

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 330
5388424

BETWEEN DAPENG QIN
 Applicant

A N D TRUST WORTHY
 AUTOMOTIVE LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: May Moncur, Advocate for Applicant
 Yvonne Yue Wang, Advocate for Respondent

Investigation meeting: 13 September 2012 at Auckland

Date of Determination: 24 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Qin) alleges that he was unjustifiably dismissed from his employment as an assistant mechanic of the respondent (Trust Worthy). There is also a claim of disadvantage and a claim for penalties. Trust Worthy resists those contentions on a number of grounds.

[2] This was an engagement of very short duration lasting less than a week. Mr Qin, at the commencement of the relationship, was a recent arrival from China. He saw an advertisement in a Chinese web site circulating amongst the Chinese community in New Zealand. The advertisement was placed by Trust Worthy and sought an assistant mechanic. The advertisement spoke of a salary being payable and was clearly soliciting an employee.

[3] Mr Qin arrived at the workplace without prior warning at around 3.30pm on 16 March 2012 and he had an interview with the employer's director, Mr Xu. There

is dispute between the two men as to how long the interview took. Mr Xu says it took 20 minutes whereas Mr Qin said it took 10 minutes, but either way, there is some common ground about what was discussed.

[4] In particular, Mr Xu produced to the Authority a recollection of the questions he asked and the answers he was given and Mr Qin did not challenge the thrust of that evidence.

[5] A number of aspects of what happened at that interview are critical to the disposition of this matter. Mr Xu says that Mr Qin represented that he was capable of doing things which he was not capable of doing and that if Mr Qin had been truthful in the initial interview, then no relationship of any kind would have commenced. The first of these issues is the question of whether Mr Qin could drive a car. Plainly that is a skill which a person working in a garage repairing vehicles might be expected to have. The evidence the Authority heard suggested that Mr Qin had a Chinese driving licence which he may have acquired by sleight of hand, but that he could not drive. Mr Xu said that Mr Qin told him in the initial interview that he could drive although it was evident very quickly on into the relationship that he could not. Mr Qin denies telling Mr Chiu that he could drive.

[6] The second particular matter in dispute is the nature of Mr Qin's qualifications. Mr Xu says that he understood Mr Qin to be an experienced gearbox repairer. Mr Qin says that he was nothing of the kind; he says he told Mr Xu that he had designed gearboxes for small cars back home in China but that he had no experience in repairing them.

[7] Finally, and perhaps most significantly of all, Mr Xu said that he had engaged Mr Qin because he believed the latter had the requisite skills to assist him to repair vehicles in his workshop. In fact, it transpired very early on in the relationship that Mr Qin had no such abilities at all and that he had not even the basic knowledge about the workings of motor vehicles. Mr Xu gave the Authority evidence about Mr Qin being unable to identify how to activate brake lights on a motor car for example, or find various switches. Mr Xu also indicated that Mr Qin did not know what an air filter was or where to find it in a car.

[8] A further aspect in dispute about that initial employment interview is that Mr Xu said that he employed all his new staff on an initial week as a volunteer and

only after the successful completion of that week were they offered employment. He says that that was the basis on which Mr Qin was engaged as well. Mr Qin did not understand that that was the position at the initial interview and claims to have only been told that on the second day that he had been working in the business.

[9] Another area of dispute from that first meeting was whether Mr Qin had told Mr Xu that he was only in New Zealand on a working holiday visa. The effect of that visa was to mean that he could only be employed in a particular business for a total period of three months. However, Mr Xu did confirm to the Authority that in the initial interview, all he asked Mr Qin to confirm was that he was in New Zealand legally and that he was able to work. He says he got affirmative answers to both those questions and that Mr Qin did not disclose that the nature of his visa was time limited as the Authority has just noted.

[10] In any event, based on what Mr Xu thought he understood about Mr Qin's abilities, Mr Xu called Mr Qin and offered him the job of assistant mechanic, he says beginning with a week's period of unpaid work as a volunteer.

[11] Mr Qin accepted the offer of the position but told the Authority that he did not understand that he was not to be paid for the first week. There is dispute between the parties about the dates of the engagement but for the avoidance of doubt, the Authority prefers the evidence of Trust Worthy on this aspect, to that of Mr Qin. The engagement commenced on 2 April 2012 and Mr Xu was immediately discouraged by Mr Qin's performance. Mr Xu said that Mr Qin could do virtually nothing to assist in the work of his business and plainly knew nothing at all about cars or how to fix them. He also said that Mr Qin was lazy, unwilling to learn, more interested in texting on his cellphone and yarning to customers and taking long lunchbreaks than learning how to do the job required of him.

[12] On 3 April 2012, the parties met at the end of the working day. Mr Xu told Mr Qin that he was not persuaded that the relationship would be successful. Mr Xu said that he did this gently "*in the Chinese way*" and that Mr Qin asked for a further day to prove himself. According to Mr Xu, Mr Qin then disclosed to Mr Xu that he only had a working holiday visa. and that he would undertake to continue working in the business after his visa expired, without requiring tax to be paid and at a reduced rate, to keep the job. Mr Xu checked this out with his accountant who apparently told Mr Xu firmly that Mr Qin's proposal was illegal.

[13] Mr Xu granted the request that Mr Qin have an extra day to prove himself , but at the end of the following day, 4 April 2012, the arrangement was finally terminated with Mr Xu telling Mr Qin that the position was simply not suitable for him.

[14] Subsequent to the termination of the relationship, there was an exchange between the parties on one of the frequently used Chinese language websites operating within New Zealand. Mr Qin accused Mr Xu of bad mouthing him on the website. Mr Xu responded by indicating that he was simply responding to Mr Qin's original posting which had been critical of him and the business, Trust Worthy.

Issues

[15] It will be convenient if the Authority reviews the following questions:

- (a) Was Mr Qin a volunteer?
- (b) Did Mr Qin misrepresent his abilities?
- (c) Was the termination of the engagement an unjustified dismissal?

Was Mr Qin a volunteer?

[16] Trust Worthy maintains that Mr Qin was indeed a volunteer in terms of s.6(1)(c) of the Employment Relations Act 2000 (the Act). But that analysis rather overlooks the definition of "worker" in the same section which includes a person intending to work.

[17] On any analysis, Mr Qin has to be seen as a person intending to work. His evidence, which on this point the Authority accepts, is that he undertook the engagement because he was seeking employment. Trust Worthy advertised the engagement as one of employment. Even on Trust Worthy's evidence, its purpose in having an unpaid week was to establish suitability for employment so it seems to the Authority to follow that the preferable view is that Mr Qin was a worker intending to work rather than a volunteer.

[18] That analysis is supported by the evidence of Trust Worthy which is that it invariably required its new staff to work an initial week without payment and then, on the footing that they satisfied Trust Worthy of their utility in the workplace, they commenced paid employment, but were also given a bonus which was equivalent to

what they might have earned in the first unpaid week of the engagement. Presumably, by analogy, if Mr Qin had completed the first week successfully, he could have looked forward to receiving the same kind of bonus payment, but his apparent unsuitability for the role precluded that.

[19] The Authority thinks it appropriate to admonish Trust Worthy in relation to its hiring practice involving a first week's employment without pay and without documentation. The Authority agrees with Ms Moncur, the advocate for Mr Qin, who quite properly emphasised that the law allows an employer to have a probationary period during which each party determines the suitability of the other for a long term relationship, but it is on terms and conditions which the law stipulates and strictly enforces: see s67A of the Act.

[20] It is a truism that ignorance of the law is no excuse and Ms Moncur quite properly drew attention to the information readily available on the familiar Chinese websites in New Zealand about this and other aspects of employment law in this country.

[21] The Authority commends to Trust Worthy the view that it should work perhaps with its very able young advocate in this matter, to develop its policy so that it can achieve its business objectives but also comply with New Zealand law, and, as a subset, avoid the necessity to defend itself in personal grievance proceedings in the future.

Did Mr Qin misrepresent himself at the initial interview?

[22] The Authority is satisfied that Mr Qin did misrepresent himself at the initial interview. The evidence the Authority heard demonstrated that Mr Qin had neither driving skills nor mechanical ability. While he would protest these conclusions, his evidence to the Authority was hardly a ringing endorsement of his skills in those particulars. In his evidence to the Authority he claimed to be able to drive but said he was unfamiliar with New Zealand conditions. But Mr Xu said he tried to get Mr Qin to drive a car out of his workshop and the latter could not; the Authority prefers Mr Xu's evidence on the point. On Mr Qin's mechanical ability, Mr Qin's own evidence provides little comfort that he could contribute to the work of a garage that repaired cars. That was Mr Xu's conclusion as well.

[23] It is difficult to see how a young man who cannot drive can be of any use in a workshop that fixes cars. Equally, the Authority cannot conceive how an employee who knows little about the workings of a motor car can be expected to participate in the repair of it. But both those aspects were the evidence that the Authority heard at the investigation meeting. As the Authority has already noted, Mr Qin's own evidence to the Authority was that he was, at best uncertain about driving a car in this country, and Mr Xu's evidence on his ability in that regard went further still. Mr Qin's lack of understanding of the most basic concepts of a mechanical nature was not denied by Mr Qin.

[24] Conversely, Mr Xu struck the Authority as a sensible man and it would be inconceivable that, as a sensible and practical business person, he would engage a new worker who had neither of the two principal skills that one would expect a person working with motor vehicles would have, namely an ability to move them around and a basic understanding of how they work.

[25] It follows from the foregoing analysis that the Authority is satisfied that Mr Qin misled Mr Xu about his abilities and that had he been accurate about his qualifications and experience, Mr Xu would not have engaged him. Therefore a direct cause of his engagement was his misrepresentation to the employer, Trust Worthy, of his attributes and experience.

Was Mr Qin unjustifiably dismissed?

[26] The Authority has already determined that Mr Qin was employed because he was a worker rather than a volunteer. It follows that, in principle anyway, he could have been dismissed from the employment, either unjustifiably or not.

[27] Trust Worthy says that, if there was an employment relationship, then it was entered into by mistake whereas Mr Qin maintains that he was simply told by Mr Xu at the close of the business day on 4 April 2012 that he was not suitable for the position and therefore his position was terminated. Mr Qin says that amounts to an unjustified dismissal.

[28] The Authority is satisfied that Mr Qin misled Trust Worthy about his qualifications and attributes to such an extent that he would not have been employed at all in the business if Trust Worthy had had an accurate appreciation of Mr Qin's actual abilities. Trust Worthy claim that the engagement was activated by mistake, a

mistaken belief on their part that Mr Qin had sufficient skills and abilities to be worthy of consideration for a permanent position in their garage and that their conviction in that regard was a function of the representations made to them by Mr Qin at engagement. What is more, the evidence the Authority heard raised real doubt about when Trust Worthy were advised by Mr Qin that he had a limited work visa. Mr Xu said he sought assurances from Mr Qin about his ability to work in this country at interview and on his evidence, was not told at that point that Mr Qin could only work for Trust Worthy for three months. The Authority is inclined to accept that again on this point, Mr Qin was less than fulsome in his communications with Trust Worthy at the interview. Certainly, it seems to be accepted that he revealed, after the employment commenced, that he was on a working holiday visa but by then, the employment was on foot.

[29] By virtue of s.162 of the Act, the Authority has the same powers as the High Court or District Court to make orders under either the Contractual Mistakes Act 1977 or the Contractual Remedies Act 1979. The Contractual Mistakes Act 1977 (the 1977 Act) contemplates relief inter alia where a party alleges that the other party has induced it to contract by a mistake known to the other party. Here, the argument would run that Mr Qin knew or ought to have known that his skills were inadequate for the role, but yet he misrepresented his position so as to induce Trust Worthy to contract with him.

[30] Similarly, in terms of the Contractual Remedies Act 1979 (the 1979 Act), where the Authority has power to grant relief by cancellation of the contract if the truth of the representation is essential to one of the parties (see for instance *Skywards Catering Ltd v Apthorp-Hall* [1995] 2ERNZ 218), the argument would run that Mr Qin, by representing himself erroneously as a person capable of working in a garage, brought himself within the terms of the provision because the very representations he made about his abilities were essential terms for the employer.

[31] Looked at in a practical commonsense way, it is difficult to see how Trust Worthy can be criticized for bringing the relationship to an end after finding out that not one but three essential terms of the employment had been misrepresented, or potentially misrepresented by Mr Qin. Trust Worthy had entered the employment in the mistaken belief that the young man they were engaging was at worst, worthy of consideration for employment as an Assistant Mechanic. In fact, on the evidence the

Authority heard, Mr Qin had none of the central attributes that a garage proprietor would be expected to seek in such an employee. The Authority concludes then that it was available to Trust Worthy to dismiss Mr Qin legitimately both because the contract was entered into because of a mistaken belief that Mr Qin had attributes he did not have and/or because Trust Worthy entered the contract in reliance on Mr Qin's several misrepresentations: the 1979 Act applied.

[32] Of course, a dismissal for misrepresentation may still be unjustifiable if the representation is not essential in the formation of the contract for instance. Here, the Authority places reliance on the fact that three separate and essential terms of the engagement were misrepresented by Mr Qin which, taken together, induced Trust Worthy to enter into the arrangement. Put another way, the Authority is satisfied, on the evidence it heard, that Trust Worthy would not have engaged Mr Qin if it were not for those critical misrepresentations as to his driving, his overall ability and his immigration status. It is true that if the only matter relied upon were the immigration status, then the decision would be different because the Courts have long held that employment agreements are not contracts of utmost good faith. It follows that the Courts will not require a prospective employee to disclose material which might be relevant, provided that person does not deliberately mislead. In the present case, the evidence is clear that, looked at in the round, Mr Qin misrepresented his abilities so as to induce the formation of the contract.

[33] What then of the failure to pay wages during the brief engagement? The Authority has already established that Mr Qin was an employee and not a volunteer. It follows that he is entitled to payment for the period of the employment. Contrary to the claim made on Trust Worthy's behalf, there is an evidential basis for Mr Qin's claim to have been disadvantaged as a consequence of the unjustified action of his employer. The unjustified action, of course, was the failure to pay wages in the absence of any of the protections required by New Zealand law around a probationary period of employment. In order to trial an employee, there is a provision in the statute which is perfectly adequate for both parties but there is no provision which allows an employer not to pay an employee for providing services.

[34] It follows that Trust Worthy has committed an unjustified action by failing to pay Mr Qin and that as a consequence of his failure to receive remuneration for the short period of the employment, he has suffered disadvantage.

[35] Subject to issues of contribution, the Authority is satisfied that Mr Qin should receive wages for the period of the employment together with compensation for the personal grievance found by the Authority of an unjustified action causing disadvantage.

[36] The Authority will not levy penalties against the employer in relation to the failure to provide a written employment agreement or the failure to pay wages or provide wage and time records. While ignorance of the law is no excuse, the Authority is satisfied that Trust Worthy was acting on the mistaken belief that it could legally recruit workers on the basis that they spent the first week without ordinary pay to assess their suitability and accordingly no wage and time records were kept for that period, nor was an employment agreement provided.

[37] The Authority thinks it has made it abundantly clear in this determination that that practice of Trust Worthy must cease and that if it wishes to undertake trial periods in the future with new staff, which it is perfectly entitled to do under New Zealand law, it must do it in accordance with the law and follow the specific requirements of the statute to the letter.

Determination

[38] Mr Qin has not satisfied the Authority that he has been unjustifiably dismissed. The Authority is satisfied that if Mr Qin had been accurate about his background qualifications and experience, he would never have been hired for the role and, having been hired and then as it were found out, the Authority is satisfied that Trust Worthy was able to dismiss Mr Qin justifiably.

[39] However, the Authority is also satisfied that Mr Qin has suffered a disadvantage because of the unjustified action of Trust Worthy in not paying him for the short period of the employment. Given that Mr Qin was an employee on the Authority's analysis, he is entitled to be paid for his work and the fact that he was not paid for the period of the employment (albeit short) constitutes a disadvantage.

[40] However, s.124 of the Act requires the Authority to consider whether what Mr Qin did contributed to the commission of the personal grievance. It is difficult not to conclude that Mr Qin's responsibility for the personal grievance is not 100%. As the Authority has already made clear, if Mr Qin had been honest about his attributes and experience, he would never have been engaged in the first place and so the fact

that he provided false information to the employer, which the employer relied upon, really was completely responsible for the commission of the personal grievance.

[41] Accordingly, while the Authority is satisfied that Mr Qin has a personal grievance by reason of having suffered a disadvantage because of the unjustified actions of the employer in failing to pay him for the short period of the employment, the Authority must also conclude that Mr Qin's contribution to the circumstances giving rise to the personal grievance is 100%. It follows that no remedies can be payable.

Costs

[42] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority