

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 23
5469542

BETWEEN STONE (ZHIYUE) SHI
Applicant

A N D ADVANCED COMPUTERS
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
Nancy Zhang, Operational Manager for the Respondent

Investigation Meeting: 20 January 2015 at Auckland

Date of Determination: 29 January 2015

DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr Stone (Zhiyue) Shi, is entitled to unpaid wages totalling \$2,590.05 gross together with holiday pay**

- B. The respondent, Advanced Computers Limited, is to make payment of the sum of \$2,590.05 gross together with holiday pay on that amount to Mr Shi within 14 days of the date of this determination.**

- C. There is no order as to costs.**

Employment relationship problem

[1] The applicant, Mr Shi, seeks payment of wages amounting to \$2,807.95 gross from the respondent, Advanced Computers Limited (Advanced Computers). Mr Shi says this is the amount he is owed for work performed by him for Advanced Computers and which he has not been paid. Advanced Computers says that it does not

owe Mr Shi any unpaid wages. Advanced Computers says Mr Shi was paid for work performed by him during his employment by it.

Investigation meeting

[2] For the Authority's investigation, the applicant, Mr Shi, and Ms Nancy Zhang and Ms Karen Zhang for Advanced Computers provided written statements. Each confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[3] As permitted under s174 of the Employment Relations Act 2000 (the Act), this determination has not set out all the evidence received. I have stated findings on relevant facts and legal issues and made conclusions in order to dispose of the matter.

Issues

[4] The issues for determination by the Authority are:

- (a) Is Mr Shi owed wages for work he says he performed for Advanced Computers during the course of his employment by it?
- (b) If so, what is the amount of unpaid wages owing?

First issue

Is Mr Shi owed wages for work he says he performed for Advanced Computers during the course of his employment by it?

[5] Advanced Computers is a computing and technology company with branches in Glenfield and Penrose, Auckland. Its customers include individuals and small to medium sized businesses and its services include electronic, computer, iPad and iPhone repairs¹.

[6] The applicant, Mr Shi is a citizen of China and a recent immigrant to New Zealand. Mr Shi has a number of qualifications in information technology (IT) obtained over almost 20 years from educational institutions in China. Mr Shi also has considerable experience in IT repairs from employment while resident in China.

¹ www.advancedcomputers.co.nz

Since arriving in New Zealand, Mr Shi was employed to undertake computer repairs for Ezone Computers Limited in Auckland.

[7] In April 2014, Mr Shi was looking for full-time employment and saw an advertisement in the Sky Kiwi Chinese website for a full-time computer technician. The advertisement was placed by Advanced Computers and stated that the position was a full-time, five day a week role.

[8] Mr Shi applied for the position on 10 April, sending his application and CV to Ms Nancy Zhang, the Operational Manager of Advanced Computers.

[9] Ms Nancy Zhang emailed Mr Shi requesting that he come to Advanced Computers North Shore branch for an initial technical assessment, which he did.

[10] Ms Nancy Zhang told the Authority that she was unsure as to whether Mr Shi would work out as an employee because even though his technical skills seemed adequate, his English was not very good. Therefore, Ms Zhang decided to offer Mr Shi a casual employment agreement to enable her to assess his abilities.

[11] Mr Shi was offered a written employment agreement which stated that he was to be employed on a casual basis depending upon Advanced Computers' requirements and Mr Shi's availability.

[12] Clause 5(c) of the employment agreement stated:

“The hours of work shall be those as offered by the Company and agreed to by the Employee, which must match on-service charge hours on repair jobs accomplished with full payment.”

[13] Clause 6 of the employment agreement stated that Mr Shi would be paid \$15 gross per hour worked and that only hours actually worked would be paid for. This clause also provided that Mr Shi would be paid on the 25th of each month and that all paid hours must be recorded on the staff timesheet with the supervisor's or manager's signature.

[14] Mr Shi signed the employment agreement on 26 April and the agreement was signed on behalf of Advanced Computers on 28 April.

[15] Mr Shi says he began work on 28 April. Mr Shi says he had some flexibility in his working hours but that he usually started work between 9.30 and 10 am each day

and usually finished between 4pm and 6pm. On one or two occasions he had to leave a little earlier when there was torrential rain to pick his daughter up from school.

[16] Mr Shi says he was not requested to fill out any time sheets recording his hours of work, rather he was required to provide a fingerprint each morning when he arrived and each evening when he left.

[17] Ms Nancy Zhang says Mr Shi was not required to provide a fingerprint because he was a casual employee. However, Ms Nancy Zhang says that all full-time employees were required to provide a fingerprint when they arrived at work and when they left. This was not so much for time keeping purposes but for performance appraisals when issues such as lateness could be raised with an employee.

[18] Ms Karen Zhang is the Branch Manager, in charge of daily operations at Advanced Computers on the North Shore. It was Ms Karen Zhang's responsibility to allocate work to Mr Shi, which she did. However, Ms Karen Zhang said she was not responsible for supervising Mr Shi's hours of work. Ms Karen Zhang was aware that all full-time staff had to provide a fingerprint when they arrived at work and when they left. Ms Karen Zhang says fulltime staff were paid on the basis of the hours worked by them between providing fingerprints on arrival and on departure. Ms Karen Zhang told the Authority that the company's accountant was responsible for the timesheets completed by staff, but she had no knowledge of how the timesheets were compiled and collected by the company's accountant.

[19] When asked by the Authority who was responsible for signing Mr Shi's timesheets, Ms Karen Zhang said it was her supervisor, Ms Nancy Zhang. However, according to Ms Karen Zhang's evidence, she was responsible for the daily operation of the North Shore branch and Ms Nancy Zhang spent most of her time at Advanced Computers' Penrose branch. No timesheets for Mr Shi were provided to the Authority.

[20] Ms Nancy Zhang says Mr Shi may have come to work at 9.30 in the morning and left at 5.30 or 6.00 in the evening, but those were not the hours he was to be paid. Ms Nancy Zhang says that under the terms of the casual employment agreement that Advanced Computers had with Mr Shi, he was to be paid only for actual hours worked.

[21] However, it became clear that neither Ms Karen Zhang nor Ms Nancy Zhang spoke with Mr Shi about the way in which he was to be remunerated, other than as specified in the employment agreement, \$15 an hour for actual hours worked.

[22] Ms Nancy Zhang provided a record to the Authority entitled "Service Order Sales by Technician". This was in response to a request by the Authority for wage and time records. The form is a record of jobs performed by a technician, in this case, Mr Shi. The form records that on 1 May 2014, for example, Mr Shi worked for 1.50 hours for which he was remunerated \$22.50. The form provided is for the period 1 to 27 May and records that during that period Mr Shi worked for 28.11 hours for which he was remunerated \$421.65 gross. For the period 27 May to 13 June the form records that Mr Shi worked 24.22 hours for which he was remunerated \$354.15 gross`.

[23] I do not accept that this record is a record of the hours worked by Mr Shi. Rather, it is a record of Mr Shi's hours recorded in respect of individual jobs for which Advanced Computers on-charged its clients. This became clear when Ms Nancy Zhang and Ms Karen Zhang confirmed that when a job is allocated to a computer technician, he or she quotes the hours they expect the job will take to complete for a customer. In the event the job exceeds the time quoted, the technician is not paid for the hours in excess of the quote. Accordingly, if Mr Shi quoted repair time of 1 hour on a computer but in fact the job took him 3 hours, he would not be remunerated for the extra 2 hours.

[24] This practice appears to me to amount to a breach of s.4 of the Wages Protection Act 1983 which states that ... *an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to the worker without deduction.*

[25] Ms Nancy Zhang told the Authority that in such an instance the technician could refer the matter to her for consideration and she would decide if any further remuneration would be made. Such action is in my view in breach of the Wages Protection Act 1983. The answer to the first issue is "Yes".

Second Issue***If so, what is the amount of unpaid wages owing?***

[26] Mr Shi's pay became an issue when he sent an email to Ms Nancy Zhang on 2 June disputing his salary payment. Following further discussions between Ms Nancy Zhang and Mr Shi, Mr Shi decided to terminate his employment agreement on 13 June because he disputed the salary payment made to him. Mr Shi immediately prepared a log of his hours of work from the date he commenced employment on 28 April until his resignation on 13 June.

[27] I accept the work log prepared by Mr Shi as the best evidence of the hours of work he performed for Advanced Computers. Mr Shi was clear that if he was to be paid in the manner that Ms Nancy Zhang explained at the investigation meeting, he would never have accepted the job. The record provided by Advanced Computers to support the payment to Mr Shi records that, for example, on 6 May Mr Shi worked for less than 1 hour and was paid \$9.15. Indeed, for the period 1 May to 27 May Mr Shi worked no more than 2.50 hours each day. The total, as mentioned, according to Advanced Computers was 28.11 hours for which Mr Shi was paid \$421.65.

[28] I do not accept that to be an accurate record of the hours that Mr Shi actually worked for Advanced Computers. Rather, it is a record of Mr Shi's hours allocated to particular jobs which were on-charged to customers. As an employee Mr Shi was entitled to payment for work performed for Advanced Computers even if it was unable to "on charge" his time to customers.

[29] I find that for the period 28 April 2014 to 13 June 2014 Mr Shi worked a total of 242 hours. Mr Shi was paid for 52.33 hours for that seven week period. After deducting 17 hours for lunch breaks taken by Mr Shi, the total hours owed to him for which wages have not been paid totals 172.67 hours. 172.67 hours x \$15 per hour equals \$2,590.05 gross.

[30] I find Advanced Computers owes Mr Shi the sum of \$2,590.05 gross for hours worked and not paid to him, together with holiday pay.

[31] Advanced Computers is to pay Mr Shi the sum of \$2,590.05 gross together with holiday pay on that amount within 14 days of the date of this determination.

Costs

[32] There is no order as to costs.

Anna Fitzgibbon
Member of the Employment Relations Authority