

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 166
5361593

BETWEEN BING CHEN
 Applicant

A N D NEW HOME GROUP LIMITED
 First Respondent

 NEIL GONG
 Second Respondent

Member of Authority: James Crichton

Representatives: May Moncur, Advocate for Applicant
 Veronica Ceponis, Counsel for First Respondent
 No appearance for Second Respondent

Investigation meeting: 14 May 2012 at Auckland

Date of Determination: 16 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Chen) alleges that he is owed arrears of wages totalling \$5,562 being 27.5 days unpaid wages together with unpaid holiday pay on those wages. In addition, Mr Chen claims a penalty for failure to provide an employment agreement and another penalty for failure to provide wage and time records.

[2] The first respondent (New Home Group) says that it did not employ Mr Chen and therefore is not responsible for Mr Chen's wages.

[3] Mr Chen is a tiler and he met the second respondent, Mr Neil Gong, in early March 2011. Mr Gong allegedly offered Mr Chen work completing a project at the Sudina Hotel. Mr Chen said that he was told he would be paid \$180 a day in the hand

for each of five days a week. Mr Chen offered Mr Gong his IRD number but apparently Mr Gong said it was not necessary.

[4] For the first three weeks of what was a brief engagement, Mr Chen was paid on time. What happened was that every Thursday, Mr Chris Yuan would appear with a cheque and Mr Gong would take that to the bank and come back with cash to give to Mr Chen. Mr Yuan is the director of New Home Group.

[5] It is the essence of Mr Chen's evidence that he believed that both Mr Gong and Mr Yuan were principals of New Home Group. He maintained in his evidence before the Authority that Mr Gong had told him that he and Mr Yuan *jointly owned the company New Home Group Limited and they had been running the company together with business across New Zealand*. Because Mr Gong did not present himself for examination at the Authority's investigation meeting, the Authority was unable to obtain independent verification of that claim. However, the Authority does have the evidence of Mr Yuan who stoutly rejected any suggestion that Mr Gong was a joint principal in New Home Group. He said that Mr Gong was no more and no less than a subcontractor to New Home Group and he produced a document which he said was the subcontract between the parties.

[6] When Mr Chen sought to inquire into the failure to pay him on time, his evidence is that he was referred by both Mr Gong and Mr Yuan to the other and so in effect he was being shuttled from one to the other. Mr Chen's evidence is that when he approached Mr Gong about payment, Mr Gong referred him to Mr Yuan on the basis that it was Mr Yuan who provided the money. Conversely, when Mr Chen raised the matter with Mr Yuan, he referred Mr Chen back to Mr Gong.

[7] Mr Chen thought that he was an employee paid a daily rate. He never sent an invoice and simply told Mr Gong of the hours that he worked each day. He believed Mr Gong and New Home Group were effectively one and the same because he claims that Mr Gong led him to believe that was the position.

Issues

[8] Because the Authority has no power to investigate and determine disputes unless there is an employment relationship, the first issue that the Authority must dispose of in the present case is whether Mr Chen had an employment relationship with anybody or not.

[9] It follows that the next question the Authority must decide is, assuming there was an employment relationship with a party, was that employment relationship with either the first or the second respondent.

[10] The Authority was not assisted in its investigation by the absence from the investigation meeting of Mr Gong. Mr Gong had been particularly reminded about the investigation meeting by a careful support officer and had previously told the Authority's support officer that he was attending the investigation. At the appointed time for the investigation meeting to commence, the Authority stayed its hand for some ten minutes in case Mr Gong was delayed. The support officer also rang Mr Gong directly the investigation meeting was due to start and sought to speak with him, but the telephone went to voicemail. A message was left reminding Mr Gong of his obligation to be present. The Authority is satisfied that all proper steps were taken to ensure Mr Gong knew of his obligations and indeed prior to the day of the meeting, the indications were that Mr Gong would be present. In those circumstances, the Authority felt able to proceed and determine the matter.

Was Mr Chen an employee?

[11] The Authority is not persuaded that Mr Chen was an employee on the evidence before it.

[12] Section 6 of the Employment Relations Act 2000 establishes the test for identifying whether a person is in an employment relationship or not. Pursuant to s.6(2) the Authority is required to *determine the real nature of the relationship ...* and by s.6(3) the Authority is required to *consider all relevant matters, including any matters that indicate the intention of the persons ...* but is not to treat as determinative any statement by a party that describes the nature of the relationship.

[13] In the leading case of *Bryson v. Three Foot Six Limited* [2005] 3 NZLR 721 the Supreme Court determined that the Authority must establish the real nature of the relationship by amongst other things, looking at the common law tests that have historically been applied to ascertaining the nature of the relationship and may also derive assistance from industry practice and take account of information about the parties intention provided that latter aspect is not decisive of the nature of the relationship.

[14] On that basis then, dealing first with the intention of the parties, the evidence before the Authority is that one party anyway (Mr Chen) thought he was in an employment relationship. However, the Authority is satisfied that there is no evidence whatever that either of the other potential parties to the arrangement thought they were in an employment relationship with Mr Chen. There was no employment agreement in writing and even on Mr Chen's evidence, the only thing that he seems to have agreed about with the other party is the hours that he would work and the rate that he would be paid for those hours. He proffered his IRD number but again, even on his evidence, was told that it was not required. The only basis on which it could be *not required* is that Mr Chen was not an employee but was a contractor.

[15] The context was also relevant. This was a relatively short term engagement. Mr Gong contacted Mr Chen and offered him work on a particular project because it appeared that Mr Gong was behind in his obligations at that project.

[16] Insofar as it can be relied upon, there is a letter before the Authority from Mr Gong. It is unsworn testimony of course but nonetheless appears to be signed by Mr Gong and it clearly states that Mr Chen was a contractor and not an employee and by way of testament to that statement, it is contended that Mr Chen was paid more than he would have been if he had been an employee.

[17] The control test seeks to identify the extent to which the prospective employee is controlled or directed by the possible employer. As the Court said in *Clark v. Northland Hunt Inc.* [2006] 4 NZ ELR23:

The greater the level of control, the more likely the Court will be prepared to find that a contract of service exists.

[18] The evidence before the Authority suggests a very limited amount of control exercised over Mr Chen by either respondent. As to the first respondent, there is evidence that Mr Yuan attended at the work site occasionally and according to Mr Chen, inspected the latter's work. Mr Yuan did not recall specifically inspecting Mr Chen's work but certainly confirmed that he took account of progress generally on-the-job when he made his periodical visits. So far as can be discerned from the evidence before the Authority, Mr Gong's position in respect to Mr Chen's involvement was that all he was interested in was getting the job completed on time and on budget. The arrangement with Mr Chen was short term and as the Authority

has already noted, was only embarked upon because Mr Gong had fallen behind in the tiling work that he was responsible for. No tools or uniform were provided by either respondent to Mr Chen further distancing the relationship. In all the circumstances, the Authority is not persuaded that there is any great level of control over Mr Chen which militates against a finding that Mr Chen was employed.

[19] The integration tests seeks to identify whether the prospective employee is integrated into the work of the possible employer or not. Again, the evidence before the Authority suggests that Mr Chen was not integrated into the business affairs of either the first or the second respondent. His role does not seem to have been integral to the tiling project; by all accounts Mr Chen was brought in once the project was well advanced in order to pick up speed and get the job done more quickly. It follows that it is difficult to see how Mr Chen could have a high degree of integration with the business of either respondent. Further, he worked at only one work site (the Sudina job) and not at any other site for either of the respondents. The Authority is not persuaded that Mr Chen is integrated into either of the respondents' work arrangements.

[20] The fundamental test seeks to identify whether the person engaged is performing the services as a person in business on his own account, or not. Here it is not possible to conclude precisely that that is the position; the parties are not at one on their intention with Mr Chen saying that he was employed and both respondents saying that he was a contractor. But given the factual matrix, the absence of any documentation which would suggest employment, the absence of any agreements between the parties about traditional employment issues like annual leave, statutory holidays and the like, the failure by either respondent to account to the Inland Revenue Department for Mr Chen's tax and the fact that, although Mr Chen did not provide an invoice, he did provide the number of hours he worked and was apparently trusted to do that without any timekeeping arrangement such as a wage and time book being kept by the employer or either of them, the Authority concludes that the fundamental test favours the conclusion that Mr Chen was a contractor.

[21] Lastly, the Authority turns to consider industry practice. It is by no means uncommon in the building industry for projects to be undertaken by a principal contractor delivering results to a principal through the use of sub-contractors. In addition, it is very common in the building industry for labour only contractors to be

used of the sort which the Authority considers Mr Chen was. That is to say, the Authority considers that it is more rather than less likely that Mr Chen was a contractor on a daily rate basis and that from his remuneration, he was supposed to be accounting to the Inland Revenue Department for tax and to also provide for his own funding for annual leave, sick leave and the like.

[22] Having reviewed all of the foregoing material, the Authority's considered view is that Mr Chen was a labour only contractor and not an employee of either the first or the second respondent. It follows that the Authority cannot assist Mr Chen further with his claim for unpaid monies. However, for the sake of completeness, the Authority wishes to comment on Mr Chen's submission that he was entitled to rely upon Mr Gong's representations that he (Mr Gong) was a partner or joint venturer in New Home Group and thus that Mr Chen was actually engaged by New Home Group rather than by Mr Gong. The Authority thinks there are a number of fallacies in this argument and although they are not strictly speaking germane to the Authority's conclusion, they are set out here for the sake of completeness.

[23] First, the Authority thinks that Mr Chen's only relationship was with Mr Gong and that Mr Chen was a contractor to Mr Gong. The Authority thinks that Mr Chen simply misunderstood what Mr Gong was saying about his involvement with New Home Group. The Authority was hampered by not hearing Mr Gong in person but did hear from Mr Yuan who clearly had a significant business connection with Mr Gong and denied that he had ever heard Mr Gong maintaining that he (Mr Gong) was involved with New Home Group other than as a contractor to New Home Group. Evidence of the nature of that relationship was of course presented to the Authority by way of a sub-contract agreement between New Home Group and Mr Gong and Mr Gong's own statement makes clear that in his opinion Mr Chen was his contractor and that Mr Chen was paid when Mr Gong was paid and that the reason that Mr Chen is short paid now is because Mr Gong has not been paid and the reason Mr Gong has not been paid is because Mr Yuan has not been paid either.

[24] Mr Chen presumably relies on the doctrine of ostensible authority to ground his claim that he was employed by New Home Group. But there are a number of difficulties with that contention of which the first, and perhaps most important, is that Mr Yuan gave clear evidence to the Authority that he employs people in his business on proper employment agreements but also undertakes contract works which requires

him to contract through his company with others who can provide him with additional resources such as Mr Gong. It follows that if Mr Chen were employed by New Home Group then on Mr Yuan's evidence, he would have been in a proper and clearly expressed employment relationship.

[25] Next, Mr Chen's principal relationship, on the facts before the Authority is not with New Home Group at all but with Mr Gong and given the Authority's reluctance to accept Mr Chen's conclusion that Mr Gong was part of New Home Group, (for the reasons already identified), it is difficult for Mr Chen to make out his case.

[26] One further matter that Mr Chen does rely upon is an electronic advertisement for tilers which post dates the relationship in dispute and which purports to be from New Home Group. Mr Chen invites the Authority to rely on this as evidence for the conclusion he himself apparently reached that he was in truth employed by New Home Group. The difficulties with this thesis are first that the advertisement actually talks about both employment and contractor roles for tilers and secondly and most importantly, on Mr Yuan's evidence the electronic advertisement was lodged by New Home Group on behalf of Mr Gong who did not have the appropriate access to be able to lodge the advertisement himself. The Authority has no reason to doubt what Mr Yuan told it; Mr Yuan struck the Authority as being entirely straight forward in his evidence.

[27] Accordingly, the Authority is not persuaded first that Mr Gong held himself out to be a partner or joint venturer in New Home Group and thus Mr Chen's reliance on that belief is simply mistaken. Secondly, even if that conclusion is not sustainable, the evidence of Mr Yuan is very plain that if Mr Chen had been his employee there would have been no doubt about the nature of the relationship as he has employees of New Home Group and they are plainly employed rather than on contract.

Determination

[28] For reasons already set out, Mr Chen has failed to make out his claim that he is an employee of either the first or the second respondent. The Authority's conclusion is that Mr Chen was a contractor on a labour only basis to Mr Gong and Mr Gong was contracted to New Home Group.

[29] The Authority has great sympathy for Mr Chen in the loss of money that he has clearly worked hard for, but on the evidence it heard, Mr Chen cannot be paid

until Mr Gong is paid and Mr Gong cannot be paid until New Home Group is paid. The Authority can only express the hope that those payments are made soon so that Mr Chen does not have to proceed to seek recovery of his debt in the ordinary Courts.

Costs

[30] Costs are reserved.

James Crichton
Member of the Employment Relations Authority