

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 161
3078475

BETWEEN Ji Huang
 Applicant

A N D Yu (Graham) Wu
 Respondent

Member of Authority: David G Beck

Representatives: None

Investigation Meeting: On the papers

Submissions Received: 17 March 2020 from the Applicant

Date of Determination: 22 April 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Huang claimed that he was employed by a Mr Wu who appears to be an agent for a company “Across Trip Limited” that is not registered on the New Zealand Companies Register. Mr Huang worked as a Tour Guide/Driver. Very limited documentation exists as to the nature of the employment relationship.

[2] In an omnibus that he did not own, Mr Huang undertook two identical tours from Christchurch to Twizel, Wanaka and Queenstown; this involved him being a driver and tour guide to parties of Chinese nationals and overnight stays in the aforementioned locations. The two tours in dispute ran from 15th to 19th February

2019 and 19th to 27th February 2019. Mr Huang alleges that he was not paid for either tour and claims \$5,950.19 in unpaid wages.

[3] Mr Huang indicated that he approached Mr Wu on 20th March 2019 and was promised a part-payment of \$2,000 but this was not paid. On 13 April 2019 Mr Wu contacted Mr Huang and asked for a loan of \$256 that he claimed was for administration fees associated with the two trips. Mr Huang obliged him, but says Mr Wu only returned \$200 a few days later. Mr Wu made two further assurances that he would pay a significant part of the wage arrears owed (\$3,000) but did not deliver. In frustration Mr Huang filed a claim with the Disputes Tribunal, but at the hearing of 5 September 2019 he was advised no jurisdiction existed and was directed to the Employment Relations Authority. Mr Huang recalls further contact with Mr Wu after the hearing with a further assurance of repayments in instalments but none were made.

[4] Mr Huang filed a Statement of Problem with the Authority on 15 October 2019 seeking an order for payment of the identified arrears owed.

The Authority Process

[5] Mr Wu did not file a statement in reply and has not responded to any contact from the Authority he did not participate in a case management conference held on 28 February 2020 and did not file a brief of evidence. Mr Huang with the assistance of an interpreter subsequently provided a statement of evidence of monetary amounts paid from Mr Wu for previous tour engagements and further background on his relationship with Mr Wu. The statement of problem also contained copies of translated text exchanges between the parties evidencing Mr Wu's knowledge of the arrears owed and his various broken assurances to resolve such.

[6] Pursuant to section 174D Employment Relations Act 2000 ("the Act"), I have decided with Mr Huang's concurrence to deal with this matter without holding an investigation meeting.

[7] Pursuant to s 174E of the Act I make findings of fact and law and outline conclusions on matters to resolve the disputed issue that is essentially an application for wage arrears under s 131 of the Act, and make orders but I do not record all evidence and submissions received.

Issues

[8] The issues to be decided are:

- a) Was Mr Huang in an employment relationship with Mr Wu?
- b) If so, is Mr Huang owed wage arrears he has identified for the periods 15th to 19th February 2019 and 19th to 27th February 2019.
- c) An assessment of the level of costs to be awarded to the successful party.

Was Mr Huang an employee?

[9] Mr Huang has indicated that prior to working for Mr Wu he ran an acupuncture business that was struggling and that he needed to supplement his low returns from this business. Mr Huang has indicated that he was introduced to Mr Wu through a friend. On 29 September 2018, Mr Wu added Mr Huang to his WeChat account and asked him to assist with a tour group from 2nd to 6th October 2018. Text exchanges followed between Mr Huang and Mr Wu to negotiate a daily rate for each tour and a rate of \$250 was struck; one text from Mr Wu indicates this was: “Salary 250 + meal supplement 50 + accommodation 100?” (further texts from Mr Wu continued to designate the daily amount as “salary”). Mr Huang then supplied Mr Wu with his IRD and bank account details.

[10] Mr Huang was paid for his first tour in stages by 16 October totalling \$999.92 and three further tours up to 18 February 2019. Mr Huang provided the Authority with copies of his bank statement for the periods in question that showed intermittent payments from what appears to be Mr Wu’s personal account.

[11] To determine whether Mr Huang is an employee or a contractor, Section 6 of the Act requires that the Authority examine the true nature of the relationship and assess all relevant factors including applying the relevant legal tests set out and affirmed by the Supreme Court in *Bryson v Three Foot Six Limited*¹. If I find Mr Huang is not an employee then I have no jurisdiction to determine his wage arrears claim. The following matters from *Bryson* require my attention:

- a) the intention of the parties;

¹ [2005] NZSC 34 (SC)

- b) whether there was any written documentation setting out the terms of the relationship or ‘label’ attached to such;
- c) an examination of how the relationship operated in context including looking at issues of control and integration;
- d) whether overall, it could be reasonably established that Mr Huang was operating a business on his own account; and
- e) whether there is overwhelming evidence of any industry practice defining contractual relationships.

[12] Normally applying the above factors would involve carefully assessing the evidence of both parties and weighing up the various considerations as none are singly determinative. In this case, because of Mr Wu’s total lack of engagement, this will be a somewhat cursory analysis on the limited evidence that I have before the Authority. Mr Huang who is self-represented has I consider, provided sufficient information on request and he has been fully co-operative in the process. The test applied in context and my findings, that are necessarily a limited or a very basic analysis, are discussed below.

Intention of the parties

[13] The absence of any contractual agreement determining the intentions of the parties at the commencement of the relationship is problematic and I would have to view how the parties conducted their relationship in the context of the work undertaken by Mr Huang. What I do have is Mr Huang’s evidence that on WeChat he was asked by Mr Wu to assist with tour groups, no specific discussion on what the form of the contractual relationship would be appears to have taken place but they bargained over the amount to be paid that Mr Wu crucially described as “salary”. Mr Huang supplied Mr Wu with his IRD number and bank account details that indicate from his perspective that he thought he was being employed. I understand that Mr Wu may have been a contractor as he was being referred the work by a third party, Chinese Travel Agency. No other indicators of what was contemplated in the relationship have been brought to my attention and the only general guidance I have in statute is an obligation under s 3(a)(ii) to recognise the “...inherent inequality of power in employment relationships”.

[14] I find that on balance with the scant information provided that Mr Huang had no intention of entering into a contracting relationship and viewed the engagements as intermittent employment. Mr Wu has proffered no evidence to refute this assumption.

The control test

[15] Applying this consideration requires the Authority to examine where the ultimate authority in the relationship lies.² The timing of each engagement and indeed allocation of work was under the control of Mr Wu, he simply directed Mr Huang to undertake the work at scheduled times and places (including routes used) and thus Mr Huang had no control over when he undertook the work. During each engagement or tour that included the necessity to stay away from his home overnight, Mr Huang could not practically engage in alternative work. Mr Huang did have the choice to turn work down but as no written agreement was in place he would have been unaware of the extent of such a right or any restrictions Mr Wu may have imposed if he declined assignments. It is thus reasonable to assume that Mr Huang, as is the case of many casual employees, accepted work when available and the days and hours and location of work were dictated by Mr Wu. I find Mr Wu exercised control over the timing and allocation of work and where it was to be performed.

The Integration Test

[16] This test requires a consideration of whether Mr Huang could be viewed as an integral part of Mr Wu's business. On the latter, it can be reasonably implied that the nature of Mr Wu's business is that he ran what was akin to a labour hire agency providing clients with his employees to undertake driving services. It is not clear whether Mr Wu owned or controlled the allocation of vehicles but without casual drivers prepared to work for him he had no business as he presumably had obligations under some form of contract with a tour operator to provide drivers on a regular basis. For statutory health and safety purposes Mr Wu is presumably or legally, operating as a PCBU (person conducting a business undertaking) and responsible amongst other matters for his drivers being compliant with road transport licensing requirements pertaining to passenger service vehicles. In the absence of any evidence from Mr Wu, I find Mr Huang was integral to Mr Wu's business.

² Gordon Anderson and John Hughes, *Employment Law in New Zealand* (1st ed, Lexis Nexis, Wellington, 2014) at 121: *Humberson v Northern Timber Mills Ltd* (1949) 79 CLR 389 (HCA).

Fundamental test

[17] Basically the application of this test is a consideration of whether Mr Huang could reasonably be considered in business on his own account and thus assuming an element of risk as to his engagement with Mr Wu including profit and loss from any joint venture. In this regard I found no evidence that Mr Huang ran a business on his own account – he owned no plant or equipment, did not contract with other tour companies and all he had to offer for hire was his driving and language expertise. I do add that Mr Huang did operate as a sole trader in the provision of a small scale acupuncture business but tour driving could not in my view be reasonably viewed as an allied activity of such.

Taxation Issues

[18] Mr Huang did not invoice Mr Wu for his services nor was there any evidence from limited text exchanges, that he was asked to do so – Mr Wu simply placed money in Mr Huang’s bank account for previous tours undertaken. It was not clear whether being in receipt of Mr Huang’s IRD details whether Mr Wu deducted PAYE on the amounts paid to Mr Huang. The amounts paid to Mr Huang in round sums suggest otherwise and Mr Huang provided his IR3 tax return that showed overall including from his acupuncture business that he declared a very modest income well below a requirement to register for GST and his residual tax to pay was similarly modest. I find that Mr Wu did not clarify the situation and did not provide any indication that he was remitting any monies to the IRD on Mr Huang’s behalf. I can only conclude that money was received by Mr Huang for the services he undertook that was described by Mr Wu as salary.

Industry Practice

[19] I have nothing before me to determine what the industry practice is and can therefore not consider or speculate on this factor except to observe that few precedents exist examining this specific industry and parallels with say courier drivers³ or taxi drivers’ cases⁴, are not helpful as the nature of their work is distinguished (typically by the contractor’s ownership of a vehicle being a decisive factor). The nearest comparison is public transport bus drivers who operate under a range of either

³ See *TNT Worldwide Express (NZ) Ltd v Cunningham* (1993) 1 ERNZ 695 (CA).

⁴ *Labour Inspector v Southern Taxis Ltd* [2019] NZERA 359.

‘contract of service’ arrangements (including significant collective agreement coverage around local government provision) or contracting situations (‘contract for services’) depending upon the size of the operator and context of services provided.

Overall finding contractor or employee?

[20] Section 6 of the Act allows the Authority to determine the true nature of the relationship and in these circumstances despite the paucity of evidence, I conclude that Mr Huang was a casual employee of Mr Wu’s driver supply agency and that the Authority has jurisdiction to determine his wage arrears claim.

The Claim

[21] Mr Huang’s bank statement indicates past payments from Mr Wu that correspond with the tasks that he was set in driving a tour bus and incurring accommodation, fuel and other expenses associated with this work. The text exchanges do not signal that the amounts claimed are in dispute just that Mr Wu despite several assurances has not fulfilled his part of the core element of an employment relationship – remuneration for work undertaken. I find Mr Huang’s uncontested claims for arrears to be made out in full in accord with s 131 of the Act.

Remedies

Arrears

[22] I find Mr Huang has established an arrear of wages claim, in the amount of \$5,950.19 and I order Mr Huang to pay this amount.

Costs

[23] In the circumstances, this matter was dealt with without costs being incurred by the applicant but I think it is appropriate to award Mr Huang his application fee of \$71.56.

Certificate of Determination

[24] Pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, Mr Huang will be provided with a certificate of determination with an affixed Authority seal. This will record that Yu (Graham) Wu must pay Ji Huang the amounts specified in paras [23] and [24].

David G Beck
Member of the Employment Relations Authority