

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 208  
5403408

BETWEEN FENGQIN YANG and JINFU  
ZHANG  
Applicants

A N D WILLIAM TAN  
Respondent

Member of Authority: James Crichton

Representatives: Julie Ding, Counsel for Applicant  
Respondent in person

Investigation Meeting: 19 February 2013 and 4 April 2013 at Auckland

Date of Determination: 23 May 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Fengqin Yang and Jinfu Zhang (the applicants) are an elderly Chinese couple now resident in Auckland. They have two children, a son, also resident in Auckland whose name is Bin Zhang (Bin), and a daughter, Li Zhang (Li) who is still resident in China.

[2] The applicants wanted to unite their family in New Zealand and to that end the applicants engaged with the respondent, William Tan (Tan), who is a restaurateur in Auckland.

[3] It seems common ground that Tan offered both to help Li with her immigration status and to offer her employment in his restaurant. The applicants say that Tan would only offer the employment to Li if he was paid the sum of \$14,000 by the applicants.

[4] In pursuit of the matter, the applicants say that they paid Tan \$7,000 on account, on or about 8 May 2012, that the amount was paid to Tan in cash, delivered to him personally at his restaurant, and that Tan provided a receipt for the money. The balance of another \$7,000 was unpaid and the applicants say they then commenced seeking ways to raise the second \$7,000.

[5] Tan denies receiving the payment of \$7,000, denies that the receipt is his, and denies that he offered to provide the employment to Li in return for the payment indicated.

[6] Tan acknowledges that he indicated to the applicants that if he assisted them with the immigration work associated with getting Li permanent residence in New Zealand, he would expect to be paid and that there would be fees and charges for that work. However, he is adamant he was never paid anything for the work that he did. The Authority notes in passing that Tan maintained in the Disputes Tribunal that he was not paid any money either although it is apparent from the decision of the referee that the referee did not believe Tan.

[7] Exchanges between the parties continued during May 2012 with the applicants claiming that Tan demanded the balance of the money owing and Tan alleging that he was insisting on payment of fees in order to justify him continuing to progress Li's immigration inquiry.

[8] When the applicants became aware that it was illegal to demand a premium for the provision of a job, they began proceedings to recover the \$7,000 that had already been paid.

[9] An application was made to the Disputes Tribunal on 19 June 2012 and a decision of the Tribunal issued on 9 October 2012 declining to grant the relief sought.

[10] The applicants then filed a statement of problem in the Authority seeking to recover the \$7,000 allegedly paid to Tan together with legal costs and a penalty of \$10,000 for a breach of the Wages Protection Act 1983.

[11] Tan denies receipt of the applicants' \$7,000, denies being in breach of the Wages Protection Act, denies demanding money for the provision of a job, and indicates that the fees (if any) related to his advice as a de facto immigration consultant. Tan alleges that the receipt provided to the Authority as evidence of the

payment of \$7,000 does not contain his signature and is therefore a forgery. Tan maintains that the text exchanges between himself and Bin are consistent with his position that no money was ever paid.

### **Issues**

[12] It will be convenient if the Authority responds to the following questions:

- (a) Was any payment made?
- (b) If payment was made, what was it for?
- (c) Can the applicants recover the payment?

### **Was any payment made?**

[13] The Authority is presented with two competing stories. On the one hand the applicants says that Ms Fengqin Yang's savings were paid to Tan by Mr Jinfu Zhang (her husband). A receipt which the applicants say was signed by Tan was provided dated 8 May 2012 and that receipt contains the following legend:

*Here received a deposit \$7,000 from Jinfu Zhang, re family reunion immigration sponsorship job offer.*

[14] Both the applicants gave evidence by affirmation to the Authority that this was the position.

[15] Tan on the other hand, denied that the money had ever been received, denied that the receipt was his, and denied that he would offer to provide employment for a fee, claiming instead that fees (if any) would have been for the provision of immigration services. However, Tan is adamant that no money ever changed hands and he maintains that the text traffic between himself and Bin (the applicants' son) is evidence for his endeavouring to get paid at all for his services as an immigration consultant and not for the recovery of the balance of the fee paid for the provision of the job.

[16] The Authority finds it difficult to understand why the applicants would take the trouble to prosecute their cause, first in the Disputes Tribunal and then before the Authority if no payment had been made. It seems a very complicated way of trying to defraud another person.

[17] Moreover, Tan's evidence is not entirely consistent. First, it is difficult to explain the receipt. Tan says it is a forgery. But simply making that allegation does not make it true. There is nothing before the Authority to suggest that the receipt is anything but genuine. Tan could have explained why he said that the receipt was a forgery but he simply repeated his denial of the genuineness of the document. On the face of it, the signature purporting to be Tan's on the receipt is the same signature as that on the letter offering employment, and it is not contended by Tan that there is any forgery of the signature on the letter.

[18] Next, the text messages tend to support the evidence of the applicants. While Tan maintained that they were consistent with his explanation, namely that he was trying to get some payment for the immigration services that he was providing, that is not consistent with some of the texts. As counsel for the applicants astutely pointed out in her closing submissions for her clients, two of the text messages refer to Tan paying back the money once he has proof that the job offer has been withdrawn in the material that is being considered by the immigration authorities. For instance, in a message from Tan to Bin sent at 1.06pm on 20 May 2012, Tan has this to say:

*There is nothing to talk about. You have no credibility to me. Your words cannot be trusted. You are time wasters, you like to think this application can still be processed after my withdrawn (sic), you like to take that risk, that is fine. But I am telling you now, this is happening next week. You are undermining my ability, I told you, I guarantee you a confirmation letter of the application declined. I'll come to you with the money and a print out ..*

[19] And again, on 19 May 2012 at 5.47pm Tan sent two messages, one after the other to Bin. The first of these is in the following terms:

*I'll get copy of confirmation of her application being declined*

[20] And the second:

*Then I'll come bring you the money and the copy of the document.*

[21] That resulted in a text message from Bin an hour later in the following terms:

*Fell (sic) free to withdraw your offer. My sisters application has nothing to do with the offer. After you withdraw just return our money. Thanks.*

[22] Finally, on 21 May 2012 Bin sent this message to Tan:

*Hi William, we have withdrawn the job offer you provided from the application. Now you can give the offer to other people. Thank you for your help anyway. When can you return the money to my Mum?*

[23] None of those texts to and from Tan support his contention that he had not been paid and was seeking to obtain payment. Indeed, quite the reverse is the case. Those texts confirm that he had been paid and they discuss an apparent basis on which the money might be returned to Bin on behalf of his parents.

[24] A further factor in balancing the competing stories is the fact that, notwithstanding that Tan denied to the Disputes Tribunal that he had received any money, nonetheless it is apparent from the referees decision, that the referee did not believe him.

[25] A final consideration that weighs with the Authority is Tan's truculent and aggressive stance with the Authority. Tan made little effort to cover up his distaste for being involved with the Authority's investigation and provided as little as possible assistance to the Authority to assist it to reach its conclusion. A cynical view of that behaviour might be that it was motivated by self interest and had Tan a viable basis for defending the claim other than bald denials, he might have been more co-operative. Having said that, the Authority would observe that the only witness Tan referred the Authority to, Jimmy Lee (Lee) was unfailingly helpful and courteous in the Authority's dealings with him.

[26] Lee's evidence, while willingly given, did not bear on the central question for decision in this section of the determination, namely whether any payment was made or not. Lee remembers being asked to call at the applicant's house seeking money but he did not know what the arrangements were and he was not a witness to the payment of money or to any argument about it. Lee did say that he thought payment was for immigration services rather than for the provision of the job, but it is difficult for the Authority to place any reliance on that observation which can only be a matter of opinion.

[27] While Tan urges the Authority to rely on Lee's evidence, and in particular his evidence that no money changed hands in his presence, that does not deal with the possibility that money was paid to Tan on behalf of the applicants, when Lee was not

physically present. That in fact is the applicants' position, that Lee was not there when the money was taken in.

[28] On balance then, the Authority's considered view is that Tan was paid \$7,000 by the applicants. The applicants' evidence was willingly given and heartfelt, given under affirmation, and repeated evidence which they had already given at the Disputes Tribunal. Like the Authority, the Disputes Tribunal also thought money had been paid. Tan tries to deal with the receipt by simply denying its authenticity but without any evidence to support that view. The receipt clearly refers, *inter alia*, to a *job offer*. Finally, Tan's uncooperative behaviour before the Authority and the inconsistencies in his explanation of the text messages impel the Authority to the conclusion that the evidence for the applicants is to be preferred and the evidence of Tan is to be set aside.

**If payment was made, what was it for?**

[29] This is really the kernel of the issue between the parties because if Tan can successfully argue that the payment, although made, was not for an improper purpose, as the applicants' contend, then Tan is right to protest the jurisdiction of the Authority. In his appearance at the Authority, Tan devoted most of his energy to complaining about the Authority's investigation and maintaining that it had no jurisdiction. The Authority was at pains to point out that if a breach of s.12A of the Wages Protection Act 1983 (the 1983 Act) was found, then the Authority did have jurisdiction.

[30] Tan's position was that this was a simple debt recovery matter and that it ought to be dealt with in the ordinary courts where presumably he would continue to argue that he never received any payment at all.

[31] Tan's position is that there was no payment but he acknowledged that he was trying to be paid and he says that what he was trying to be paid for was not the provision of a job but was for the provision of immigration services. And of course, he pointed out to the Authority that the provision of immigration services was not illicit and that if he was providing those services, he was entitled to be paid for them.

[32] In his closing submissions, Tan advances an explanation for this whole series of events as an elaborate attempt to extort money from him activated either by the applicants or by their son Bin. But why would an elderly Chinese couple, quite

unsophisticated, concoct such an elaborate plot to extort money from Tan either for themselves or on behalf of their son? As the Authority has already observed, this seems an extraordinary course of conduct to either initiate or be a part of. It is common ground that the parties met, and had an association of some sort. It is also clear that Bin was not involved at first instance. His involvement came later. On the applicants' evidence, the money had been paid over before Bin was involved. So, for Tan's evidence to be accepted, the money must have been an invention, the payment of it a lie, and both the applicants and Bin complicit in those falsehoods. There is simply no evidence to support Tan's claim. The Authority is satisfied on the evidence it heard that the money existed, was paid to Tan and that Bin subsequently tried to get Tan to pay it back.

[33] However, if the Authority were to find that the payment made by the applicants to Tan was for the provision of immigration services, then the Authority would immediately have to accept that it had no jurisdiction.

[34] But again, the evidence is against Tan. First, the applicants told the Authority in the clearest terms that they were paying Tan for a job for their daughter Li. Second, the receipt, already referred to, refers to a job offer. Third, the text messages, some of which the Authority has already referred to earlier in this determination, all seem to be concerned with a job offer. Furthermore, a careful analysis of the text messages suggest that Bin and Tan had a provisional agreement that once the job offer had been removed from Li's application with the immigration authorities in Beijing, Tan would repay the money. Certainly Bin's subsequent texts suggest that his behaviour was driven by an understanding that he had a deal with Tan on that basis.

[35] None of that, in the Authority's view, is consistent with Tan's claim that he was seeking to be paid as an immigration consultant. Indeed, on the face of it, Tan's evidence is simply not truthful because it is completely inconsistent with the text exchanges that he was having with Bin which quite explicitly concern the return of money already paid ostensibly against a background of having agreed that in return for the withdrawal of the offer of employment, the money would be returned.

[36] On the balance of probabilities then, the Authority is satisfied that the payment made by the applicants to Tan was for the provision of a job. Tan's immediate response to the first meeting with the applicants and the receipt of the \$7,000 on account (half of his "fee") was to provide a letter which offers Li a position in his

restaurant in Auckland as a kitchen hand which formed the centre piece of Li's application for the appropriate work Visa to enter New Zealand which he filed with the immigration authorities in Beijing on 15 May 2012.

### **Can the applicants recover the payment?**

[37] Given that the Authority has found as a fact that the payment was made by the applicants to Tan and that the payment was made for the purposes of securing a job, the Authority concludes that the 1983 Act (s.12A) applies and that section, the terms of which are set out below, gives the Authority power to make orders requiring the repayment of that sum on the application *inter alia* of "the person by whom the money was paid".

[38] Section 12A of the 1983 Act is in the following terms:

*12A No premium to be charged for employment*

- (1) No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.*
- (2) Where an employer receives any amount of money in contravention of sub-section (1), whether by way of deduction from wages or otherwise, then, irrespective of any penalty to which the employer thereby becomes liable, the person by whom the money was paid or, as the case may be from whose wages it was deducted, may recover that amount from the employer as a debt due to the person; and civil proceedings for the recovery of the amount may be instituted in the Employment Relations Authority by the person or, notwithstanding any disability to which the person is subject, by a Labour Inspector designated under s.223 of the Employment Relations Act 2000 on behalf of the person;*
- (3) Any such proceedings instituted by any Labour Inspector may be continued or conducted by the same or any other Labour Inspector.*

[39] It will be apparent from the foregoing provision that it is a breach of s.12A(1) of the 1983 Act for an employer such as Tan to *seek or receive any premium in respect of the employment of any person*. Further, where such a premium has been received, the person paying the money (in this case the applicants) may recover the

amount from the employer as a debt due to them by civil proceedings in the Authority.

[40] The Authority being satisfied that the applicants have paid Tan the sum of \$7,000 as a premium in respect of the employment of their daughter Li, the Authority will make orders requiring Tan to repay that money.

### **Determination**

[41] Pursuant to s.12A of the Wages Protection Act 1983, William Tan is ordered to repay to Fengqin Yang and Jinfu Zhang the sum of \$7,000 being a premium that was paid by the applicants to the respondent for a provision of a job.

[42] The Authority is also asked to impose a penalty of \$10,000 under s.13 of the 1983 Act. The imposition of a penalty is always a discretionary act. The Authority considers the breach by William Tan to be egregious. He took advantage of vulnerable and somewhat innocent elderly Chinese people and the Authority has an obligation to express society's condemnation of that kind of behaviour. A penalty of \$3,500 is imposed. That penalty to be paid to the applicants for their use.

### **Costs**

[43] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority