

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 144/09
5126815**

BETWEEN CHANG (DONNY) CHEN
 Applicant

AND DIAMOND VENDING
 MACHINES LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: C Sinclair, advocate for Applicant
 No appearance for Respondent

Investigation Meeting: 6 May 2009

Determination: 8 May 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Chang (Donny) Chen says his former employer, Diamond Vending Machines Limited (“DVML”) owes him unpaid wages and a payment reimbursing him for the use of his vehicle for work-related purposes. He also says he should be repaid an ‘employment fee’ which he paid to one Mark Winitana.

[2] DVML said in reply that it was not liable for any of the payments sought because:

- (a) the person who entered into an employment agreement with Mr Chen (Mr Winitana) did so without authority, so that it was not bound by the agreement; and
- (b) any ‘employment fee’ was paid to Mr Winitana in his personal capacity, or as agent for a company named MJM International Limited.

1. Whether DVML bound by employment agreement

[3] There was to be a preliminary investigation meeting on 20 March 2009 to determine whether DVML was properly cited as the employer party, or whether Mr Winitana should have been cited as a party in his personal capacity. However the parties attended mediation on 18 March 2009, and reached a settlement under s 149 of the Employment Relations Act 2000. The terms read as follows:

“1. Diamond Vending Limited agrees that they were the employer of Chang (Donny) Chen. His employment with them was covered by an individual employment agreement, signed by Mark Winitana and dated 7 March 2008.

2. This is a full and final settlement of the matter to be heard by the Employment Relations Authority on Friday 20th March 200[9]. The substantive issues remain unresolved.

3. The parties agree to waive any confidentiality provision surrounding mediation in order that the contents of this settlement can be released to the Employment Relations Authority.”

[4] Accordingly the Authority proceeded to hear the claims in respect of unpaid wages; vehicle expenses; and the ‘employment fee’.

2. The claims for monies owing

A. Preliminary matter

[5] According to the companies office register, DVML has a single director, Stephen McMillan. Mr McMillan is aware of the claims against the company, and was the person who entered into the mediated settlement on its behalf.

[6] The notice of the investigation meeting with which this determination is concerned was served on the company at several addresses including the registered address for service. Documents from two of the addresses, including the registered address for service, were returned. A support officer spoke to Mr McMillan on 24 April 2009 to confirm his receipt of the notice, and advised him of the date of the meeting. Mr McMillan suggested the notice be sent to a P O Box number which he

gave. The notice was duly sent. In those circumstances I fix DVML with notice of the meeting.

[7] There was no appearance at the investigation meeting on behalf of the company, and no reason was given for this. I therefore proceed under clause 12, Schedule 2 of the Employment Relations Act to act as fully in the matter as if DVML had attended or been represented.

B. Payment of unpaid wages

[8] Mr Chen started work for DVML on 7 April 2008. The parties' written employment agreement provided that Mr Chen be paid a salary of \$35,000 per annum plus commission. Commission was not paid but is not being sought. Mr Chen was not paid his salary in respect of the 7 weeks of his employment, and seeks payment in that respect.

[9] An emailed message from the general manager Mark Winitana, dated 22 May 2008 and expressing concerns about Mr Chen's performance to date, prompted Mr Chen to seek advice.

[10] He and his advocate met with Mr Winitana in late May or early June 2008. Other matters, including the failure to pay Mr Chen any wages to date, were raised. As recorded in emailed exchanges between the advocate and Mr Winitana, there was agreement that payment would be made but that Mr Winitana's lawyer was 'preparing a document for you to sign'.

[11] No document was prepared and no payment was made. The failure to pay is unexplained.

[12] DVML is ordered to pay to Mr Chen the sum of \$4,711.54, being 7 weeks' pay at a rate of \$35,000 per annum.

B. Motor vehicle expenses

[13] Mr Chen seeks the reimbursement of expenses incurred in using his own vehicle for work-related travel. He submitted properly quantified claims to Mr

Winitana, but no payment was made. That matter was also raised at the meeting with Mr Winitana and was included in the agreement to pay referred to above. Again, no payment was made.

[14] Mr Chen is entitled to reimbursement of his travelling costs calculated as:

$$1909 \text{ km} \times 76.5\text{c/km}^1 = \$1,460.39$$

[15] Payment is ordered accordingly.

C. The employment fee

[16] According to the companies office register Mark Winitana is the director and a shareholder in MJM International Limited (“MJM”). MJM appears to have been operating as an employment recruiter, because Mr Chen saw and responded to one of its advertisements for job vacancies. On or about 20 February 2008 he entered into an agreement with MJM in which he was to:

- a. pay it a ‘deposit’ of \$1,500, which was refundable if suitable employment was not found within 6 weeks of signing the agreement; and
- b. pay it a ‘service fee’ of 30% of the first year’s salary plus GST in 5 working days’ if it secured him a suitable position.

[17] An employee or associate of MJM executed the agreement on its behalf. That person subsequently told Mr Chen that a potential employer wished to meet him, and arranged a meeting.

[18] The meeting occurred about a week later. Mr Winitana participated as the ‘potential employer’. He disclosed that he was a director of MJM and said he also had a long-standing involvement in DVML. Mr Chen understood Mr Winitana to be saying he had shares in DVML, and elsewhere it has been suggested he was a director of the company. The companies office register indicates Mr Winitana was neither a director nor a shareholder, but in any event Mr Winitana entered into the employment

¹ Being the rate for a vehicle in the 2000 – 3500 cc range, as Mr Chen’s vehicle was.

relationship as 'general manager' of DVML and the company now agrees it was bound by the agreement.

[19] The 'employment fee' is a sum of \$8,000 which Mr Winitana sought and obtained from Mr Chen in respect of the 'service fee' specified in the agreement with MJM. Mr Chen says Mr Winitana asked for payment to be made to him in person and directly rather than to MJM, because Mr Winitana's partner had absconded with a large sum of money. Mr Chen made the payment accordingly.

[20] On the face of the matter Mr Winitana was acting on behalf of MJM Limited when he sought this money. He did not appear and give evidence, and while a summons was prepared for this purpose service on him was not effected.

[21] Accordingly while there is cause for significant concern about his conduct, his actions are not within the scope of s 12A of the Wages Protection Act 1983, which provides:

“(1) No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.”

[22] Had there been evidence that Mr Winitana was acting on behalf of DVML, s 12A would have applied to give Mr Chen a right to recover the money in the Employment Relations Authority. Failing that, however, the recipient of the premium was Mr Winitana or MJM - not the employer – and any remedy for Mr Chen lies elsewhere.

Summary of orders

[23] DVML is ordered to pay to Mr Chen:

- a. \$\$4,711.54 (gross) as unpaid wages;
- b. \$1,460.39 in reimbursement for vehicle expenses;

[24] Interest is payable on the above sums at the rate of 5% from 22 May 2008 to the date of payment.

[25] Payment is to be made within 7 days of the date of this determination.

R A Monaghan

Member of the Employment Relations Authority