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Kirby v New Zealand China Friendship Society [2015] NZEmpC 189 (22 October 2015)

Last Updated: 27 October 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2015\] NZEmpC 189](#)

EMPC 150/2015

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN JOHN KIRBY Plaintiff

AND NEW ZEALAND CHINA FRIENDSHIP SOCIETY

Defendant

Hearing: 2 October 2015

(heard at Christchurch)

Appearances: J Kirby, plaintiff in person

J Pullar, counsel for the defendant

Judgment: 22 October 2015

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr Kirby has brought a de novo challenge to a determination of the Employment Relations Authority (the Authority) which concluded he was a volunteer – and not an employee – when he undertook work in China for New Zealand China Friendship Society Inc (the Society).¹ His claim for unpaid wages and accounts was accordingly dismissed.

[2] After hearing from the parties, I directed that the challenge should be heard in two stages. The first would involve resolution of the primary question as to whether

Mr Kirby was, at all material times, an unpaid volunteer or an employee. If the

¹ *Kirby v New Zealand China Friendship Society Inc* [2015] NZERA Christchurch 66.

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answer to that question was that he was an employee, there would need to be a second hearing to determine what, if any, remedies were appropriate.

The respective cases

[3] Mr Kirby asserts that in 2010 he travelled to China and worked there as a representative for the Society, on the understanding he would be involved in various aspects of a project in which the Society was engaged. Mr Kirby said he did so

under a contract of service with the expectation he was to be paid for his services; he asserts he was not a volunteer, and could not afford to be. Although Mr Kirby was based at Shandon Bailie School (SBS or the school) in Gansu Province, it would have been illegal for that institution to have paid him. Mr Kirby said he was not employed by SBS as a teacher, although he worked from a room at the school; rather he was employed by the Society. In April 2012, he expressly raised the issue of payment with the Society's Vice-President, Mr Bromwich, who promised the Society's executive would discuss and resolve this issue. Mr Kirby says subsequent payments were made on behalf of the Society to him in Chinese currency, via an entity with which the Society was associated, the Rural Development Training Centre (RDTC), for the months of April, May and June 2010. Mr Kirby also asserts that in July 2010, the President of the Society, Mr Livingston, engaged him to undertake further tasks for the Society in July 2010 as an employee.

[4] Mr Kirby says that despite his age of 72 at the time, there were in fact no Visa issues. He obtained sequentially two 90-day L Visas (tourist Visas), and then a 30-day L Visa followed by a 90-day F Visa (for those intending to go to China for an exchange, visit, study tour or other such activity also called a business Visa). He then obtained a further 90-day Visa. As he did not have a Z Visa (work Visa), SBS could not employ him.

[5] Mr Kirby says he was, in effect, constructively dismissed in September 2012, when his services were no longer required by either the Society or SBS. Although he has raised outstanding issues as to payment over the years since these events occurred, he says he did not initially consider he could establish that he was an employee, and so did not raise a claim to that effect until he received advice at a

Citizens' Advice Bureau in late 2014 that he should do so. He then filed his claim in the Authority; he contends the Authority reached the wrong conclusion.

[6] The case for the Society is that it has acted as a facilitator for the provision of teachers to SBS over many years. Although the Society assists such volunteers with their expenses in travelling to and from China, such a person provides teaching services to SBS which pays for those activities and provides accommodation. In Mr Kirby's case there was a Visa issue, in that he could not obtain a work Visa as he was over the age of 65.

[7] To facilitate Mr Kirby's placement at SBS as a teacher, his Visa application stated only that he was to be sent to China as a voluntary representative of the Society; if he chose to do so, he could undertake activities in connection with poverty reduction projects which were being delivered by the Society using SBS as a base. Mr Bromwich says that relevant documentation shows the Society only ever intended that his relationship with the Society would be as a volunteer. Mr Bromwich denies that there was ever any statement made to Mr Kirby to the effect that Mr Kirby would be paid by the Society for his work, or that there was an extension of his duties at any time in 2012 so that he would undertake paid work for the Society.

[8] Mr Bromwich says that in late August 2012, Mr Kirby advised that because of an incident which had occurred he was leaving SBS. A replacement teacher was accordingly recruited to send to China to work for SBS as a teacher. Mr Kirby was unhappy that he was to be replaced. Ultimately, the Society agreed to pay him the sum of \$730, being the balance of the NZ\$2,500 allocated by the Society for expenses with regard to the sending of Mr Kirby to China. That was a full and final settlement. The Society's position from then until now is that there is no further liability for any payment to Mr Kirby.

Resolution of factual issues

[9] There are obvious and significant differences in the two accounts given by the parties. Both have placed documents before the Court to support their respective

positions. Mr Kirby, as an unrepresented person, placed numerous documents and extracts from documents before the Court, many of which he had annotated with dates and comments, which he said proved that he was employed by the Society. It will be necessary to consider all this material in a chronological sequence and in doing so it will be necessary for me to determine whose evidence I find to be more reliable on any given issue.

[10] When assessing credibility, it is the Court's responsibility to carefully evaluate all the evidence, looking for inconsistencies between witnesses, and whether there are any external indications which can assist in a determination as to what occurred. As has frequently been observed in the past, the evidence has to be evaluated in a commonsense but fair way. All aspects of the evidence have to be assessed. A finding of credibility is unlikely to be based on only one element to the exclusion of all others, and will instead need to be based on all the factors by which

it can be tested in a particular case.²

[11] This is not a case where the demeanour of witnesses when giving their evidence is determinative. There are well recognised difficulties in assessing credibility through demeanour alone. Important also are contemporary materials, objectively established facts and the apparent logic of events.

Relevant legal principles

[12] Whether a person is an “employee” is a question to be assessed on the basis of [s 6](#) of the [Employment Relations Act 2000](#) (the Act) which provides:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, **employee**–

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes–

(i) a homemaker; or

(ii) a person intending to work; but

(c) excludes a volunteer who–

2 Farnya v Choney [1951 Carswell BC 133 \(B.C.A\)](#), [\[1952\] 4 W.W.R \(N.S\) 171](#), [\[1952\] 2 D.L.R](#)

354, at [8]-[9]. See also, the comments of O’Halloran, J A in the same case.

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer;

and

...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority–

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

...

[13] The issues which therefore require consideration are:

a) Did Mr Kirby expect to be rewarded for work as a volunteer?

b) Did he receive any reward for work performed as a volunteer?

[14] The analysis of whether a person does or does not expect to be rewarded for work to be performed as a volunteer must be carried out objectively. In my view, the principles that apply in determining whether an employment agreement or contract is in existence or as to its terms, should also apply when determining if an individual is a volunteer since such an enquiry may be related to the alternative possibility that the

individual is an employee.³ That is, one must consider the natural and ordinary

meaning of the language used by the parties in any relevant oral or written agreement; if necessary it is valid to cross-check a provisional view of what any words which have been used mean against the context.⁴

[15] In *Brook v Macown*,⁵ Judge Inglis held that “[s 6\(1\)\(c\)](#) may be taken as excluding only a sub-group of volunteers (those not expecting or receiving a reward)

³ The applicable principles are set out by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [\[2010\] NZSC 5](#), [\[2010\] 2 NZLR 444](#); such principles apply to employment agreements.

⁴ *Silver Fern Farms v New Zealand Meat Workers etc Trade Union* [\[2010\] NZ CA 317](#), [\[2010\] ERNZ 317](#).

⁵ *Brook v Macown* [\[2014\] NZEmpC 79](#).

rather than volunteers more generally”.⁶ She also held that the enquiry does not start and stop with an assessment of whether a person is a volunteer. She said:⁷

If the requirements of [s 6\(1\)\(c\)\(i\)](#) and (ii) are met it follows that they are not an employee. However it does not follow that they are an employee if these requirements are not met. That is because subsections (2) and (3) require a more expansive enquiry. The assessment is an intensely factual one, requiring consideration of all relevant matters, including material from which the intention of the parties can be gleaned.

[16] I respectfully agree with these observations. Thus, even if Mr Kirby does not meet the exclusionary test of “volunteer” under the Act, there is still an issue which arises under [s 6\(1\)\(a\)](#), which requires consideration of whether he was employed to do any work for hire or reward under a contract of service. Such an enquiry requires a consideration of the real nature of the relationship between the parties.

[17] I turn now to the factual issues. I do so first by considering the respective circumstances of each party, and then analyse the chronology of events, making appropriate findings where those events are the subject of different accounts.

Mr Kirby

[18] Mr Kirby said that at the time of these events he was aged 72. He had been a volunteer for various humanitarian projects such as working in remote and poor areas, assisting destitute children and refugees. He told the Court that he had been a volunteer for most of his life.

[19] Mr Kirby was normally resident in New Zealand, although he resided for some 10 years in Hong Kong, holding a Hong Kong identity card. He said that he would never have Visa difficulties because his wife is Chinese and he had visited China more than four times which would entitle him to a 90-day Visa. As explained earlier, he could not, however, obtain a Z Visa (work Visa) because of his age; and he could not be paid by a Chinese entity without a Z Visa. It was possible for him to apply for an F Visa (business Visa), available to an applicant proposing to undertake

business research, lectures and cultural exchange activities.

⁶ At [18].

⁷ At [19].

[20] At the time, Mr Kirby was described as having been a member of the Society for 35 years. Mr Kirby was aware that members of the Society provided their time on a voluntary basis when teaching in China; he said, however, whereas these other members could do this on a Z Visa, he could not because his age precluded him from obtaining such a Visa.

The Society

[21] Mr Bromwich is currently President of the Society, having held this role since May 2013. During the events under review, Mr Bromwich was the Society’s Vice-President; he had been the liaison person between the Society and SBS, since 2001.

[22] The Society was established in 1952 by the well known New Zealand born social reformer, Mr Rewi Alley, and New Zealand associates. The Society has a broad range of objectives, including the commemoration of the legacy in China of some of its founders, particularly that of Mr Alley. The Court was advised that no member of the organisation receives payment or fees for the performance of their duties, nor is any person paid by the Society for carrying out activities on its behalf.

[23] The Society has a longstanding relationship with SBS, demonstrated by the fact that executive members of the Society have visited the school regularly since the late 1980s. New Zealanders have been recruited by the Society as teachers of agriculture, woodwork, English, and also as representatives of the Society. The Society has also assisted with delegations and groups sent by SBS to New Zealand.

[24] Since 2006, the Society has delivered a series of community development projects in Shandon based at SBS, at least one of which is relevant to the present case. It was a project whereby a cooperative training of “Trainer of Trainers Programme” would be undertaken at the school with the intention that training courses could then be delivered to a broad catchment in Gansu Province in North West China (the cooperatives project). The intention was to support cooperatives in poor, rural communities. This project was the subject of a grant from a New Zealand Government Development Fund. It commenced in September 2008 and was initially

intended to finish in October 2009. Due to delays in implementation, it did not conclude until 2010; the precise date of conclusion will need to be considered later in this decision. The SBS Vice-Principal at the time, Mr Lin Guozhong, also an honorary member of the Society, was Manager of the project. He was absent for much of the project period as he was studying in New Zealand but in 2010, he returned to SBS and was involved in the completion of the project.

[25] Another relevant Society project involved the establishing of model cooperatives in two districts of Shaanxi Province, which Mr Bromwich said had a projected timeframe of December 2010 to December 2012.

[26] In his role as liaison person with SBS, Mr Bromwich has facilitated teacher placements at the school, introducing 14 such teachers to the school. He has also visited SBS at least once per year, and since 2006 at least twice per year. In facilitating the placement of New Zealanders as teachers, Mr Bromwich said that the Society's role was to introduce and recommend potential teachers. The decision to accept a recommended candidate would be made by SBS. Mr Bromwich explained that due to the isolation of the school, a relatively low salary was offered. Consequently it was common for there to be only one candidate in any one year.

[27] Mr Bromwich understood from discussions he had with representatives of the Gansu division of the State Administration of Foreign Experts Affairs (SAFEA), which approved who could be accepted as a foreign teacher at SBS, that there could be some leniency in approving a particular candidate where there was an issue as to age. This was in recognition of the special nature of the school, the difficulty in finding foreigners to go to a remote place like Shandon, and the importance of the relationship between Gansu Province and New Zealand through the legacy of Mr Alley.

[28] When introducing a candidate, the Society provided advice to the candidate as to the arrangements which will apply. This included the fact that the school would pay a salary of 3,000 Yuan per month and provide free accommodation, power and Internet connection. The Society facilitated the introduction by providing up to NZ\$2,500 for international travel and associated expenses.

[29] Mr Bromwich stated that SBS is a Chinese Government school consisting of a vocational unit with students within the age range of approximately 18 to 20, being provided with skills for employment; there is also a smaller middle school supporting students in the age range of 15 to 17.

[30] A teacher recruited by the Society would undertake the key role of teaching oral conversational English, which is a particular area of weakness for local teachers. The retention at SBS of a foreign teacher was also regarded as enhancing the status of the school, and assisted in attracting students. The teaching responsibilities were approximately 12 to 16 hours a week. Mr Wen Yongming was the International Relations Officer of the school, and the point of contact for these arrangements. The school would have oversight of the teacher once that person took up the teaching role.

[31] Mr Bromwich produced an employment agreement between SBS and a recently recruited teacher (for the 2014-2015 academic year) which shows that there was indeed an employment relationship between that candidate and SBS. However, Mr Bromwich says that SBS has been "unable to find the contract of employment with Mr Kirby due to a change in personnel and changes in offices". Beyond that statement, there is no evidence one way or the other as to whether a written employment agreement was in fact signed between Mr Kirby and SBS. There is, however, other relevant evidence from SBS which will be described below.

The chronology

[32] In mid 2009, Mr Kirby approached the Society as to the possibility of being recommended to SBS for the position of English teacher. He came highly recommended by a past president of the Society, who was familiar with Mr Kirby's previous voluntary work.

[33] There was a series of telephone conversations between Mr Bromwich and Mr Kirby as to this possibility. The main point to be taken from this evidence is that Mr Bromwich says he told Mr Kirby that the Society's financial input to the arrangement would be that it would pay up to NZ\$2,500 for the purposes of travel

and related expenses, as was budgeted annually by the Society. Mr Kirby denies that any such statement was made. I shall return to this issue later.

[34] By mid September 2009, it was thought there was an acceptance that Mr Kirby would be able to work for SBS for one year, based on the fact that he held a Hong Kong identification card. However, it was still thought necessary to obtain a Visa; Mr Kirby considered that the appropriate step would be to seek a one-year multiple entry F Visa (business Visa), supported by the Society. Mr Kirby became proactive in advancing this issue.

[35] By 19 September 2009, Mr Kirby had drafted a letter for the purposes of obtaining such a Visa. It is clear from an email from Mr Bromwich to Mr Kirby of that date that the parties had agreed not to refer to the "contract with SBS to deliver English teaching".

[36] The letter which I find Mr Kirby drafted purported to set out activities that he would undertake for the Society, being "business research", "lectures" and "cultural exchange" work (activities for which an F Visa could be granted). The letter provided for the possibility of signature by Mr Bromwich, but the copy produced to the Court was not signed by him; nor was it dated, although Mr Kirby has endorsed the date of 21 September 2009 on the copy of the document which he produced. Mr Bromwich told the Court it was a draft only and was overtaken by later drafts, confirming that he did not sign it and did not intend to since it was a draft letter only.

[37] Mr Kirby asserts that it is this document which constituted his "contract of service". There are several problems with this

assertion. The first, as already mentioned, is that it is unsigned and in its original form was undated. The second is that it says nothing about payment. The third is that contemporaneous emails show that a further version was sent by Mr Kirby to Mr Bromwich on 20 September 2009; and that on 22 September 2009, Mr Bromwich responded raising several concerns. It is apparent that by this stage the President of the Society, Mr Livingston, had also prepared a draft letter of support, since Mr Bromwich referred to this in his email of

22 September 2009. In the same email, Mr Bromwich specifically emphasised the point that since the proposed letter of support for a Visa application suggested

Mr Kirby would be undertaking activities on behalf of the Society, it would be necessary to refer to the fact that he was doing so as a volunteer.

[38] Finally, it is obvious that this was not the operative letter, because on

24 September 2009, Mr Livingston signed the version of the letter which the Society had drafted. This Society drafted letter referred to the development projects undertaken by the Society in various provinces, particularly Gansu Province. It also emphasised the Society's relationship with SBS, and the fact that this enhanced the school's standing as a centre for rural development in North West China, stating that there was an increasing need for such representation in China. In that regard, Mr Livingston confirmed that Mr Kirby had broad experience in voluntary development assessment work, and had made himself available to represent the Society "in the capacity of a voluntary [Society] representative for our projects there". Proposed duties were described, which included "oversight on our Society's behalf of the establishment of cooperative Trainer of Trainers Programme at Shandon Bailie School and of the plan to extend cooperatives in four new counties of Zhangye". The letter concluded by stating that the Society requested that support be given to Mr Kirby to assist in providing the valuable assistance which he had offered to provide. I find that this letter clearly indicated Mr Kirby was an experienced volunteer, and that the Society was proposing that he would be a representative of the Society on a voluntary basis. It did not say he would be paid for his services. Mr Kirby confirmed the letter was provided to him.

[39] The Society also provided Mr Kirby with a second letter to assist him in dealing with superannuation issues in New Zealand. That letter dated

29 September 2009, was also signed by Mr Livingston. It was similar in content to the earlier letter of 24 September 2009. Specifically it referred to Mr Kirby undertaking a voluntary position. It did not say he would be paid for his services. Again the letter was provided to Mr Kirby.

[40] It is of course the case that neither of these letters referred to the fact that Mr Kirby would also be undertaking a role at SBS as a teacher of conversational English, paid for by SBS. To that extent, neither letter described the totality of the arrangements, and indeed subsequently, Mr Bromwich was to say "we bent the rules

and worked very hard to accommodate you as [a] Society Cultural Ambassador". I find that the parties deliberately did not refer to any teaching work which would be performed for SBS, so as to avoid the possibility that the authorities would conclude that Mr Kirby needed to obtain a work Visa if employed as a teacher by SBS. The letters were written so as to assist Mr Kirby to take up his position as a teacher at SBS. To this point, however, there is no doubt that the Society was supporting Mr Kirby on the basis that he would be an unpaid volunteer in respect of any services he rendered for the Society.

[41] Mr Kirby also produced a document which he said was written by Mr Wen in his capacity as Assistant Principal of SBS on 10 October 2009. It was in similar terms to the correspondence provided by the Society to support Mr Kirby's application for a business Visa. It too referred to the fact that Mr Kirby would be undertaking "business research, lectures and cultural exchange" as a representative of the Society, and that he would teach for 12 months from the end of February 2010. Mr Bromwich accepted that this letter was provided. I find that this document was also provided so as to support Mr Kirby's application for an F Visa. Significantly, it also referred to him undertaking a teaching role.

[42] In early January 2010, Mr Bromwich sent an email to Mr Wen recording that Mr Kirby had sent his Visa application to the Chinese Embassy but it had been returned and another document was required. Mr Bromwich advised that the Embassy had requested a "Visa notification letter issued by the local Foreign Affairs Department". There is no evidence that such a document was in fact provided by Mr Wen.

[43] Mr Bromwich's email went on to remind Mr Wen that because of Mr Kirby's age, the Society was stating that Mr Kirby was being sent to China as a project support person for the Society, rather than as a teacher in accordance with a letter of invitation which had been provided by SBS in late 2009. Mr Bromwich suggested that there were two other Visa options. The first of these was that Mr Kirby would obtain a 90-day L Visa (visitor's Visa) which could be changed to an F Visa (business Visa) upon arrival; or he could enter on a 90-day visitors' Visa with multi-entry, returning to Hong Kong each 90 days so as to obtain a further Visa from

that source. It was noted, however, that this would "cost the school too much for internal travel". That is, it was confirmed the school would be meeting the costs which were associated with Mr Kirby being based at SBS.

[44] I infer that the former option was adopted, because the evidence before the Court is that on 10 February 2010, Mr Kirby was issued a 90-day L Visa (visitors' Visa). There is no evidence that SBS, in these circumstances, was not prepared to employ Mr Kirby as a teacher for its purposes; or that it would not pay him the standard amount for doing so, 3,000 Yuan per month. Indeed, Mr Peng Dongjun, Principal of SBS, subsequently stated that a special case was made for him to be employed by the school for a six-month period; there is evidence before the Court that other volunteers were authorised to teach at SBS under a similar arrangement, when they could not or had not obtained a work Visa.

[45] In February 2010, the Society arranged for Mr Kirby to travel from Christchurch to Wellington to attend a development seminar. The purpose of this arrangement was to assist Mr Kirby in obtaining an understanding as to how he should relate to persons involved in the Society's projects, when he was based at SBS. There was also a particular issue the Society wanted him to consider which related to the financial reporting in respect of the cooperatives project which the Society was promoting.

[46] Mr Kirby produced an email sent by Mr Bromwich to him at about this time. The copy produced to the Court is undated, but it is common ground it was sent to Mr Kirby after the February meeting. In that email, Mr Bromwich referred to a report he had received from Mr Wen about the cooperatives project. Mr Bromwich said "I can see you have a better understanding of what role you can play, both in teaching, and in supporting our project's work". I find that this confirms it was intended Mr Kirby would undertake two roles.

[47] Mr Kirby arrived at SBS on 5 March 2010, remaining there until early September 2010. I shall discuss shortly the nature of the activities he carried out following his arrival.

[48] On 4 April 2010, Mr Bromwich and a colleague visited SBS and other areas where projects were being undertaken by the Society. Mr Kirby produced a report of the trip in which he is referred to in this way:

NZCFS Teacher: SBS.

[49] Reference was also made to the Society's "ongoing" teacher supply and student exchange programme with SBS.

[50] To the extent that these references shed any light on the issue before the Court, they acknowledge that the Society was continuing to supply a teacher to SBS for teaching purposes. However, it is unclear who prepared the document; I attach little weight to it.

[51] Mr Kirby told the Court that in the course of this visit, he and Mr Bromwich discussed the question of remuneration by the Society. He said this was necessary because he wanted evidence of payment to show to the police who interviewed him from time to time as to his circumstances. Mr Kirby also said he could not say that he was being paid by the school since this would be illegal. Payment needed to be made by the Society. He said Mr Bromwich agreed he would have this issue attended to at the next Executive meeting. For his part, Mr Bromwich said that such a conversation did not occur and could not have occurred. He said Mr Kirby was being paid by the school from its own funds, and not from any funds relating to the cooperatives project; and that the Society did not employ teachers at the school. Furthermore he would have had no authority to make such a promise.

[52] In evaluating this issue it is necessary to consider Mr Kirby's evidence on other topics. The first relates to receipts which apparently confirmed a payment to him of 3,000 Yuan for each of the months of March to August 2010. Mr Kirby says that the receipts acknowledging receipt of 3,000 Yuan for the months of March, July and August was in each case forged; by contrast, the receipts which he also produced for the months of April, May and June were genuine; he did receive 3,000 Yuan as wages for each of those months, and his signature acknowledged receipt.

[53] Each of the six receipts are in Chinese script but a translation produced by the Society for the month of April relevantly states:

Wage of ¥3,000 Yuan from Shandon Bailie School, Gansu Province

(16 April 2010).

Then there was provision for an "Officer" and separately the "recipient" to sign the document.

[54] Mr Kirby alleges that these receipts were also required as evidence for a renewal of his L Visa; and that those payments which were made emanated originally from the Society and were on-paid by RDTC which was involved as a joint venture partner in the Society's cooperatives project. He said this conclusion was supported by an extract from a Society document which he construed as indicating an allocation by the Society of funds to RDTC. However, as Mr Bromwich confirmed, it appeared the statement related to expenditure which the Society had made in 2008.

[55] It is also to be noted that when this issue was raised in the Authority, Mr Kirby's evidence was that these amounts were paid to him by SBS so that he could pay for his accommodation. He did not say the sum was for wages paid by the Society or RDTC. Nor did he tell the Authority that three of the receipts were fictitious, and that he did not receive cash in three only of the six months.

[56] The Society produced evidence which included a letter sent by the Principal of SBS to Mr Livingston on 20 April 2011 which stated that the school had paid Mr Kirby's salary (RMB 3,000 Yuan a month) and travel subsidies (RMB 1,000 Yuan per school term), according to the agreement which it had with the Society; and that SBS had kept all Mr Kirby's signatures for those payments.

[57] The Society itself also gave evidence as to the disposition of its funds in this period. Mr Bromwich stated that the Society had made no such payments. The Treasurer for the Society, Mr Goodwin, was also called to give evidence on this point. He confirmed that the maximum grant to assist volunteer teachers with travel costs to and from Shandon was NZ\$2,500 per teacher, and that the then Treasurer had confirmed that the Society did not employ or pay any salaries to volunteer teachers, including Mr Kirby. The Society's accounts were produced for the financial year to March 2011. The only material entry in those accounts is "Shandon Bailie School teacher travel \$3,172", which Mr Goodwin said covered Mr Kirby's travel costs to Shandon, and those of his successor who was sent to Shandon in the same financial year. I was directed to no other entries from which it could be concluded that the monthly payments to which Mr Kirby referred were sourced from the Society. I have no reason to doubt the evidence from SBS officers to the effect that it did not pay the monthly amounts.

[58] I do not accept Mr Kirby's evidence that it should be concluded that three of the six receipts are fictitious because his signature has been forged and that he did not receive the sums to which they refer in those months. No expert evidence to support the allegation of forgery was placed before the Court. It is a very serious assertion which would require proper proof. Furthermore, Mr Kirby's position on this point is inconsistent; it is not an assertion which was made with reference to the originals of the documents; and it is a very recent allegation. One of his reasons for stating that three of the receipts are genuine, is that in the instances of April, May and June, the (poor) reproductions that have been placed before the Court appear to show a document having been placed to obscure Chinese script at the top of each such document. Mr Kirby says this was to ensure that when a copy of the receipt was presented by him to the police for Visa purposes, it would not reveal that he had been paid by a Chinese entity. There is no evidence as to when the photographed reproductions of the receipts were taken, by whom, or which might confirm that Mr Kirby's speculation is correct.

[59] On the basis of the evidence placed before the Court, I find that Mr Kirby's evidence is far-fetched and implausible. The better view is that the six documents all confirm payments of 3,000 Yuan per month made by SBS to Mr Kirby, as the Principal of the school has confirmed; and that Mr Kirby has acknowledged receipt by countersigning.

[60] Mr Kirby attempted to tie in these allegations to his assertion that given the fact he was holding an L Visa the school could not pay him so Mr Bromwich

promised that he would arrange for the executive to authorise payment instead. As I have already concluded, although Mr Kirby did not have a work Visa, a special case was able to be made for him to be employed by SBS.

[61] It is convenient now to address the issue of whether he was in fact a teacher at SBS. On 25 May 2010, Mr Kirby sent a detailed email to Mr Livingston and Mr Bromwich entitled "Report on English Teaching at Shandon Bailie". That email gave a detailed description of the English teaching facilities and work. Subsequent emails from Mr Kirby referred to activities relating to the teaching of English, such as his emails of 27 May and 1 June 2010. These emails tend to confirm he himself was engaged in the activities which he described. For its part, representatives of the school stated that Mr Kirby was "a good teacher" (31 August 2010); when he departed, an email from the school recorded: "we appreciate your contributions to our English teaching, to our work effectiveness and also your good advice and hard work to our library" (16 September 2010). I have referred already to the "Employment Certificate" signed by the Principal of SBS confirming Mr Kirby had been an English teacher at the school from March to August 2010. I have no reason to doubt the reliability of this evidence from SBS. The payments made to Mr Kirby were made by the school because he was employed by it to teach.

[62] There is no doubt that Mr Kirby was also engaged on activities relating to the cooperatives project. The Society itself accepts this was the case and that, for example, he attended a two-day "End of Project Workshop" which was arranged by Mr Liu for late June 2010 with participants from a variety of entities who had been involved in the project. That this event marked the conclusion of the cooperatives project is confirmed by a Project Completion Report submitted by the Society to the Government agency in New Zealand which had funded it.

[63] I find that Mr Kirby was enthusiastic and apparently active with regards to the activities which he carried out in a voluntary capacity for the Society as its representative; but he was not paid for doing so.

[64] By contrast, Mr Kirby was paid for his services as a teacher. I do not accept

Mr Kirby's assertion that the Society paid three monthly amounts for wages and that

this confirms Mr Bromwich agreed at the April meeting and then arranged for the Society to make such payments. I accept the evidence from Mr Bromwich that such a conversation did not occur.

[65] The essence of Mr Kirby's contention is that because he had Visa issues, the Society agreed to employ him for wages, and that it was agreed – presumably by all parties including SBS – that he would not be employed to teach at the school. This assertion is made despite the fact the Society had not budgeted for and did not authorise such expenditure, and that the school says it paid Mr Kirby as a foreign teacher at the agreed rate. It is not supported by the facts.

[66] Returning to my consideration of chronological events, Mr Kirby produced a document which he said was a further application for an F Visa (business Visa). He has endorsed a date on it of 23 April 2010, and says that it was a document issued on behalf of the "Shandon County Government" to assist him in obtaining a Visa on the premise that he was providing a "valuable cultural exchange". Mr Kirby says in effect that since there is no reference in the document to him being a teacher at SBS the Court should conclude that he was employed as a teacher. Much of the language contained in the document is that which was used in his Visa application in September 2009; and no original has been produced. It may have been prepared to obtain a Visa on the same basis as occurred in September 2009. In any event, apart from Mr Kirby's annotations, it is undated, and it is unsigned. I do not accept that the document can be relied on for present purposes.

[67] On 1 June 2010, Mr Kirby sent an email to Mr Livingston, copied to Mr Bromwich under the subject heading "The Foreign Language Classroom Shandon Baillie" stating that he had obtained a further 90-day Visa, after which he would have to proceed to Hong Kong with, what he hoped, would be a further

90-day Visa. This communication is consistent with him continuing to teach at SBS.

[68] Mr Kirby produced two photographs, which he says relate to meetings that occurred in Shandon on 13 July 2010 when the Society's President, Mr Livingston, was present. He says he was told by Mr Livingston that the Society had a budget for the purposes of advancing two of its projects in the provinces of Lingze and Shaanxi.

Mr Kirby supports this assertion by referring to one page (only) of a Project Completion Report form mentioned earlier, which related to the conclusion of the cooperatives project. The page to which he refers relates to Objective Three, which involved the establishing of cooperatives in four counties, including Lingze. The particular reference on which he relies is in fact a financial statement, where the budgeted sum for this particular objective was \$9,432, but actual expenditure was

\$11,204 due to the fact that the work involved had taken 35 days rather than 24 days

[69] Mr Kirby advanced the proposition that these references confirm that Mr Livingston told him he was to undertake work for the Society for 35 days for the purposes of Objective Three by working in Lingze, with the implication that the fund to which he made reference would be available to him. He said the work would be performed in November 2010. However, the document on which he relies is dated

9 October 2010 and confirms that the work involved had already occurred. I find that it is inconceivable Mr Livingston gave him any such instruction. Regrettably it is once again necessary to conclude that Mr Kirby's evidence is unreliable.

[70] Mr Kirby also said that Mr Livingston recorded these instructions in writing, as could be seen he says, from one of the photographs he produced. It is impossible to infer such a conclusion from the rather poor photocopied image which was produced. Mr Kirby said Mr Livingston then provided him with two copies of the document; one of those was placed with his personal effects. He asserted that Mr Bromwich had attended SBS on 20 September 2010 in Mr Kirby's absence, when Mr Bromwich identified and recorded the personal effects which he left in Shandon following his departure. Mr Kirby also alleged that on that occasion Mr Bromwich removed Mr Kirby's personal documents, including the report allegedly prepared by Mr Livingston which required Mr Kirby to undertake the Objective Three work. This assertion is illogical. First, the Objective Three work had already been undertaken. Second, Mr Kirby was not present when Mr Bromwich attended SBS and could not give reliable evidence as to what then occurred. I find there is no evidence that Mr Bromwich removed documents belonging to Mr Kirby. Mr Kirby's assertion regarding a document which confirmed he was to undertake Objective Three work is untenable.

[71] Mr Kirby also attempted to rely on another document relating to the work of the Society in Shaanxi Province, which he said commenced in July 2010 and that he was involved in it. However, that document related to a different project in another province. Mr Bromwich stated the project had not been confirmed when Mr Kirby claimed to be working for it. The relevant application was submitted in August 2010 with a start date of December 2010. I find there is no evidence Mr Kirby was tasked to undertake any aspect of it.

[72] In emails sent by Mr Kirby to Mr Bromwich on 25 and 26 August 2010, he recorded that his personal property had been damaged and that he was leaving the school. He advised he would be departing on 6 September 2010.

[73] Mr Wen advised Mr Bromwich on 31 August 2010 that there had been some difficulties involving Mr Kirby, but of particular concern was the fact that he had not been able to obtain a work Visa. The school requested that the Society select a new foreign teacher as soon as possible.

[74] However, by 11 September 2010, Mr Kirby was indicating that he wished to return to SBS. By this time, the Society had arranged for a substitute foreign teacher, which SBS accepted since that person had a work Visa, who would commence work in early 2011; that person would be employed by SBS on the same basis as had applied to Mr Kirby. When visiting SBS on 20 September 2010, Mr Bromwich confirmed to Mr Kirby that SBS did not consider it had “any further

work placement for you”.⁸

[75] It is apparent from subsequent emails that Mr Kirby felt seriously aggrieved at the fact that he was no longer welcome at the school. However, in Mr Kirby’s emails of the time, he acknowledged that the Society had no responsibility for what had occurred – contrary to what he told the Court when giving his evidence. The only issue he raised as far as the Society was concerned was that it should pay him “the outstanding amount re cost of insurance etc (NZ\$750)”. In none of the many

emails Mr Kirby sent at the time did he say that he was owed wages by the Society.

8 (Emphasis added).

[76] On 16 September 2010, Mr Wen wrote to Mr Kirby thanking him for his assistance at SBS and acknowledging his contribution to the school’s English teaching. The email stated that a work Visa was necessary for a foreign teacher, and that the school had decided to employ a person who could meet this requirement. Subsequently Mr Kirby stated that this was a letter of dismissal from the school.

[77] In November 2010, Mr Kirby prepared a formal request for recompense of costs of travel and related expenditure, and in respect of damage to his personal property and/or his inability to recover it; he submitted this to the Society. The Executive Committee of the Society considered it on 20 November 2010. Subsequently Mr Bromwich relayed its decision to Mr Kirby. The remaining sum of

\$730 from the NZ\$2,500 allocated by the Society to support Mr Kirby’s travel and related expenses would be paid, providing he accepted this as a full and final payment and that there would be no further requests for financial recompense. Mr Kirby acknowledged receipt of this sum by email of 30 May 2010. His email acknowledged in effect that was the end of the matter; however, Mr Kirby now says that was not the case. This was arguably a valid accord and satisfaction,

extinguishing any further liability.⁹ Although this legal point was not taken for the

Society, it is relevant to credibility.

[78] Nine months later, on 24 August 2011, the parties attended a Disputes Tribunal hearing in Christchurch because Mr Kirby had brought a claim against the Society. The agreed outcome was that Mr Kirby would donate his personal items to the school, and that Mr Livingston would write to Mr Kirby recording appreciation for his previous work in China. Then the adjudicator recorded “this agreement determines this dispute”. Mr Kirby says that a claim for wages was “rejected” by the Disputes Tribunal and referred to the Employment Relations Authority. I do not accept that the possibility of a wages claim was raised by Mr Kirby in 2011; if this had occurred, and given Mr Kirby’s persistent focus on his concerns, a claim would have been brought long before late 2014. Moreover, this account is denied by

Mr Bromwich whose evidence I prefer.

9 John Burrows, Jeremy Finn and Stephen Todd, *Law of Contract in New Zealand* (4th ed, Lexis

Nexis, Wellington 2012) at 19.2.3.

[79] On 19 June 2013, the matter came before the Disputes Tribunal again. A second hearing did not proceed because the Tribunal considered that there was no new evidence which would justify the matter being reopened. Mr Bromwich says that at that hearing, Mr Kirby did not raise any wages issue; this is supported by Mr Goodwin who also says there was no mention of the matter. Mr Kirby, however, stated in his evidence that there was reference to a wages claim being advanced. I prefer the evidence of the two witnesses for the Society, since had the possibility of a claim being made to the Authority arisen in 2013, then it would have been filed soon after. There is no doubt that Mr Kirby by this time was taking all possible steps to advance his concerns, as reflected in the hundreds of emails which he sent to Society members and others on the topic, many of them abusive and defamatory.

[80] Mr Goodwin visited Mr Kirby twice in 2014 in an attempt to deal with his claims. He asked Mr Kirby for verifiable evidence. No documentation was produced indicating the Society had agreed to pay more than what it already had. Subsequently, Mr Kirby sent yet further abusive emails, alleging fraudulent activities on the part of the Society, particularly with regard to the Government funding it has received. None of the samples I have reviewed justifies such serious and improper allegations; that they were sent does Mr Kirby no credit at all.

[81] Mr Kirby said that he decided to bring the issue of wages to the Authority, following advice received from the Citizens' Advice Bureau, apparently in late 2014. That claim for wages was not made until four years after the event suggests in this case that it was a very late afterthought.

Conclusions

[82] I now deal with the issues which fall for determination on this challenge.

[83] I find that Mr Kirby was sent to China by the Society as a teacher to work for SBS. He was an employee of SBS; not an employee of the Society. He did, however, agree to undertake unpaid voluntary work for the Society as described in Mr Livingston's letters of 24 and 29 September 2009. That was his choice.

[84] Having regard to the overall unreliability of Mr Kirby's evidence, and the reliability of evidence given by Mr Bromwich I find that Mr Kirby was told in advance that the Society had a budget of up to NZ\$2,500 to assist in travel and related costs; and that SBS would pay him 3,000 Yuan per month and would provide accommodation as recompense for the teaching duties he would perform for the school.

[85] I find that Mr Kirby undertook voluntary activities in his capacity as a representative of the Society; he was enthusiastic and active in that regard, up to the conclusion of the cooperatives project in late June 2010. The nature of Mr Kirby's activities after that date is less clear and the evidence before me is not sufficiently reliable to conclude that he conducted activities on behalf of the Society after that date.

[86] Assessed objectively I find that there was no reasonable basis for Mr Kirby to conclude that he would be rewarded for work undertaken as a volunteer for the Society. Mr Kirby has advanced several assertions wherein he claims that such an expectation was created and/or agreed in September 2009, in early April 2012 following his meeting with Mr Bromwich, and on 12 July 2010 following his alleged meeting with Mr Livingston. Mr Kirby's reasons for his conclusion that it was agreed he would be remunerated for work performed for the Society are misconceived. I conclude that there is no basis for his assertion that he expected to be rewarded for the work he undertook as a volunteer.

[87] The payments made by the Society related to the expenses involved in his recruitment as a foreign teacher in SBS. Those payments did not relate to the work he undertook as a volunteer for the Society.

[88] Mr Kirby was not a volunteer who expected to be rewarded by the Society for work performed in that capacity; nor did he receive any reward for work performed as a volunteer for the Society.

[89] Furthermore, the real nature of the relationship between the parties was not one of employer and employee. Mr Kirby's relationship with the Society was that

of a volunteer who could not, from an objective perspective, have expected remuneration for his services. Consequently, he was not remunerated for work he undertook in China on behalf of the Society. Wages were never discussed, they were never paid by the Society and there was no intention that they would be. Mr Kirby never applied for or received sick leave or annual leave during the time he says he was employed. The Society had a budget only for the provision of travel and associated expenses which it agreed to pay, as had been the case for other foreign teachers it sent to SBS, before and after it sent Mr Kirby.

Other issues

[90] I invited the parties to provide submissions on issues of jurisdiction which may have arisen had I concluded Mr Kirby was an employee. These could have included the territorial reach of the Act, the proper law of the contract, and whether the correct forum for determination of any employment issues was in New Zealand or China. I acknowledge the submissions provided by the parties in that regard, but given the clear conclusion I have reached as to Mr Kirby's status, it is unnecessary for me to carry on to consider those issues.

Disposition

[91] I agree with the conclusion reached by the Authority. The challenge is dismissed. The Society may bring an application for costs; such an application should be supported by evidence and submissions filed and served within 14 days of the date of this judgment. Mr Kirby may file and serve a response 14 days thereafter. Any such application will be determined on the papers.

B A Corkill

Judge

Judgment signed at 2.30 pm on 22 October 2015

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