Ms Zuo was rostered to work from 20 August 2017 until 17 September 2017 but left work shortly after her shift started on 8 September 2017 and did not return.

[28] On 8 September, just after Ms Zuo's started work, her partner entered Palm Bar to speak to Mr Zhou. The purpose of this visit was to get the company to pay Ms Zuo the wages it owed her for the trial. In the ensuing discussion, Mr Zhou was told that the wages needed to be paid immediately or Ms Zuo would stop work. Ms Zuo's partner was asked to leave, which he did, followed shortly afterwards by Ms Zuo.

[29] After Ms Zuo left Mr Zhou made several unsuccessful attempts to telephone her followed by a text message asking her to telephone him. The response he received was a message that she would not discuss what had happened until the arrears of wages were paid. She described her protest as being on strike until she was paid.

[30] An exchange of messages on WeChat followed later that day. Mr Zhou sent a message to Ms Zuo asking her to follow what he described as the procedures in the employment agreement. In sending this message he was hoping to establish her intentions and whether she was returning to work or had quit. His message did not deal with the missing wages. Ms Zuo did not respond personally and, instead, her partner sent an email to Mr Zhou just before 8 pm. Mr Zhou was advised that Ms Zuo had not resigned. Her actions were described, again, as being on strike for the wages that she should have been paid for the work trial.

[31] Mr Zhou was off duty on 11 September 2017 when he received a message from Ms Zuo informing him that, on legal advice, she would resume work the following day and asking him to arrange a shift for her. She repeated that message later during the day and apologised for any inconvenience she had caused. He never replied. Ms Zuo did not return to work on 12 September 2017, even though she had originally been rostered to work that day, or on any of the subsequent days that she was rostered to work.

[32] By 18 September 2017, Mr Zhou considered the point had been reached where Ms Zuo had ended her employment, because there had been no contact between them after her messages on 11 September. He did not explain why Ms Zuo's messages went unanswered.

[33] Ms Zuo's protest was characterised by Palm Bar as a repudiation of the employment agreement capable of being accepted by it.⁹ As a precursor to arguing that Ms Zuo repudiated the employment agreement, Ms Lewis emphasised that the agreement contained a dispute resolution mechanism that had not been adhered to by her. Ms Lewis listed six occasions when, she said, Ms Zuo could have consulted Ms Guan. The submission was that, in taking the drastic step of leaving work, she undermined her claim about the reason for the protest.

[34] This argument was advanced because liability to pay for the trial was initially disputed and to provide some context to the catalyst for the protest. Before making the concession mentioned earlier, the company had maintained that while Mr Zhou

⁹ Relying on the Contract and Commercial Law Act 2017, s 36.

and Ms Liu were happy for Palm Bar to pay for the trial, the company's policy was that Ms Guan had the final say about that. It would seem the company considered this information had been relayed to Ms Zuo before she carried out the trial.

[35] Whatever Palm Bar now believes was intended about payment for the trial, that information was not communicated to Ms Zuo at any time. It knew, or ought to have known, that an unqualified commitment to pay had been made and not met. Ms Lewis' submission would see an onus being placed on Ms Zuo to initiate a dispute resolution mechanism to obtain payment of an undisputed debt. Such an argument is wholly unpersuasive.

[36] Returning to the issue of repudiation, the communication between Mr Zhou and Ms Zuo after her abrupt departure had one important feature. In almost all of the messages sent by Mr Zhou, he was looking for confirmation about Ms Zuo's intentions. It was clear to him, from what was being said by her or on her behalf, that she did not intend to end her employment. He deferred taking any action pending some clarity being provided and did not, at any stage, purport to end the employment relationship.

[37] The nearest these exchanges got to dealing with potentially ending employment was one message from Mr Zhou informing Ms Zuo that she was neglecting her work and that if she did not want to continue to be employed, she would have to "send ... a resignation notice." Two weeks' notice was requested, as required by the agreement. In another message Ms Zuo was told that since she had decided not to come back to work, "formal legal procedures" would be necessary, but he did not describe them and no steps were taken.

[38] Relying on Ms Zuo's departure and these exchanges of messages, Ms Lewis sought to establish that she had repudiated the employment agreement and, when the company did not respond to her request to return to work, that was conduct by it accepting the repudiation. She relied on s 41 of the Contract and Commercial Law Act 2017.

[39] That section reads:

41 When cancellation may take effect

- (1) The cancellation of a contract by a party does not take effect—
 - (a) before the time at which the cancellation is made known to the other party; or
 - (b) before the time at which the party cancelling the contract shows, by some clear means that is reasonable in the circumstances, an intention to cancel the contract, if—
 - (i) it is not reasonably practicable for the cancelling party to communicate with the other party; or
 - (ii) the other party cannot reasonably expect to receive notice of the cancellation because of that other party's conduct in relation to the contract.
- (2) The cancellation may be made known by words or by conduct showing an intention to cancel, or both. It is not necessary to use any particular form of words, so long as the intention to cancel is made known.

[40] Ms Lewis did not refer to any case where silence was sufficient to establish that a contract was cancelled. I do not accept that Palm Bar satisfied s 41 and, consequently, that Ms Zuo's employment came to an end when Mr Zhou stopped communicating with her.

[41] To satisfy s 41 cancellation must be made known to the other party: see s 41(1)(a).¹⁰ Section 41(2) allows cancellation to be achieved by words or conduct or both. Nothing said or done by Mr Zhou could be construed as making Ms Zuo aware that Palm Bar considered she had repudiated the employment agreement and the company was cancelling it in response. All the indicia point in the other direction, towards communication showing the agreement remained alive at least temporarily.

[42] The company was already in breach when Ms Zuo staged her protest and, while the walk-off was not commendable, it was perhaps understandable. Mr Zhou knew the reason for it and he elected not to treat that behaviour as a repudiation by making it clear that the agreement continued to apply at least until such time as proper notice was given to end it. That notice was never given by Ms Zuo. If it was necessary to

¹⁰ Palm Bar did not seek to argue that s 41(1)(b) applied.

do so, I would find that each of the messages sent by Mr Zhou seeking clarity about Ms Zuo's intentions affirmed the agreement.¹¹

[43] Palm Bar had an alternative argument, that Ms Zuo abandoned her employment. Pursuant to cl 13.6 of the employment agreement, employment automatically terminated at the end of the third consecutive working day when she was absent from work without permission. The Court was invited to draw an inference that she was not genuinely intending to return to work and her messages on 11 September were no more than an attempt to stave off a claim that she had abandoned her employment.

[44] Abandonment is defined in the agreement. It did not occur unless Ms Zuo was absent from work for three consecutive working days without notifying Palm Bar. It also required Palm Bar to have made reasonable efforts to contact her. Ms Moncur, Ms Zuo's advocate, submitted that three consecutive working days did not elapse because Ms Zuo was not rostered to work on 9 September 2017 and had contacted the company on 11 September seeking to return to work. I agree; Ms Zuo was not absent for the required number of working days to trigger the abandonment clause. This argument would also fail because Palm Bar made no efforts to contact Ms Zuo after she communicated with it on 11 September.

[45] I agree with the Authority's conclusion that the company's failure or refusal to restore Ms Zuo to its roster meant that she was dismissed with effect from 11 September 2017.¹²

Was the dismissal justified?

[46] The test for justification is in s 103A of the Act. It is to assess whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.¹³ The test is objective.¹⁴

¹¹ Contract and Commercial Law Act, s 38.

¹² Substantive determination, above n 1, at [89].

¹³ Section 103A(2).

¹⁴ Section 103A(1).

[47] While Ms Lewis presented an argument that Ms Zuo's behaviour showed a lack of good faith, the reality is that the company was in breach of its obligations and its attitude to paying her was the direct cause of all that followed. In those circumstances, a fair and reasonable employer would not have left matters as they were on 11 September 2017 by ignoring Ms Zuo's requests to return and to work out the problem between them (such as it was).

[48] Ms Zuo was unjustifiably dismissed and is entitled to remedies.

Remedies?

[49] In the Authority Ms Zuo claimed \$15,000 as compensation for humiliation, loss of dignity and injury to her feelings. The Authority considered that \$7,000 was appropriate before taking into account any contribution to the dismissal by her.¹⁵ A reduction for her contributory conduct was made because, while she had a legitimate issue to raise, she did so in an unsatisfactory way. The Authority made a 20 per cent reduction for that contributory conduct.¹⁶

[50] Challenging the award of compensation, Palm Bar argued that direct evidence of loss was required.¹⁷ It was said that there was little evidence Ms Zuo genuinely suffered psychological harm, distress, depression, anxiety, stress or guilt caused by its actions. A calculating view was attributed to her, because of communications she sent to the company referring to the possibility of a complaint being made about it and the difficulties that would follow.

[51] Palm Bar's alternative argument was that if an award was to be made, it should be in the lowest band referred to in *Waikato District Health Board v Archibald*.¹⁸

[52] Ms Zuo's evidence was not overly detailed, but she described a negative impact on her both financially and mentally following the dismissal and, in particular, her reaction to being supported by her parents in China. I am satisfied there was

¹⁵ Substantive determination, above n 1, at [97]–[98].

¹⁶ At [102].

¹⁷ Relying on *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, [2017] ERNZ 352 at [116].

¹⁸ *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62].

sufficient evidence to support an award of compensation. That evidence did not suggest an ulterior motive in pursuing Palm Bar to have it satisfy its contractual and statutory obligations.

[53] I agree with the Authority that a reasonable starting point before considering any contributory conduct was \$7,000, which would be an award in the lowest band referred to in *Archibald*.¹⁹ That said, it was inappropriate for Ms Zuo to pursue her complaint with Palm Bar in the manner she chose, even though its behaviour was egregious. The Authority made a 20 per cent discount for that contributory behaviour and, in the circumstances, that allowance was appropriate. Consequently, there is no reason to depart from the Authority's award which is now confirmed.

The penalty

[54] The Authority concluded that a penalty was appropriate because Palm Bar had failed to pay Ms Zuo her holiday pay, calculated at eight per cent of her gross earnings.²⁰ In the subsequent analysis the Authority accepted that there was one breach, that it was inadvertent or at worst negligent, and that there was no evidence of any effect on Ms Zuo of not being paid holiday pay.²¹ It also noted that, at the end of the investigation, Palm Bar was given additional time to provide further information during which it could have made an offer to pay but did not do so.²² Weighing all of these factors, the Authority decided that the appropriate and proportional penalty was \$1,000 payable to the Crown.²³

[55] Ms Lewis concentrated Palm Bar's challenge on the amount of the penalty by arguing it was grossly disproportionate in the circumstances and taking into account other consequences for the company. Palm Bar considered that no penalty should be imposed because the breach:

¹⁹ Above n 18; and by reference to *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [52]–[54] and [67].

²⁰ Relying on *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.

²¹ Substantive determination, above n 1, at [125].

²² At [126].

²³ At [130].

- (a) arose due to a miscalculation of a minor nature on the per hour rate payable to Ms Zuo;
- (b) affected only Ms Zuo;
- (c) operated for less than four weeks;
- (d) did not seriously harm the employee; and
- (e) was unintentional.

[56] To support this part of the challenge Ms Guan said that there had been a penalty of a different sort imposed on Palm Bar, because its ability to sponsor migrant workers had been suspended for six months by the Ministry of Business, Innovation and Employment. The suspension meant that the company's name was published on the Ministry's website. A further and related penalty was said to have been suffered by the company, because it lost two long-standing and senior staff members whose work visas required renewal during the suspension time.

[57] The following factors are usually taken into account in assessing whether a penalty should be imposed and, if it is, the amount:²⁴

- (a) The object in s 3 of the Act.
- (b) The nature and extent of the breach or involvement in the breach.
- (c) Whether the breach was intentional, inadvertent or negligent.
- (d) The nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach.

²⁴ See the discussion in *Nicholson v Ford* [2018] NZEmpC 132, [2018] ERNZ 393 at [18].

- (e) Whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach.
- (f) The circumstances of the breach, or involvement in the breach, including the vulnerability of the employee.
- (g) Previous conduct.
- (h) Deterrence, both particular and general.
- (i) Culpability.
- (j) Consistency of penalty awards in similar cases.
- (k) Ability to pay.
- (l) Proportionality of outcome to the breach.

[58] Assessing the relevant factors, I accept that the amount of the short-payment was modest, but it involved a failure to satisfy an employment standard.

[59] While there was no evidence about how the breach occurred, I am prepared to give the company the benefit of the doubt and accept it was able to satisfy the Authority that what happened was inadvertent or at worst negligent.

[60] Failure to pay Ms Zuo what she was owed self-evidently had an effect on her, because she was deprived of the use of her money. What is more, the money has remained owing to Ms Zuo even though the company's preparedness to pay it was signalled when an amended statement of claim was filed on 10 April 2019. It forms part of the funds held by the Registrar to satisfy the stay granted by the Court.

[61] The next relevant factor to consider is previous conduct. Palm Bar has not previously breached the Holidays Act in relation to Ms Zuo or anyone else.

[62] That leaves for consideration whether it is appropriate to impose a penalty having a deterrent effect, both generally or in relation to this employer. Deterring employers from failing to properly calculate and pay holiday pay points towards imposing a penalty, as does the need to punish Palm Bar and deter it from repeat behaviour of this sort. Palm Bar knew from a reasonably early point in time that it had not properly calculated and paid what was owing and its efforts to correct this error were unsatisfactory.

[63] While some of these factors suggest a penalty might not be imposed, I consider they are outweighed by the breach being of a minimum standard and the need for general and specific deterrence. I agree with the Authority that a penalty of \$1,000 is appropriate.

Outcome

[64] Palm Bar's challenges to the Authority's determinations are dismissed.

[65] The Registrar is holding funds deposited by Palm Bar to satisfy a stay of execution of the determination. The Registrar is directed to pay that money plus accumulated interest to Ms Zuo.

[66] Payment of the penalty was stayed pending further order of the Court. That stay is set aside and the amount is due and owing.

[67] Costs are reserved. The parties are encouraged to agree on costs but, if agreement cannot be reached, memoranda may be filed. Ms Zuo may submit a cost memorandum with 15 working days and Palm Bar may respond within a further 15 working days. Submissions are to be confined to no more than 10 pages.

K G Smith
Judge

Judgment signed at 3.30 pm on 19 June 2020