

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 222
5139910

BETWEEN TIANHAN CHENG
 Applicant

A N D JINGWEI BAI
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Respondent in person

Investigation Meeting: 31 May 2013 at Auckland

Date of Determination: 31 May 2013

DETERMINATION OF THE AUTHORITY (Delivered Orally)

- A. The application for reopening an investigation is granted.**

- B. Mr Jingwei Bai is to provide the Authority with an address for service immediately at which any documents or correspondence can be sent and received by him.**

- C. The Authority will provide Mr Bai with a copy of the original application and all associated documents. Mr Bai is to lodge a statement in reply within 14 days of receipt of the documents.**

- D. A telephone conference will be arranged within 7 days of receipt of the statement in reply to set a new investigation date.**

- E. Costs are to lie where they fall.**

Application for reopening

[1] The original employment relationship problem was investigated by the Authority at a meeting on 16 November 2009. Mr Bai had not lodged a statement in reply to the statement of problem. At the investigation meeting Mr Bai did not make an appearance and the Authority member proceeded to investigate the problem pursuant to clause 12 of the 2nd Schedule of the Employment Relations Act 2000 (“the Act”). A determination by the Authority was issued on 18 November 2009¹.

[2] In late 2012, Mr Bai attempted to sell a residential property owned by him and discovered that a charging order had been registered against this property preventing the sale. Mr Bai became aware for the first time that the charging order related to the above determination issued by the Authority. Mr Bai says he was not aware that the Authority had investigated an employment relationship problem by Mr Tianhan Cheng and that an investigation meeting had been held on 16 November 2009. Mr Bai says he was not aware that the Authority had issued a determination in favour of Mr Cheng.

[3] Mr Cheng says he served documents at Mr Bai’s residential property at 17 Croydon Road, New Lynn. Mr Cheng says he saw that someone was at home at that address, knocked on the door and when no one replied he left the documents in the mail box. Mr Cheng accepts that he did not see who was at the house when he left the documents in the mail box. Mr Cheng says his wife emailed Mr Bai telling him that an investigation meeting was to be held to investigate his employment relationship problem at the Authority in Auckland on 16 November 2009. Mr Cheng says he also put a public notice in a Chinese newspaper the *Mandarin Pages* for 4 days from 28 October to 31 October 2009 stating that the investigation meeting was proceeding on 16 November 2009 and gave details of the Authority case number and the address of the Authority.

[4] Mr Bai says he did not receive any documents nor the notice of investigation meeting. Mr Bai says the property at which the documents were served is a rental property and he was not told of any documents or notice of investigation meeting by his then tenant. Mr Bai says he and his wife live at a different address in Kelston and no documents were served at his residential address. Mr Cheng accepts no documents

¹ AA410/09 5139910

were served at the residential home of Mr Bai and his wife in Kelston. Mr Bai says the email address used by Mr Cheng's wife was one he had not used since 2007. Mr Bai provided the Authority with copies of power bills to verify the address at which he and his wife reside.

[5] Mr Bai says he was overseas for most of 2009. Mr Bai says he was out of New Zealand from 31 August 2008 to 23 June 2009, then again from 15 July 2009 to 8 August 2009 and then from 22 September 2009 until 28 November 2009. Mr Bai says he did not see the Chinese newspaper, the Mandarin Pages and did not know about the investigation meeting. Mr Bai produced his passport which showed Mr Bai was out of New Zealand at those times and was in China at the time the investigation meeting on 16 November 2009.

[6] Further, Mr Cheng says he was employed by Mr Bai, was paid \$18 an hour and that Mr Bai was to deduct PAYE but did not. Mr Cheng says there was no employment agreement and that he did not receive holiday or sick pay and if he did not work received no pay. Mr Bai says he did not employ Mr Cheng, he was a contractor.

[7] The Authority has a discretionary power to reopen an investigation pursuant to clause 4 of the 2nd Schedule of the Act. While the power is discretionary it must be exercised in accordance with principle.

[8] The principal test for determining whether a matter ought to be reopened or not is whether a failure to do so would constitute a miscarriage of justice. The Authority must balance the risk of miscarriage of justice against the countervailing principle that certainty in litigation is important.

[9] Taking these factors into account, the application for the investigation to be reopened is granted. I accept that Mr Bai was not served with the statement of problem and associated documents and was not aware of the investigation meeting held on 16 November 2009.

[10] I am satisfied that a miscarriage of justice would occur if the reopening application is not granted. In addition the new evidence as to whether Mr Cheng was an employee or a contractor indicates that Mr Bai may have a defence to Mr Cheng's employment relationship problem which requires further investigation.

Directions

[11] Mr Bai is to provide the Authority Support Officer immediately with an address for service.

[12] The Authority Support Officer will today, forward to Mr Bai a full and complete copy of the original application and all associated documents. Mr Bai will have 14 days from the date of receipt of those documents to lodge a statement in reply.

[13] A telephone conference call is to be arranged within 7 days of receipt of the statement in reply to set down a date for an investigation meeting of the substantive issues.

[14] Costs are to lie where they fall.

Anna Fitzgibbon
Member of the Employment Relations Authority