

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5367995
[2012] NZERA Auckland 405

BETWEEN	JOSEPH CHIN Applicant
A N D	SWITCH ON LIMITED First Respondent
A N D	TONGHUA LIMITED Second Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
No appearance for Respondent

Investigation meeting: 17 October 2012 at Auckland

Date of Determination: 16 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Chin) alleges that he is owed wages by one or other of the respondents (the respondents).

[2] Despite the Authority's support officer taking all the usual steps to engage with the respondents and seek their input into proceedings, no statement in reply has been filed and, despite promises to engage, the respondents have not engaged with the Authority at any stage of its preliminary process or indeed its investigation.

[3] Despite the failure of the respondents to so engage, the Authority is satisfied that all proper steps were taken to engage the respondents and that the respondents' failure to address the matter is wilful rather than inadvertent.

[4] Mr Chin is a magician but by virtue of the difficulties of gaining employment in that capacity, he had a “regular” job to support himself but also used his lunch hours to perform street magic.

[5] In that capacity, he met Tuncer Sakgun, a director of both the first and second respondents. Mr Sakgun offered Mr Chin a contract to work in his new bar called the Crow Bar. The arrangements made between the two men contemplated an employment relationship wherein Mr Chin would work Wednesday, Friday and Saturday night for two hours each night at Mr Chin’s standard rate of \$80 per hour.

[6] The new bar was due to open in August 2011 and Mr Chin was asked to become a regular staff member on the basis just referred to. Mr Sakgun undertook to prepare an employment agreement but in the meantime proposed that Mr Chin should invoice his hours to the business.

[7] The invoices have all been provided to the Authority and the nature of those invoices needs to be considered next. They are all in the same terms. None are GST invoices and all of them, after the usual preamble, contain the following narration:

Magic services for Switch On Media Productions @ “Crow Bar – 26 Wyndham Street, Auckland – (date)” 2 hours from 10pm to 12pm cost \$160.

[8] After a short time, Mr Sakgun told Mr Chin to redirect the invoices to Jian Zhang who was described to Mr Chin as Crow Bar’s “accounts person”. In fact, Mr Zhang is a director of the second respondent.

[9] There were always difficulties with payment of Mr Chin’s accounts. Notwithstanding that, Mr Chin was encouraged by the furnishing to him of an employment agreement which he was asked to sign. He did as he was asked and returned the document but never saw it again. Mr Chin understood that the employer was to sign the document and then he would get a copy back; at the point at which Mr Chin had signed the employment agreement, the employer had not signed.

[10] Acting in reliance on the signing of the employment agreement, Mr Chin relinquished his day time job so that he could concentrate on doing the work that he loved. But payment for his services was always erratic and Mr Chin’s evidence is that from October 2011, he was effectively only being paid every second week and then only because he pestered the employer for payment.

[11] In November 2011, the bar was closed because of liquor licence problems and when Mr Chin confronted Mr Sakgun about the matter, Mr Sakgun indicated that there were cashflow problems but that it would be resolved.

[12] By December 2011, Mr Chin's outstanding wages amounted to over \$2,000 and he made the decision to seek employment elsewhere and to start recovery action.

[13] In addition, the Authority notes that the debt could have been a great deal more than the claim advanced now by Mr Chin because in November 2011, when payment problems had become endemic, Mr Chin agreed with the respondents that, rather than invoice at the agreed rate of \$80 per hour, he would accept payment for a flat figure of \$400 per week for the 6-8 hours per week that he was required to work. It is recovery of the outstanding wages derived from his entitlements at the lower rate of pay that is the subject of this wages claim.

Issues

[14] The questions the Authority needs to answer are as follows:

- (a) Was Mr Chin an employee or a contractor;
- (b) Who was the employer;
- (c) Is Mr Chin entitled to recovery of his wages?

Was Mr Chin an employee?

[15] The Authority is satisfied on the evidence before it that Mr Chin was an employee. It is plain on his evidence, which the Authority has no reason to doubt, that Mr Chin was told that he was to be employed, was provided with an employment agreement which he signed and which he understood would govern the relationship between the parties.

[16] He was asked to file invoices with the employer, not because they sought between them to create a contractual relationship but simply because the employer wished to have a record in the nature of a timekeeping record of the hours that Mr Chin actually worked in the bar. The invoices are not GST invoices and the Authority is satisfied that their only purpose is to record the hours that Mr Chin actually worked.

Who was the employer?

[17] All of Mr Chin's invoices are addressed to "Switch On Media Productions". Mr Chin's evidence, which the Authority accepts at face value, is that he was approached by Mr Sakgun to be employed in the Crow Bar as a magician. Mr Sakgun is a director of both Switch On Limited and Tonghua Limited, the first and second respondents respectively.

[18] On the face of it, the employer might appear to be Switch On Limited were it not for one factor that the Authority must take into account.

[19] That factor involves an unpaid cheque dated 23 December 2011 drawn on the second respondent and signed by Jian Zhang. The cheque is in the sum of \$1,000 and was paid into Mr Chin's bank account on 28 December 2011. It was then reversed out again on 4 January 2012 because the second respondent's bank declined to pay the cheque giving the answer "refer to drawer".

[20] In the absence of further and better particulars from the respondents, it is difficult for the Authority to identify whether the two respondents are inextricably linked into the business of the Crow Bar so as to make the employment of Mr Chin difficult to apportion to one or the other, or whether the employment of Mr Chin is clearly with one entity or the other.

[21] Looking at the matter in a practical way, Mr Chin appears to have thought that he was employed by the first respondent, at least until he received the cheque the Authority has just referred to. From that point on, he plainly was unsure about the identity of his employer.

[22] It is, of course, possible that Mr Chin was not employed by either of the respondents and was employed by yet another entity, but on the basis of the evidence before the Authority, it seems most likely that Mr Chin was employed by the second respondent Tonghua Ltd. The Authority reaches this conclusion because the evidence of payments received, in particular the cheque just referred to, is of payments from Tonghua.

Is Mr Chin owed wages?

[23] The Authority is satisfied that Mr Chin is owed wages in the sum of \$2,200 gross. The Authority has been provided with very clear documentary evidence by Mr Chin about the outstanding amounts and that remains the total outstanding. In effect, the Authority has before it a summary position disclosing the total wages claim which is a schedule of the unpaid invoices which are invoices numbered 8 through to 20. However, invoices 9, 14 and 15 are recorded as having been paid and there are two other miscellaneous credits which have been included to bring the total claim down to the figure referred to above.

Determination

[24] The Authority is satisfied that Mr Chin was an employee and that he was employed by Tonghua Limited and that that entity owes Mr Chin the total sum of \$2,200 gross.

[25] The second respondent is to pay to Mr Chin that sum. Mr Chin remains responsible for the declaration and payment of income tax on this sum.

[26] A certificate of determination is to issue.

Costs

[27] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority