

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 207
5348973

BETWEEN CHIN MING (DAVID)
CHANG
Applicant

AND WELLDONE LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: T Yang, counsel for applicant
G Bennett, advocate for respondent

Investigation meeting: 16 January, 16 March and 21 May 2012

Submissions received: 28 and 30 May 2012

Determination: 19 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Chin Ming (David) Chang says his former employer, Welldone Limited (WL), owes him unpaid wages and holiday pay.

[2] WL says Mr Chang was not its employee, rather he acted in a voluntary capacity while he obtained work experience.

Preliminary matter

[3] Mr Chang's statement of problem included a claim for compensation for injury to feelings, but that remedy is available under the Employment Relations Act 2000 only when the employee has raised a personal grievance.

[4] A letter dated 9 May 2011, and attached to the statement of problem, purported to raise a personal grievance in respect of: *'unpaid wages, holiday pays and interest from 18 October 2010 and compensation for breach of relevant employment laws in New Zealand.'* Claims for unpaid wages and holiday pay do not, without more, amount to personal grievances. The claim for compensation as specified in the letter was too broadly-stated to provide WL with the required information about the nature of the personal grievance necessarily underlying that claim.

[5] In a memorandum dated 13 January 2012 counsel said the personal grievance was that Mr Chang was disadvantaged by an unjustifiable action of his employer's in that he was not paid wages for the period claimed, and because of: *'threats made to the applicant by the respondent when the applicant raised the issue about the non-payment of wages.'* Again, a failure to pay wages does not in itself amount to a personal grievance. Secondly the threats in question were not identified, although it transpired that they concerned a conversation which allegedly occurred in March 2011. There was nothing to suggest a grievance had been raised in respect of them prior to the attempt in the memorandum. Accordingly at best any grievance in that respect was raised outside the 90-day time limit specified in s 114 of the Act.

[6] When I sought counsel's response to these matters she withdrew the personal grievance. Since there is no personal grievance before the Authority - and I would not in any event have found a grievance had been raised inside the necessary time - the remedy of compensation for injury to feelings is not available to Mr Chang. Accordingly this employment relationship problem has proceeded as a claim for wages and holiday pay only.

Was Mr Chang an employee

[7] WL was in the business of preparing and printing material such as catalogues, flyers, letterheaded stationery and business cards. It also sold printing equipment. Its managing director, Jian (Kevin) Chen, has a qualification in computer graphics obtained outside New Zealand, and was carrying out work other than office work himself. His wife, Yuan Wei (Sophie) Gao, carried out the office work.

[8] At the same time Mr Chang was seeking employment. He had completed his studies in New Zealand for a Diploma in Computing/Information Technology at level 7, and approached a recruitment consultant, Tom Lee, for assistance.

[9] On 5 October 2010 Mr Lee and Mr Chang entered into an agreement under which Mr Chang would assist Mr Lee to communicate and negotiate with an employer to achieve a job offer, a work visa and permanent residence. Mr Lee would charge a fee comprising an amount payable prior to the first job interview, an amount payable when the employee obtained employment, and an amount payable when the employee obtained permanent residence.

[10] Mr Lee knew of Mr Chen and his business so he contacted Mr Chen to enquire whether there were any vacancies. Mr Chen advised he was looking for a graphic designer to work as an intern, to which Mr Lee responded that Mr Chang had just finished design school. Mr Lee and Mr Chen arranged an interview time for Mr Chang. Mr Chen said there was a discussion to the effect that Mr Chang would be a volunteer, while Mr Lee said he was not aware the position was to be unpaid. Mr Chang said Mr Lee told him he was to go to WL to try the work out for about half a day.

[11] Mr Chen's and Mr Chang's evidence - together with Mr Lee's receipt of a fee in respect of the job interview only - mean I do not accept that Mr Lee was unaware the arrangement with Mr Chang was intended to be unpaid at least to start with.

[12] Mr Chang's interview went ahead on or about 14 October 2010. It was common ground that as part of the interview Mr Chen asked Mr Chang to prepare a design for a catalogue, which Mr Chen then critiqued. It was also common ground that Mr Chen indicated he considered the design substandard. In what I consider an acknowledgement of this exchange, Mr Chang's response in the Authority was that he did not have enough time to complete the design.

[13] It was common ground that Mr Chen told Mr Chang he was looking for a graphic designer. Otherwise Mr Chen's account was that, after a discussion with Mr Lee, he decided to offer Mr Chang an opportunity to work on an unpaid basis while he learned the job. Mr Chen also had reservations about Mr Chang's standard of

English. He anticipated that, when Mr Chang's design skills and his English had improved, a position could be offered.

[14] Accordingly Mr Chen said he invited Mr Chang back to WL, where he offered an opportunity to attend in order to obtain work skills and advised Mr Chang he would not be expected to work every day.

[15] Mr Chang began attending the WL workplace, and said that after about a week Mr Chen advised he was to be engaged full time as a graphic designer. The circumstances set out above mean I consider this unlikely.

[16] In addition Mr Chang's evidence about the terms and conditions of employment agreed at the time was vague. Although he asserted that hours of work of 9 am to 6 pm on Monday – Friday were agreed, beyond indicating the agreement was reached some time after he began reporting to WL he was unable to say when. When asked about the agreement on wages, Mr Chang said he asked about wages a few times after he had started reporting for work without being paid, but was unable to say when any rate was discussed and agreed. I consider it likely that any discussions about the rate of pay occurred in 2011.

[17] Mr Chen's brother-in-law, Yuan Peng (Mark) Gao, arrived in New Zealand in October 2010 and lived with Mr Chen and Ms Gao. Mr Gao assisted in the WL business on an unpaid basis. Both he and Mr Chang said Mr Chang attended every day from 9am – 6 pm, and that both worked at packing and sending products. Mr Gao also said he believed at the time that Mr Chang was present on an internship and was learning how to make business cards. Mr Gao was summoned to give evidence at my initiative, and despite the family connection he appeared to be an impartial witness. I have no reason to disbelieve his evidence, and I accept it.

[18] Mr Chang said that, when he began asking about payment, Mr Chen promised to pay after he returned from a planned trip to China. It is likely that Mr Chen promised at least to address the relationship between WL and Mr Chang when he returned from China, but not that he acknowledged or confirmed any obligation to pay Mr Chang as a full time employee from the commencement of Mr Chang's attendances in October.

[19] Mr Chen and Ms Gao were absent in China from about Christmas 2010 to early March 2011. According to Mr Chen, Mr Gao was left in charge of WL's business.

[20] During the absence of Mr Chen and Ms Gao, both Mr Gao and Mr Chang worked at WL, with Mr Chang carrying out over the counter and internet sales. In the absence of Mr Chen I doubt that there was enough to keep him busy on a full time basis during this period.

[21] In March 2011 Mr Chang's open work visa was due to expire. An immigration consultant, Richard Benjamin, assisted Mr Chang with his application for a new work visa as well as visas for Mr Chang's family, and was to assist the family to obtain permanent residence. During January and February 2011 Mr Benjamin met with Mr Chang and his family and prepared the materials necessary to support an application for a work visa based on offer of employment as a graphic production designer at WL. The materials included an advertisement published in the New Zealand Herald on 3 March 2011 for a graphic production designer with Photoshop and CorelDraw experience. It was not clear who placed that advertisement.

[22] The materials also included an undated letter of offer of employment, a job description and a written employment agreement. The employment agreement provided that: employment was to commence on 7 March 2011; the position was graphic production designer; hours of work were 9.00 – 18.00 on Monday – Friday; and the rate of pay was \$12.75 per hour. Similar information was contained in an 'Employer Supplementary Form Work Visa Application'.

[23] After Ms Gao returned to New Zealand in March 2011, she signed the letter of offer, the employment agreement, and the Employer Supplementary Form Work Visa Application. Prior to the Authority's investigation the parties had disputed whether the signature on these documents was Ms Gao's. During a resumption of the investigation meeting in May 2012 Ms Gao, who was also summoned to give evidence at my initiative, confirmed that she signed the documents. She said further that she signed the documents on Mr Chen's instruction.

[24] Mr Chang was granted a 12-month work visa with a commencement date of 25 March 2011, and specifying that he was permitted to work for WL.

[25] Mr Chang and his wife Yi Peng (Alice) Yen said that on 29 March they met with Mr Chen and Ms Gao to discuss Mr Chang's request for the payment of wages backdated to October 2010. They said they were told the business was not profitable and could not afford to pay Mr Chang. Mr Chang said further that Mr Chen threatened to have Mr Chang's work visa cancelled if he left WL, although as Ms Yen put it Mr Chen pointed out that the visa was in the name of WL and that was where Mr Chang was permitted to work.

[26] Mr Chang and Ms Yen also alleged that Mr Chen asked for a payment of \$40,000 to support their application for permanent residence. Mr Chen denied this, and said Mr Chang told him another company, of which Mr Chang was aware, would support an application for permanent residence on the payment of \$20,000. In any event Mr Chen was already supporting an application for permanent residence of a family member, and said he explained that he could not support a second application. Mr Chang said he attempted to raise the matter with Mr Chen again in a subsequent telephone conversation which he recorded. However the recording was of poor quality and confirmed only that there were references to the profitability of the business and to GST. There was not enough evidence to take that allegation any further.

[27] Finally, Mr Chang said that on 29 March 2011 Mr Chen asked him to work for free on Mondays and Thursdays only, so that he could obtain paid employment elsewhere for the remainder of the week.

[28] Mr Chang worked for two days a week without pay until 29 April 2011, when he obtained alternative employment.

[29] The circumstances of the termination of Mr Chang's employment could give rise to a personal grievance on the ground of constructive and unjustified dismissal, but that matter was raised for the first time in counsel's submissions in reply dated 28 May 2012. Raising a new cause of action in submissions is unacceptable. Moreover, even if the submissions sufficed to raise a grievance on the ground of unjustified

dismissal then the grievance was raised significantly out of time. For those reasons I do not address it.

Was there an employment relationship

[30] My findings of fact about the exchanges between Mr Chang and Mr Chen, against the background of Mr Chang's exchanges with Mr Lee, mean I do not accept that an employment relationship was entered into in October 2010.

[31] I accept that in late 2010 Mr Chang attended the WL premises and carried out the tasks he said he did, but not that he did so pursuant to a binding obligation to that effect. At the same time Mr Chen should have been moving towards a more formal arrangement, but instead matters were allowed to drift. Unfortunately this effect was exacerbated by the intervention of the relatively long trip to China of Mr Chen and Ms Gao.

[32] The business of WL remained open during the absence of Mr Chen and Ms Gao. While it is of concern that Mr Chang continued to report for work as he said he did, and received no income, he was not instructed to do so and I find he was not acting pursuant to an employment agreement that obliged him to do so.

[33] The written employment agreement dated 7 March 2011 was a binding agreement. An employment relationship commenced no later than the date specified in the agreement, namely 7 March 2011. WL conceded this at the end of the investigation meeting.

Wages owed

[34] From 7 March 2011 WL was obliged to provide work to Mr Chang between 9 am and 6 pm on Mondays to Fridays, and to pay him at the rate of \$12.75 per hour. It did not do so.

[35] WL is therefore ordered to pay to Mr Chang wages calculated as:

$$8 \text{ weeks} \times 40 \text{ hours/week} \times \$12.75/\text{hour} = \$4,080$$

[36] The minimum wage was increased to \$13.00 per hour on 1 April 2011. WL is therefore ordered to pay an additional amount calculated as:

$$4 \text{ weeks} \times 40 \text{ hours/week} \times .25/\text{hour} = \$40$$

[37] Mr Chang is also entitled to holiday pay on the total of these sums. The calculation is:

$$8\% \times \$4,120 = \$329.60$$

[38] Payment is ordered accordingly.

Summary of orders

[39] WL is ordered to pay to Mr Chang:

- a. the sum of \$4,120 as unpaid wages; and
- b. \$329.60 as holiday pay on that amount.

[40] I further order that interest be paid on the amounts specified in (a) and (b) above, calculated at 5% per annum from 29 April 2011 to the date of payment.

Costs

[41] Costs are reserved.

[42] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority