

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 410/09
5139910

BETWEEN TIANHAN CHENG
 Applicant

AND WHITE BAI
 Respondent

Member of Authority: R A Monaghan

Representatives: M Lee, counsel for applicant
 No appearance for respondent

Investigation Meeting: 16 November 2009

Determination: 18 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tianhan Cheng says his former employer, White Bai, dismissed him unjustifiably on the ground he had allegedly made a mistake in his work, and failed to pay final wages owed to him.

Preliminary matters

1. Service of documents

[2] Difficulties in serving the statement of problem led to Mr Cheng serving the statement on Mr Bai at Mr Bai's residential address. Mr Cheng deposed that he observed Mr Bai arriving at the house, and left the document in the mail box.

[3] Mr Cheng's son sought to serve the notice of investigation meeting at the same address, but was informed Mr Bai no longer lived there. An application was made for an order for substituted service on Mr Bai by text message to a mobile phone, by advertisement in a well-known Chinese newspaper, and by email. I declined to order service by way of text message. I ordered that service both of the statement of problem and the notice of meeting be effected by publication in the specified newspaper in a specified manner and, as a back up, by email to an address provided.¹

2. Mr Bai's failure to attend

[4] Mr Bai did not file a statement in reply, and did not attend and was not represented at the investigation meeting. An affidavit of service was provided in respect of the action taken on the order for substituted service and I am satisfied Mr Bai was served by advertisement in the specified newspaper.

[5] Mr Bai has not provided cause for his failure to attend or be represented. Accordingly I have proceeded under clause 12, Schedule 2 of the Employment Relations Act 2000 to proceed to act as fully as if he had attended or been represented.

3. The existence of an employment relationship

[6] On or about 13 August 2008 Mr Bai filed a statement of claim in the District Court alleging Mr Cheng was the master builder in charge of the site where the relevant work was being performed, and seeking damages in respect of the mistake Mr Cheng was alleged to have made. I was told the matter has not been prosecuted and that an application will be made to the District Court in that respect.

[7] It appears from the statement of claim, as well as from the contents of a statement in defence and counterclaim filed in the District Court, that Mr Bai would say the parties were not in an employment relationship. However Mr Bai has not filed a statement in reply to the application in the Authority and has not otherwise contacted the Authority at all. He has not put the existence of an employment relationship in issue in the Authority, and has not given evidence. Failing all of this,

¹ The latter referred to **In the bankruptcy of Peter Anton Franck** 24 April 2009, Clifford J CIV 2009 435 77.

I have accepted Mr Cheng's evidence to the extent that it bears on the existence of an employment relationship.

Background

[8] On Mr Cheng's account, Mr Bai employed Mr Cheng as a builder's labourer on a residential building site, commencing on 5 May 2008. The agreed rate of pay was \$18 per hour after tax. Mr Cheng worked from Monday to Saturday inclusive.

[9] At the end of the working day on Thursday 17 July 2008 Mr Bai told Mr Cheng structural changes were to be made to the house and all work was to stop for the time being. I infer from what followed that Mr Bai was referring to changes required as a result of the preparation of timber framework which did not accord with the building's plans, although Mr Cheng also said in evidence that the construction was almost finished. Mr Bai indicated to Mr Cheng that he would arrange other work and would be in touch with Mr Cheng shortly.

[10] When Mr Cheng had not heard from Mr Bai by Monday 21 July he went back to the site. Mr Bai was there, and the two men spoke in the driveway. Mr Cheng asked for his final pay, being payment for four days' work the previous week, which Mr Bai refused to provide. In an oral statement to the Authority Mr Cheng said he told Mr Bai that if there was no more work for him he wanted his four days' pay. Mr Bai told him he would not be paid, that he had made a mistake and that Mr Bai was going to sue him over it. When Mr Cheng pressed for payment of his outstanding wages, Mr Bai said 'see you in court'.

[11] Mr Cheng said he was not given any details of the alleged mistake at the time. The mistake alleged in the statement of claim in the District Court was that Mr Cheng had cut part of the prefabricated framing, which he should not have done. As a result significant loss was caused. The statement of claim asserted the framing was correctly supplied according to the plans. It also alleged there had been a meeting to discuss the matter, where Mr Cheng had acknowledged cutting the timber.

[12] The framing was delivered to the site pre-cut, pre-nailed and in a kitset form, and Mr Cheng's job was to assemble it. In the Authority he denied cutting any of it,

although his statement of defence in the District Court acknowledged the admission. Mr Cheng took pains in the Authority to say that all of his work was closely supervised by Mr Bai. He said he would not cut the timber without Mr Bai's authority, and all his work was checked. This was also the affirmative defence he raised in the District Court. Accordingly I consider it likely he cut the timber, and any outstanding issue concerns his culpability in terms in particular of the supervision and instruction he received.

[13] The District Court papers suggest Mr Bai would say Mr Cheng was in charge and the responsibility was his. However in the absence of any evidence to this effect from Mr Bai, or any other supporting information, I accept Mr Cheng's account.

Whether there was an unjustified dismissal

[14] On Mr Cheng's account the dismissal was unjustified. The reason given for it could not be substantiated.

Remedies

[15] Mr Cheng sought the reimbursement of remuneration lost as a result of his personal grievance.

[16] He has not been in employment since the termination of his employment with Mr Bai, although he said he has sought unsuccessfully to obtain employment. Accordingly he has attempted to mitigate his loss.

[17] Further, in the absence of evidence from Mr Bai there are no grounds on which to base a finding that Mr Cheng contributed in a blameworthy way to the circumstances of his dismissal.

[18] At the same time Mr Cheng acknowledged that the construction was almost finished. While it may be true that, at the beginning of his employment, he was told there were other sites to which he could be deployed on the completion of the project, he also said the sites were sections owned by Mr Bai. There was nothing to indicate work was ready to start on any of those other sites in or about July 2008.

Accordingly, and taking into account the economic conditions prevailing at the time, it is probable that Mr Cheng faced a real prospect of redundancy.

[19] Balancing these factors, I decline to exercise the discretion to award more than the three months' loss of remuneration provided for in s 128 of the Employment Relations Act. However there was nothing to indicate more precisely when any redundancy would have occurred, so Mr Bai is ordered to reimburse Mr Cheng for three months' lost remuneration.

[20] If Mr Cheng worked for an average of 50 hours per week during his employment, the relevant sum is quantified as 13 weeks x 50 hours x \$18 (nett) = \$11,700 (nett)

[21] Mr Cheng also seeks compensation for the injury to his feelings caused by his personal grievance. He gave very little evidence about the effect on him of the circumstances of the personal grievance, rather his evidence concerned his reaction to being served with the statement of claim filed in the District Court. To the extent that there has been any damage to his reputation, he said it was associated with the existence of that claim. That matter cannot be compensated for in the Authority.

[22] However there was some injury in that the employment relationship was terminated because of a mistake Mr Cheng says was not his responsibility. Mr Bai is therefore ordered to compensate Mr Cheng for the injury in the sum of \$1,000.

Unpaid wages

[23] Mr Cheng is owed for 4 days' wages not paid, at 9 hours per day. Mr Bai is therefore ordered to pay him the sum of \$648 (nett).

Summary of orders

[24] Mr Bai is ordered to pay to Mr Cheng:

- (a) \$11,700 (nett) as reimbursement of the wages lost as a result of his personal grievance;

- (b) \$1,000 as compensation for the injury to his feelings caused by his personal grievance; and
- (c) \$648 (nett) in respect of wages not paid.

[25] Mr Cheng sought interest on his unpaid wages. Mr Bai is further ordered to pay interest on the sum set out in (c) above at the rate of 4.8 % per annum from 21 July 2008 to the date of payment.

Costs

[26] No claim for costs has been made. If the applicant wishes to address me on the matter he shall have 28 days from the date of this determination in which to file a memorandum.

R A Monaghan
Member of the Employment Relations Authority