

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 376/09  
5146492

BETWEEN                      ZHAO YANG  
   Applicant

AND                              NEW ZEALAND COLLEGE  
   OF CHINESE MEDICINE  
   LIMITED  
   Respondent

Member of Authority:        Marija Urlich

Representatives:              Nana Adjei, Counsel for Applicant  
   Ross France, Counsel for Respondent

Investigation Meeting:        2 July 2009

Submissions Received:        2 July and 10 July 2009

Determination:                29 October 2009

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**DETERMINATION OF THE AUTHORITY AS TO A PRELIMINARY ISSUE**

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[1]     Mr Yang taught anatomy and physiology at the New Zealand College of Chinese Medicine from July 2007 until October 2008. He says he was unjustifiably constructively dismissed from his employment with the College. The College says he was not dismissed because he was never an employee but rather a contractor.

[2]     This determination deals solely with whether the Authority has jurisdiction to consider Mr Yang's personal grievance.

**The real nature of the relationship - employee or independent contractor?**

[3]     Section 6 of the Employment Relations Act 2000 provides the meaning of employee and requires the Authority to determine the real nature of the relationship

between the parties<sup>1</sup>. The Authority must consider whether the evidence establishes the existence of a contract of or for services having viewed the evidence in its totality<sup>2</sup>.

[4] The tests applicable to a consideration of the real nature of the relationship include<sup>3</sup>:

- Analysis of the terms and conditions agreed by the parties;
- The intention of the parties (though not decisive); and
- Analysis of the historical control, integration and fundamental tests

[5] In applying these tests to the parties' factual matrix I am required to consider all relevant matters, including anything which may indicate the intention of the parties, though any statement by the parties describing the relationship is not determinative. The operation of the relationship in practise is to be assessed.

**(i) the terms and conditions agreed by the parties**

[6] The terms and conditions upon which Mr Yang was engaged are set out in written documents.

[7] Before he commenced teaching duties with the College he signed two documents - one titled *Receipt of CONTRACT FOR SERVICES*, the other *CONTRACT FOR SERVICES*. Mr Yang signed two copies of each document – first on 5 July and again on 17 July 2007.

[8] Both documents contain detailed descriptions of what contractor status means. The documents contain nothing to support the claim Mr Yang was an employee.

[9] The contract for services document had a fixed term of 5 July to 31 December 2008. Mr Yang continued to teach at the College on the same terms, but without a written contract, until 1 August 2008, when the parties entered another document, also

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<sup>1</sup> Section 6(2) Employment Relations Act 2000

<sup>2</sup> *Smith v Practical Plastics Ltd* [1998] 1 ERNZ 323

<sup>3</sup> *Bryson v Three Foot Six Ltd* [2005] 3 ERNZ 729 (SC)

titled *CONTRACT FOR SERVICES*. This document has a fixed term of 28 July – 31 December 2008.

**(ii) the intention of the parties**

[10] Mr Yang seeks to rely on a representation he says was made to him by Stephen Xu, the College's managing director, when the parties entered the contract, to establish it was the parties' intention that he would be an employee. Mr Yang says that when he questioned the terms of the contract Mr Xu said it was for a temporary period because he would initially be on probation.

[11] A temporary contract for the purposes of a probationary period is not inconsistent with either a contract for or of services.

[12] I am satisfied that Mr Yang did not challenge his status during the period of his engagement with the College. This is consistent with Mr Xu's evidence that it was Mr Yang who requested a contract for services. When I asked Mr Yang if he had raised the status issue with the College he said he signed the contract on 5 July because he wanted the position and Mr Xu asked him to, he signed the documents again on 17 July, when that contract expired he asked for a proper contract and when a written contract was provided, on identical terms but for term, he signed it. There is no suggestion in his reply that he challenged his status.

[13] I find the intention of the parties was that Mr Yang was an independent contractor.

**(iii) control test**

[14] This involves *an assessment of the manner in which the person providing the work exercises and assumes supervision and control over the person performing it. The greater the level of control the more likely the Court will be prepared to find that a contract for services exists*<sup>4</sup>.

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<sup>4</sup> Clark v Northland Hunt Inc, AC 66/06, 27 November 2006, Perkins J

[15] The written contract entered by the parties specified the responsibilities and duties of the role. Under that contract Mr Yang was provided with teaching and assessment materials and was required to submit for approval his own course materials, teaching plans, teaching materials, assessment and marking schedules and other related documents. Mr Yang attended training provided by the College and, through the College, accessed further training from external providers. His work was monitored by the College's academic principal. The lecture timetable was set in consultation with Mr Yang.

[16] I find the College exercised a degree of control over how Mr Yang delivered his lectures but not the content of those lectures. This is consistent with the role of a teacher as content expert and I find it is not definitive of the status question before the Authority.

**(iv) integration test**

[17] With this test the Authority must consider whether Mr Yang was employed as part of the business and whether his work was an integral part of that business; this can be contrasted with a contract for services where the work is accessory to the operation of the business rather than integral.

[18] Mr Yang never worked full-time for the College; in 2007 he worked 3-6 hours per week, in 2008 10–20 hours per week. Evidence that working arrangements such as those entered with the Mr Yang were typical for tutors at the College was unchallenged. Mr Yang gave his lectures on the College premises to students of the College and conducted all preparation in his own time. His lecture hours were set in consultation with the College and formed part of the published timetable. The contract provided that he could substitute his services, develop his own teaching materials (which would remain his intellectual property) and was free to have other clients. His work was subject to performance review.

[19] I find it is finely balanced as to whether Mr Yang's work was fully integrated into that of the College.

(v) **fundamental test**

[20] The fundamental test asks the question – is this person in business of their own account?

[21] Consistent with the terms of the parties' contract Mr Yang submitted invoices for all work performed for the College using a template invoice supplied by the College. He took responsibility for all tax and other compliance liabilities.

[22] I have found the intention of the parties was clear that Mr Yang was a contractor. I have also found that the control and integration tests are balanced. The parties' reaffirmed Mr Yang's contractor status in August 2008 when they re-entered the contract for services. I find this document records the true nature of the relationship which by this stage was one year old and had been produced, on Mr Yang's evidence, at his request.

**Conclusion**

[23] For the reasons set out above, find Mr Yang was an independent contractor, and not an employee of the College.

**Costs**

[24] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then leave is granted to request a timetable be set for the filing of such within 28 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority