

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5092587
AA 97/08

BETWEEN XIN XI XIAN
 Applicant

AND THE HERB PATCH LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Applicant In Person
 Graham Norton, Counsel for Respondent

Investigation Meeting: 6 November 2007, 8 February 2008

Submissions Received 20 February 2008 from Respondent
 3 March 2008 from Applicant

Determination: 17 March 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Xin Xi Xian, known as Sunny, was employed by the respondent, The Herb Patch Limited, as a farm hand. The respondent grows herbs. The farm was purchased by Mr David Ng and Mrs Gillian Ng from the previous owners, one of whom was Mr Edward Pan, in late 2006, the sale and purchase agreement being signed on 24 November 2006. Mr and Mrs Ng took over the farm in January 2007.

[2] Mr Xian was employed on 10 December 2006, prior to Mr and Mrs Ng taking possession of the farm. Mr Xian says that Mr Pan promised him an increase of \$2 per hour after six month's employment if he did the job well.

[3] Mr and Mrs Ng say they had no knowledge of an agreement to increase the hourly rate and that they had no obligation to pay it.

[4] In his submissions Mr Xian has made extensive reference to employment warnings, annual leave issues and pressure to resign. He has claimed compensation for humiliation and distress. During the Investigation Mr Xian confirmed that the only claim he was pursuing was the unpaid amount of the increase in the hourly rate. That is the sole claim I will be determining.

[5] After the dispute regarding wages arose Mr Xian made reference to an employment agreement allegedly entered into while Mr Pan owned the business. The respondent says that this agreement is not genuine.

Background

[6] Mr and Mrs Ng said they and their son Jonathan had discussions with Mr Pan about the staff and other aspects of the business. Mr Ng said he found Mr Pan to be very vague in his dealings. He was not forthcoming with information and it was very difficult to get specific information out of him. On occasions they needed to go back to Mr Pan for more information, for example, the financial reports. He said that overall the sale and purchase of the business was very much based on good faith and trust. There was an agreement that Mr and Mrs Ng would continue to employ the existing staff on their current terms and conditions

[7] Mrs Ng was involved in discussions with Mr Pan regarding staff. Mrs Ng was provided with details of the hourly payment rate for each employee. She recorded these payment rates in her diary. The payment rate for Mr Xian was \$13 per hour. There was no indication of any agreement regarding an increase after six months. No employment agreement was provided by Mr Pan for any of the employees. Mr Pan did not tell Mr Ng that there were any employment agreements. Mr Ng said there were no records that they were aware of. It was all word of mouth.

[8] The cost of Mr Xian's employment for a six month period was partly funded by WINZ which made a \$214 contribution towards his wages per week.

Pay Rate and Contract Issues

[9] Mr Ng said he was unaware that there was any arrangement to increase Mr Xian's rate of pay to \$15 per hour. This was only conveyed to him in June or July 2007 when a review of Mr Xian's wages was undertaken. In discussions with Mr Xian, Mr Xian told Mr Ng that Mr Pan had made a verbal offer to him to increase his

rate to \$15 per hour after six months. Mr Ng said he was very surprised to hear of that as he had had no previous indication of the matter. He considered the matter and came up with a proposal. If Mr Xian was prepared to take on additional roles and responsibilities then that would be a justification for increasing his pay rate to \$15 per hour. That would be based on extra productivity which would be obtained from Mr Xian through more flexible work arrangements.

[10] Mr Ng prepared a new individual employment agreement and provided it to Mr Xian for his consideration. He had used the Department of Labour's website for that purpose. Mr Ng said that he was very surprised at Mr Xian's reaction. He told Mr Ng that the employment agreement had to be the same as the agreement he had received from Mr Pan and which he said he believed Mr Ng had. Mr Ng said he repeatedly told Mr Xian that he had got nothing at all from Mr Pan. However Mr Xian kept saying that he should know because Mr Pan had told him. At that time Mr Ng asked Mr Xian to show him his contract so they could understand what he was talking about. Mr Ng said he asked Mr Xian many times to provide a copy of his employment agreement. Mr Xian's response was that he had lost it.

[11] Mr Ng said they tried to communicate with Mr Xian to find out exactly what was the matter and to understand about the employment agreement that he said existed. Mr and Mrs Ng said they were shocked and surprised by the way things were happening. It was obvious that Mr Xian was very unhappy but he would not say why he was not happy about the contract presented to him by Mr and Mrs Ng.

[12] Mr Ng said there was also confusion and lack of clarity about other terms and conditions. There was an exchange of emails between Mr Pan and Mr Ng in late June 2007. Those emails dealt in part with whether Mr Xian's hourly rate included provision for holiday pay or not. Mr Ng said as they understood matters, Mr Xian had been on a temporary employment arrangement through WINZ and so there was an issue as to whether or not annual leave was included in the \$13 per hour pay rate. In his email to Mr Pan on 27 June 2007 Mr Ng said he knew that all employees were entitled to annual leave. However he understood there were also cases where an employee chose not to take annual leave, preferring a higher rate. He noted that Mr Pan had told them that Mr Xian was paid \$13 per hour and was not taking annual leave. They had interpreted that as meaning that the holiday pay portion was built into the hourly rate.

[13] In the email to Mr Pan, Mr Ng explained the difficulty they were having with Mr Xian's terms and conditions. Mr Pan was not able to clarify the issues. Mr Ng tried to contact Mr Pan by phone many times to try and arrange a meeting to clarify the issue. However he was not successful in doing so. Mr Ng also noted that Mr Xian was claiming that Mr Pan had given him an employment contract but they had not been given a copy when they took over.

[14] In the email to Mr Pan Mr Ng also noted that Mr Xian had told them that Mr Pan promised to pay him \$15 per hour after his six month term. He explained to Mr Pan that that had not been put to them during the handover and asked how it was possible for him to promise an increase in pay when he knew that he was selling the farm.

[15] Mr Pan's reply made no reference to Mr Xian's pay rate increasing to \$15 per hour. Mr Pan maintained he had never told Mr Ng that the payment included annual leave. Mr Pan stated he did not think it was reasonable for him to supply the employment agreement for Mr Ng's company. Mr Ng said he found that strange as they had clearly told Mr Pan when they took over the business that they would employ staff on the same conditions.

The Employment Agreement

[16] It was only when the parties attended a mediation in July 2007 that Mr Xian produced a copy of the employment agreement. The agreement confirmed that Mr Xian's hourly rate was \$13 which would be paid weekly. There was no reference to the rate increasing to \$15 per hour in six months. There is a reference in clause 7 to a review of remuneration and benefits immediately after the first six months of employment. However that did not require the employer to increase the pay rate.

[17] Mr Ng said he believed that the employment agreement may not have existed at the time Mr Xian was employed by Mr Pan and that it had been created at a later date to assist Mr Xian in the claim Mr Xian was making against his business. Mr Ng said he had asked two other employees who had previously worked for Mr Pan, Mr Phi Tao, and Amy, whether they had been provided with a written employment agreement. They said they did not have an agreement and had never had one during the period of their employment with Mr Pan.

[18] Mr Ng said that he believed that if the employment agreement had been in existence at the time they took over the business it would have been made available as part of a record of information available in a due diligence process before purchase of the business. Mr Ng did not believe there would have been a reasonable reason for Mr Pan to have withheld the document.

[19] The sale and purchase agreement for the farm property was signed on 24 November 2006. Mr Xian was employed on 10 December 2006. Mr Ng said he did not think it credible to suggest that there was a promise to pay Mr Xian \$15 per hour six months later when Mr Pan would have already known he had sold the business and that he would not be around as the owner in six month's time.

[20] Furthermore, clause 8 of the agreement refers to an entitlement for four weeks' paid annual leave calculated in accordance with the Holidays Act 1981. If the agreement was signed in December 2006, the provisions for four week's holiday under the Holidays Act 2003 had not yet been implemented and would not be implemented until 1 April 2007. Mr Ng said he was also suspicious that the agreement may not have been entered into in December 2006 because where it has been signed by Mr Xian he has recorded the date as 12-12-2007. To him that suggested that it was likely that he had signed the agreement at some later date during 2007.

Statutory Holiday Pay and Annual Leave

[21] Mr Xian was confused about payments for statutory holidays. He maintained that Mr Ng had told him he was not going to pay holiday pay. However what had happened was that Mrs Ng was not sure as to whether the obligation to pay holiday pay rested with the company or with WINZ. She therefore rang WINZ and asked who paid the holiday pay. WINZ told her that the employer paid the holiday pay, so on the next day the holiday pay was paid. This took place on the day before Good Friday. Mr Xian was very ready to attribute ill intentions to his employers and reluctant to accept explanations.

[22] There was also a genuine misunderstanding regarding whether holiday pay was included in Mr Xian's hourly rate. Mrs Ng said that when she spoke to Mr Pan he told her that Mr Xian had come through WINZ and that he was paid \$13 per hour which included everything. Mrs Ng said Ms Silvia Biddick from WINZ had said

that holiday pay could be included in the pay rate so she genuinely believed that the \$13 per hour paid to Mr Xian included holiday pay.

[23] When they looked at reviewing the pay rate, Mr Xian told them that Mr Pan had promised him \$15 per hour. So they then proposed that they would keep his pay rate at \$13 per hour, but would provide four week's leave on top of the \$13 per hour. Mr Xian replied that he thought that was unfair. He said he wanted to get paid and not take the leave.

[24] Mr Xian asserted that Mr Ng had ruined his reputation with WINZ by complaining about him to his case manager. What Mr Ng did was to attempt to resolve the work and contract issues by arranging a meeting with WINZ using an interpreter. Mr Xian did not participate.

Pay Increase and Employment Agreement

[25] Mr Xian said that Mr Pan promised to increase the pay rate if he did well in the work. It was therefore a conditional offer. There was no evidence that any performance criteria had been discussed and agreed.

[26] Mr Xian said the promise was made one week before they signed the contract. Mr Xian contended that Mr Pan was the manager and not the owner of the business; he said Mr Pan had told him he was not the owner. Mr Pan had told him a woman owned it and gave Mr Xian her name but he could not recall it. He said when Mr Pan employed him he mentioned he was selling the business but did not tell him when.

[27] Mr Xian maintained that Mr and Mrs Ng did not ask for the contract. He said that every time he had a disagreement with them he told them they could have a look at the contract. But after he had said that, they had no response.

[28] I asked Mr Xian why, if he had a number of disagreements, he did not simply present the employment contract to his new employers. His reply was "*If they are unwilling to do, I cannot force them to do so. And they told me to forget more about the previous employment contract. So what else can I do?*" This was not a helpful response.

[29] I also asked Mr Xian why he had produced the contract finally at mediation. His response was "*He gave me an oral contract on the first day of the change of*

ownership. And considering they gave me another contract later it is different from the previous contract.”

[30] The employment agreement does not assist Mr Xian with his claim for a wage increase to \$15 per hour. When Mr Ng specifically asked Mr Pan about that in his email there was a decided lack of response by Mr Pan to his query. On the balance of probabilities I find that Mr Pan did not make such an offer to Mr Xian. Even if Mr Pan did make such an offer to Mr Xian it was not something that was communicated to a new employer. It was also a conditional offer. It seems very strange that someone who was in the process of selling the business and had already signed a sale and purchase agreement would offer to increase the wages of a person who was there on a six monthly agreement from WINZ at the time when the agreement with WINZ was due to expire.

Credibility Issues

[31] Mr Xian was questioned regarding his association and relationship with Mr Pan, the former director of The Herb Patch Ltd. Mr Xian said he had not known Mr Pan before being employed by him. Having considered company records and property details I can come to no other conclusion than that Mr Xian was not truthful in his claim not to have known Mr Pan prior to his employment. I also have no doubt that Mr Xian enjoyed a close relationship with the former owners of the property at 18 Brigham Road, Whenuapai, where the company is located. Prior to its purchase by Mr and Mrs Ng it was registered in the names of Weiqiang Pan and Lizhu and Chuyu Xian.

[32] Mr Xian's address is given in the Statement of Problem as being 11 Bristol Road, Whenuapai. The Bristol Road property is registered in the names of Helen Wang and Zhiguo Zhang. Zhiguo Zhang was the person who submitted the application to incorporate The Herb Patch Limited in May 2005. Zhijun Wang was a director of The Herb Patch from 27 May 2005 to 1 February 2007. Zhijun Wang's address on the Companies Register is also given as 11 Bristol Road as is Zhiguo Zhang's.

[33] Mr Xian had previously lived at a property at 6 Kawai Rise in Te Atatu. This address is given as the 2005 address for Zhijun Wang and Zhiguo Zhang on the Companies Register. This is also the address given by Zhiguo Zhang in the

application for incorporation referred to in the previous paragraph. Zhijun Wang was appointed director on 27 May 2005 and resigned as director on 1 February 2007. Mr Pan was appointed director on 18 September 2005.

[34] Mr Xian drove a car registered in the name of Lizhu Xian. Lizhu Xian's address on the Companies Register is given as 453a Old North Road. This is the same address as that provided by Mr Pan on the Companies Register.

[35] Lizhu Xian was appointed a director of Luhung Development Company Ltd in June 2007. Chuyu Xian was appointed director of this company on 30 July 2003. Chuyu Xian was a co-owner of the Brigham Road property with Weiqiang Pan.

[36] Mr Xian clearly had an association with these people; and that included Mr Pan. My view that this is so was borne out by Mr Xian's reluctance to answer simple questions, for example, who owned the car that he was driving and how long he had lived in Te Atatu.

Was the Employment Agreement Genuine?

[37] The individual employment agreement finally given to Mr and Mrs Ng had not been in existence at the time Mr Xian commenced employment in December 2006. Mr Xian's explanations for not having provided it earlier do not ring true. Neither, in the context of this matter, does his assertion that the date was an error. The agreement was very likely constructed at some time in 2007. It is strange that no other employee had an employment agreement and odd that no employment agreements were produced by Mr Pan at the time Mr and Mrs Ng took over the business, although there were discussions about terms and conditions.

[38] The agreement contains very generous conditions. If it was formed in 2006 it provides for an extra week's leave. The redundancy provision provides for three months' notice (or payment in lieu) plus a compensation payment of three months' wages. While the provision of generous conditions in itself would not be indicative of a lack of genuineness when that is taken together with Mr Xian's denied association with Mr Pan and Mr Xian's failure to produce the agreement at an earlier stage, and to provide a credible explanation for that failure, it leads to the inescapable conclusion that the document was constructed to be of assistance to Mr Xian.

[39] Unfortunately for Mr Xian, the person or persons who drafted the agreement did not see fit to insert a provision regarding an express and specific increase in wages after six months. Had there been such a provision, having found that the employment agreement was not in existence at the time employment commenced as asserted by Mr Xian it would have had no effect.

[40] No offer regarding an increase to \$15 was made by Mr Pan to Mr Xian. Even if I had found one had been made, it was a conditional offer and there is no evidence that the condition was met.

[41] The employment agreement was a construct; and even if genuine, would not have assisted Mr Xian in his wage claim.

Costs

[42] Costs are reserved. If the parties are unable to resolve the matter of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of the receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority