

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 450
5467436

BETWEEN XING SU
Applicant

A N D i GOLF LIMITED
First Respondent

ZIAOMING ZHANG
Second Respondent

Member of Authority: James Crichton

Representatives: Lyn Lim, Counsel for the Applicant
Ziaoming Zhang, Advocate for the First and Second
Respondent

Investigation Meeting: 18 September 2014 at Auckland

Submissions Received: 23 & 31 October 2014 from the Applicant
15 October 2014 from the Respondent

Date of Determination: 3 November 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Su) alleges that she is owed unpaid wages for the totality of the employment and that PAYE payments for those wages have also not been paid and she seeks interest on the unpaid wages and penalties.

[2] Neither the first respondent (i Golf) nor the second respondent (Mr Zhang) engaged in the Authority's process until the investigation meeting when Mr Zhang attended at the appointed time.

[3] It is necessary to identify some of the background in the relationship between Ms Su and Mr Zhang in order to give some context to the present claim.



[4] It seems to be common ground that Ms Su and Mr Zhang met on the internet in 2009 and commenced a long distance relationship thereafter.

[5] Some nine months after they first met, Ms Su came to New Zealand to see Mr Zhang but Mr Zhang had to leave for China very shortly after their meeting because his father had died. For whatever reason, the relationship faltered at that point.

[6] Ms Su then went back to Australia to live but then she returned to New Zealand in early 2011. Ms Su was apparently offered accommodation in Mr Zhang's mother's home where Mr Zhang himself lived but Mr Zhang and Ms Su were not together as a couple.

[7] That remained the position until the events of 6 April 2012 when a physical altercation between the two of them resulted in each of the parties accusing the other of assault.

[8] Both Ms Su and Mr Zhang were arrested by attending Police but in the result Police decided to charge Mr Zhang and the disposition of that matter was the downgrading of the charge to a Summary Offences Act assault and a discharge without conviction.

[9] As a consequence of that whole criminal process, the two protagonists ceased to have any physical contact. Ms Su moved out of Mr Zhang's mother's home and it seems, based on Police advice, the couple were encouraged not to have any further contact with each other.

[10] Despite the evidence I heard from Mr Zhang at the investigation meeting, I have been unable to establish that a Trespass Act notice was issued by Police. It may be a Trespass Act notice was issued by Police or that Police gave informal advice that the couple should not continue any association. I was advised that Police do not keep records of such notices beyond two years.

[11] That is the context then in which Ms Su claims to have been in an employment relationship with i Golf Limited a company whose sole shareholder and director was Mr Zhang.



[12] When the statement of problem was filed in the Authority, Ms Su referred to but did not attach a signed employment agreement between herself and i Golf Limited. She indicated that the original signed employment agreement was held by the Immigration Division of the Ministry of Business Innovation and Employment (MBIE) to support her work visa application, which was subsequently granted.

[13] With the assistance of the Immigration authorities, my Support Officer was able to obtain for me a copy of the employment documentation held by the Immigration Division of MBIE which comprises a signed individual employment agreement, a job description, and two supporting letters from Mr Zhang.

[14] The individual employment agreement is dated 12 March 2012 and purports to cover employment from 15 April 2012 down to 15 April 2014. It is supported by a job description also dated 12 March 2012 although that job description appears only to have been signed by Mr Zhang.

[15] I am satisfied on the evidence I heard that the employment agreement template was obtained by Ms Su from a business that i Golf Limited initially shared office premises with in the central business district.

[16] I am also satisfied that the employment agreement was created at least in part to assist Ms Su to obtain a work visa to enable her to remain in New Zealand. Critically for our purposes, the employment agreement and the associated job description are both dated approximately four weeks before the altercation between the two protagonists which led to the appearance in the criminal Court.

[17] Mr Zhang's evidence (which I accept) was that he allowed the document to be created at least in part to assist Ms Su to obtain a work visa and he emphasised that he would not have contemplated taking that step after the events of 6 April 2012 which I referred to above.

[18] Mr Zhang gave evidence at the investigation meeting that after the events of 6 April 2012, he contemplated withdrawing his support for Ms Su in terms of her immigration status but after a long emotional telephone call from Ms Su's mother, he stayed his hand. Mr Zhang says that through Ms Su's mother, he requested that Ms Su obtain other employment but he agreed not to take any steps which would have the effect of cancelling her work visa.



[19] The two other documents that the Authority obtained from the Immigration Division of MBIE are supporting letters, both of which I am satisfied are written by Mr Zhang and he himself accepts that the first of them anyway is signed by him.

[20] The first of the supporting letters is uncontroversial; it is dated 20 March 2012 (so still before the events which led to the criminal charge), is written by Mr Zhang on his own evidence and he agrees he signed the letter.

[21] The other document is in a different category altogether. It is entitled *Addition (sic) Supporting Letter* and while Mr Zhang cannot be certain that he did not write it he is adamant that he did not sign it and notes that the document is dated 20 April 2012, some two weeks after the altercation which led to his arrest.

[22] Mr Zhang's evidence on the point is that, if the date is accurate, he certainly would not have been prepared to write what the document records on behalf of Ms Su because of the events of 6 April 2012. Moreover, he is adamant that the signature on the document is not his but a forgery. Certainly, looking at that signature and comparing it with the other signatures we have of Mr Zhang, I am inclined to accept that evidence at face value.

[23] For her part, after the investigation meeting had concluded, Ms Su caused documentation to be put before me, effectively as part of her closing submissions, which indicate that the Immigration authorities were still not convinced of the necessity for Ms Su to fill the proposed role at i Golf Ltd. A copy letter is provided from Immigration dated 10 April 2012, four days after the altercation and ten days before the date of the second Supporting Letter. Of course, that material still does not bear on whether the 20 April 2012 Supporting Letter was written by Mr Zhang, or not. He says not, if the date is correct, and I believe him. Given this eleventh hour material from Ms Su, it seems most likely that the date of the second Supporting Letter is correct, but that still does not assist with who wrote the letter.

[24] While there is some mystery about whether the documents that I have just discussed were created with the dominant purpose of creating an employment relationship or to enable Ms Su to remain resident in New Zealand, there is also mystery about whether the collapse in the couple's relationship after 6 April 2012 enabled there to be an employment relationship at all.



[25] The evidence before the Authority suggested that Police had advised the couple not to have any contact after the arrest of both of them and it seems difficult to understand how there could have been an employment relationship over any period of time where the employee was prevented from any contact with her superior.

[26] Mr Zhang's evidence was that after the events of 6 April 2012 he certainly did not have it in his contemplation that Ms Su would continue to be employed by i Golf Limited. That would be consistent with the instructions of Police that the couple were not to have contact.

[27] However, Ms Su maintained that she did have contact with Mr Zhang, both through intermediaries and via the internet, and that she was able to keep working for the period from what she describes in her statement of problem as *about the end of April 2012 to 28 September 2013*.

[28] Again, Ms Su has provided further evidence on this aspect as part of her closing submissions. This material includes copies of electronic communication between the couple purportedly about the business of i Golf Ltd, including planning golf tours, reporting to Mr Zhang on various matters, corresponding with clients, corresponding with the Inland Revenue Department about the company's tax position, material showing that Ms Su had access to the company bank account, and various other electronic messages between the couple.

[29] A further issue is that Mr Zhang's evidence is that the business i Golf Limited has being extraordinarily unsuccessful, has never made profits and is effectively no longer trading. He told me (and I accept) that i Golf Limited has no assets. It follows that even if there were to be an award made against i Golf Limited, there may well be no money to satisfy any award.

Issues

[30] The Authority is to determine the following questions:

- (a) What do the documents mean?
- (b) Could an employment relationship subsist in this environment? And
- (c) Who, if anyone, was the employer?



What do the documents mean?

[31] I am satisfied that the employment agreement and the associated job description were both created prior to the events of 6 April 2012 and their purpose was two-fold, namely to create an employment relationship between Ms Su and i Golf Limited and to assist Ms Su to obtain work visa to work in New Zealand.

[32] I am also satisfied that the first of the supporting letters is a letter written by Mr Zhang to support the application for a work visa by Ms Su and that that document was executed by Mr Zhang himself and created before the events of 6 April 2012.

[33] The second support letter is I fancy in a different category altogether and I prefer Mr Zhang's evidence on the point that that letter, as it now seems was correctly dated as 20 April 2012, would not have been created by him and that it is not his signature on the document.

[34] The fact that the parties had genuine motives for creating an employment relationship at the point which they entered into that relationship does not satisfactorily resolve the question of whether those mutual understandings survived the altercation on 6 April 2012. It would be less than human to expect the parties to continue to behave as if nothing had happened after that date when on all the evidence before the Authority, it would seem that everything changed from that day forward.

[35] Mr Zhang says with some justification that he did not have it in his contemplation that Ms Su would expect to continue in employment after the altercation and his recollection of the conversation he had with Ms Su's mother tends to support that conviction that the relationship had fundamentally changed. His evidence is that he told Ms Su's mother to arrange for her daughter to get a new job but that he agreed in return not to take any steps that would have the effect of cancelling her work visa.

[36] I think I am entitled to conclude that that conversation constituted evidence of Mr Zhang's position after the altercation, bearing in mind the evidence that the parties had been told by Police not to have any contact with each other.

[37] It is frankly difficult for me to understand why Ms Su would imagine that she could contemplate continuing to work for i Golf Limited given the altercation, particularly as her claim proceeds on the footing that she seeks payment for her work



from the end of April 2012, barely three weeks after the altercation which resulted in her allegation against Mr Zhang being pursued by Police.

[38] However, the documentary evidence of electronic communications between the parties suggests there was some sort of relationship. Even if the communications between them was unconvincing (as I find it is), being primarily one sided (from Ms Su to Mr Zhang), and certainly insufficient to ground an employment relationship by itself, it is difficult to explain away the evidence that Ms Su had access to the company bank account and was engaging with the Inland Revenue Department on behalf of the company.

[39] Mr Zhang has been provided with this material, albeit after the investigation meeting concluded, and given a proper opportunity to respond, and for whatever reason, has chosen not to. The best that can be said for Mr Zhang, consistent with his sworn evidence at the investigation meeting was that perhaps he was happy enough not to disturb the status quo by affirmatively bringing the relationship to an end (witness his commitment to Ms Su's mother) but it was outside his contemplation that Ms Su would subsequently demand payment.

Could the parties have an employment relationship in the circumstances?

[40] I am satisfied on the evidence before the Authority that there was no prospect of the parties having an employment relationship in the particular circumstances of this case. Not only was it difficult for Ms Su to have any contact with her direct report, Mr Zhang who was the general manager of i Golf Limited, there is also a like difficulty for him in engaging with her as an employer would, at least if the parties were to behave as instructed by Police. Of course, there is evidence of some contact, apparently in breach of Police instructions but it is difficult not to view those contacts as minimalist. The initiative seems to come in the main from Ms Su, and the access to the bank account and the engagement with the Inland Revenue Department may be explicable by pre dating the altercation.

[41] Ms Su maintains that she made numerous requests for payment but there is limited evidence of that, and all the evidence there is seems to have been provided as an afterthought once the investigation meeting was over. Mr Zhang denies requests for payment, and maintained at the investigation meeting that after the altercation everything changed and that he certainly did not have it in his contemplation that the



company would be paying Ms Su although he was happy enough for her to remain apparently engaged by i Golf Ltd for immigration purposes.

Who was the employer?

[42] Ms Su has brought her claim both against i Golf Limited and against Mr Zhang personally. There is simply no evidence that Mr Zhang was ever the employer; Mr Zhang was the shareholder and sole director of i Golf Limited but he was never Ms Su's employer. The documents which she seeks to rely upon are clearly between her as employee and i Golf Limited as employer.

[43] Accordingly, the claim against Mr Zhang is hereby struck out.

Determination

[44] I am not satisfied that Ms Su was ever in an employment relationship with i Golf Limited. There are employment documents which in the normal course one could contemplate placing reliance upon, but in the particular circumstances of this case it seems to me self-evident that no reasonable person could imagine that the employment relationship could continue after the altercation which resulted in an information being laid by the employee against the general manager of the entity that she subsequently claimed she was employed by that information being an allegation of assault.

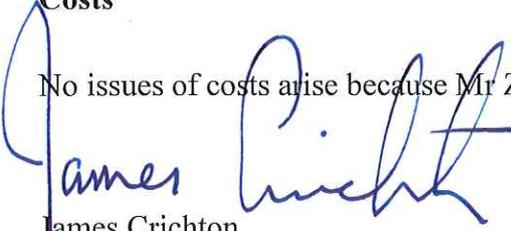
[45] Again, while in the normal course one would have expected the employer to make clear that the effect of the altercation on 6 April 2012 was to bring the employment relationship to an end that was not possible, certainly on a face to face basis, because both Mr Zhang and Ms Su had been advised by Police to have no contact with each other. However, Mr Zhang did make his position clear to Ms Su's mother and amongst other things indicated to her that Ms Su should seek employment elsewhere. I am satisfied that is as much as he could be expected to do in the circumstances at the time.

[46] It follows that Ms Su's claim for lost wages fails in its entirety as do all her other claims as I am not satisfied that there was ever an extant employment relationship, because the events of 6 April 2012 overtook the arrangements the parties had earlier entered into.



Costs

No issues of costs arise because Mr Zhang acted for himself and for i Golf Limited.



James Crichton
Member of the Employment Relations Authority

