

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 473  
3191499

BETWEEN                      XIAOXIN YANG  
Applicant  
  
AND                              VR VOOM LIMITED  
Respondent

Member of Authority:      Claire English  
  
Representatives:            May Moncur, advocate for the Applicant  
                                      Zhenzhen Chen, counsel for the Respondent  
  
Investigation Meeting:      20 and 21 June 2023 at Auckland  
  
Submissions received:      27 June 2023 from Applicant  
                                      21 June and 4 August 2023 from Respondent  
  
Determination:              24 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Yang was employed by VR Voom Limited (VR Voom) from 6 April 2022 to approximately 24 July 2022. She says that she was a permanent employee, and on either 22 July or 24 July, she was dismissed when she was told that, due to economic circumstances, there would be no work for her and she would not be rostered to work in the coming week.

[2] VR Voom says that it never dismissed Ms Yang, but rather that she was a casual employee, with no entitlement to on-going work, and it was within its rights to not offer her work when there was insufficient business.

[3] Ms Yang has asked the Authority to find that she was a permanent employee who was unjustifiably dismissed. She claims remedies accordingly.

### **The Authority's investigation**

[4] For the Authority's investigation written witness statements were lodged from Ms Yang, and from Mr Peter Dong, the sole director of VR Voom, and Ms Olivia Dong, who was performing supervisory and rostering duties at the time Ms Yang's employment came to an end. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues**

[6] The issues requiring investigation and determination were:

- (a) Was Ms Yang a permanent employee of VR Voom?
- (b) If so, was Ms Yang unjustifiably dismissed?
- (c) If VR Voom's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s123(1)(c)(i) of the Act
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Yang that contributed to the situation giving rise to her grievance?
- (e) Should either party contribute to the costs of representation of the other party.

### **Background**

[7] VR Voom provides virtual reality entertainment on a bookings basis. Ms Yang was hired by VR Voom to work at its premises, including managing pre-bookings and payments, tending to customers on arrival and if they had any difficulties using the virtual reality equipment, and performing some maintenance and cleaning as needed.

[8] Ms Yang was employed on a casual basis, and the employment agreement signed by the parties referred to her as a casual employee. She also worked as a graphic designer for another business on a part-time basis, but says that this was not enough for her to live on, so she sought out additional work at VR Voom. Her evidence is that one of the attractions for her of working at VR Voom was that it was not full time work, and that the flexibility offered by VR Voom enabled her to manage that work around her existing graphic design work.

[9] She says that although she signed an employment agreement that described her status as that of a “casual” employee, she did not know what this meant, and did not pay much attention to it. She also gave evidence that she did not understand the significance of being paid holiday pay at the rate of 8% together with her pay, and in fact was not aware that this had been done, despite this being shown each week as an additional amount on her payslip.

[10] Mr Dong, who managed Ms Yang’s pay, gave evidence to the contrary, and said that Ms Yang was careful to check her hours and her holiday pay. I prefer Mr Dong’s evidence on this point, as the terms of the agreement and the payslips themselves were clear as to how Ms Yang’s pay was made up.

[11] Ms Yang originally reported to a manager known as Icey<sup>1</sup>. Ms Yang explained that when she started working for VR Voom, her other graphic design work had fixed hours, so each week she would tell Icey which days and times she was available to work, and Icey would roster Ms Yang on to work according to her needs. Ms Yang explained that she expected to work 15 to 25 hours each week, and in particular to work on Saturdays and Sundays.

[12] In the first 6 weeks of work, Ms Yang’s hours varied from a low of 8 hours in one week, to a high of 35.5 hours in another week. From week 7 onwards, she worked between 32 hours and 40 hours per week, with the exception of a week in July when she only worked 16 hours, because she had three days away from work, unpaid, for an operation on her wisdom teeth. Mr Dong and Ms Dong were aware of this, and Ms Dong drove Ms Yang home after her operation. Ms Yang’s days of work were generally Wednesday through Sunday, which matched the days the business was open.

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<sup>1</sup> Icey was not present at the investigation meeting and did not provide any evidence.

[13] At some point, although Ms Yang could not remember when, she resigned from her graphic design work. Ms Yang did not mention this to Mr Dong or Ms Dong, and continued to request that Icey assign her suitable hours of work each week. Mr Dong said that he had noticed that Ms Yang was constantly asking for more hours of work, which surprised him somewhat because as far as he knew, she was also performing graphic design work and had told him that she wanted part-time hours from VR Voom to work around this other work commitment.

[14] In early June, Icey resigned from VR Voom. Ms Yang said that Icey promised her that Ms Yang would then be promoted to Icey's vacant full time position. Mr Dong and Ms Dong were surprised to learn this, as Icey had not mentioned this to either of them. Instead, Mr Dong advertised for a part-time person to replace Icey, and Ms Dong stepped in to perform some of Icey's duties, including working on the premises and staff rostering.

[15] Mr Dong gave evidence that he deliberately advertised for a part-time role, as he was of the view that the business was not in a position to sustain another full-time staff member. This was because the business had historically been busy during school holidays, and much quieter during term time, and had also been a beneficiary of the 'Explore Tāmaki Makaurau this Summer' voucher scheme to encourage Aucklanders to visit local businesses.

[16] By the end of July, VR Voom was facing both the end of the school holidays, and the end of the voucher stimulus, and bookings were beginning to dry up. Mr Dong said this was why he was advertising for a part time or casual staff member. He said he was open about this, and Ms Yang was aware of the advert, and was aware that he was interviewing candidates, as she let them into the office, and was introduced to a couple of candidates as Mr Dong showed them around the premises.

[17] There was an incident where Mr Dong asked Ms Yang to work for 2 additional hours on a particular day (and to be paid for these additional 2 hours at her normal hourly rate) to accommodate a large group booking. Ms Yang refused, and said that she would only work more than her rostered hours if she was paid at the rate of time and a half. Or if Mr Dong wanted her to stay later, she would start work 2 hours later in the morning. Mr Dong was surprised at this, and in the end, it was agreed that Ms Yang would start work 2 hours later and finish 2 hours later.

[18] Ms Yang says that she was then promised a wage increase by Mr Dong. Mr Dong denies this. He produces a We-Chat record of the conversation, which shows him saying: "I am currently considering giving you a raise, but you might only work until August or September".

[19] Ms Yang accepts that she had told Mr Dong that she would likely be returning to China to visit her family in August or September, which this was a reference to.

[20] This conversation falls far short of a promise by Mr Dong to increase Ms Yang's wages by a specific amount on a specific date, and nothing flows from this.

[21] There was a second incident in late July, when the mother of a teenage customer complained to Ms Dong that Ms Yang had been rude to her son. Ms Dong spoke with Ms Yang about this. Ms Yang was offended by this criticism, and by Ms Dong's exercise of authority over her.

[22] The following day, she brought her laptop to work, and began to openly spend her time at work watching shows and playing games. Ms Dong then remonstrated with Ms Yang by way of We-Chat, saying "if we communicate properly no problem is a problem! You I understand may be uncomfortable because Icey's management is different to mine...After all, we are paid to work. What will the boss think when he sees us playing games, and what will the customers think when they come in? Of course, no one cares what you do when there are no customers or when you are alone, but all I can say is that the boss has eyes."

[23] Ms Yang was very frustrated by this, and says that the original job advert stated that she would have an opportunity to play games at work. Ms Dong's evidence is that she understood and accepted that there would occasionally be quiet times at work, and it would be perfectly reasonable for Ms Yang to occasionally and discreetly play a game on her laptop when customers did not require her, however, this was not what occurred, and after she had remonstrated with Ms Yang about the customer complaint, Ms Yang suddenly and obviously began watching shows on her laptop at work rather than being attentive.

[24] The following week, business was slow. Mr Dong gave evidence that he kept an eye on bookings week to week to ensure the business could meet its financial

commitments. He contacted Ms Yang at about 5.30 pm on Friday night, as there were no bookings, and finding there were no customers in the store, he told her to close up at 6.00 pm, which was one hour earlier than usual. He also asked if she could leave her key with another staff member to pass on to him, so he could access the shop after hours.

[25] Ms Yang said she was concerned about being asked to give Mr Dong her key, and felt that he should have asked Ms Dong to borrow her key instead. Ms Yang said that being asked to leave her key suggested to her that something was wrong. Mr Dong's evidence is that he simply wanted to borrow Ms Yang's key on this one occasion, and he explained this to her via We-Chat.

[26] On Saturday and Sunday, there was only one booking each day, and Mr Dong asked Ms Yang not to come in on those days, telling her: "Fiona, I have been thinking, you do not need to work this weekend, there are only very few bookings, no need for extra staff, thank you."

[27] Ms Yang replied that she was "working full time" and this meant she would not have regular working hours. Mr Dong replied, "Do you mean "casual"? Ms Yang then replied: "So I'm full time when there is no one, and I'm casual when you hire someone?"

[28] Mr Dong replied that he did understand what Ms Yang was getting at, and that "casual working hours vary, is it hard to accept?" Ms Yang replied that her work times should be arranged a week in advance, via schedule. After some more short messages, Ms Yang asked to be provided with a copy of her employment agreement.

[29] On Monday, Ms Yang contacted Ms Dong, asking for the shift schedule for the week. Ms Dong replied: "Due to the current economic climate, we have no choice but to close most of our weekdays, so there is no way to schedule your shift in the short term." Ms Yang replied, acknowledging that "weekends aren't too busy, are they?" and Ms Dong said "Yes, the shop won't be particularly busy after the holidays."

[30] Ms Yang then called the Employment New Zealand advice line. She says that only after speaking to them did she appreciate that she was in fact a permanent part time worker.

[31] On 8 August 2022, Ms Yang emailed Mr Dong, saying she believed she was a permanent part-time employee based on advice given to her by Employment NZ and the Auckland Community Law Centre, and raising a personal grievance claim seeking 8 weeks wages, holiday pay at the rate of 8%, \$2,500 for emotional damage, and mediation.

[32] Mr Dong replied, saying he thought there had been a misunderstanding, and that Ms Yang had not been dismissed, but that she was a casual employee, not a permanent employee, and she had agreed to casual status from the beginning. Mr Dong said he was willing to resolve this misunderstanding between them.

[33] Ms Dong also reached out to Ms Yang via We-Chat offering her more work. Ms Yang replied: “please ask [Mr Dong] to come and talk to me in person. Because I don’t think the problem is scheduling”.

[34] The parties did attend mediation, but were unable to resolve matters. I must now determine whether Ms Yang is a casual employee, or a permanent employee. If she was a permanent employee, I will need to then consider if she was unjustifiably dismissed, when Ms Dong told her at the end of July, that they were not able to schedule her shift in the short term.

### **Analysis**

[35] A “casual” employee is one who works as-and-when required. They have no expectation of on-going employment, and in exchange, have the right to turn down work that is offered to them by the employer, who likewise has no special call on the employee’s time. The court has stated:

The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work.<sup>2</sup>

[36] In considering the law on this matter, the court further expressed the view that:

The common theme of these cases is that, where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.<sup>3</sup>

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<sup>2</sup> *Jinkinson v Oceania Gold (NZ) Limited*, EMC Christchurch CC9/09, at [41].

<sup>3</sup> *Ibid*, at [52].

[37] It is well-established that an employment relationship can commence on a genuine casual basis, and over time, can change to become a permanent part time or permanent full time role.

[38] Ms Yang's position is that, although she originally agreed to a casual contract, and this was what she wanted at the time because it would allow her to effectively combine her work for VR Voom with her existing other work, over time, she worked a sufficient number of hours per week, and with sufficient regularity, that she became a permanent employee. Accordingly, it was not open to Mr Dong (or Ms Dong) to unilaterally reduce her hours, and by doing so, she was unjustifiably dismissed.

[39] Ms Yang worked consistently Wednesdays to Sundays on most weeks. After the first 6 weeks of her employment, she almost always worked 5 days per week, usually a 40 hour week, but not less than 32 hours. Mr Dong gave evidence that he and the business were happy for Ms Yang to work these hours, because she requested them and the business had a need for someone to work those hours at that time.

[40] Ms Yang particularly mentions the week she had dental surgery. Ms Yang said she told Mr Dong that she would not be able to work on those days, and it is submitted for her that this amounted to needing to seek permission to be away from work. Mr Dong said that she advised VR Voom that she would not be able to work on those days, and this was fine, because she was a casual employee.

[41] I do not find that Ms Yang was required to seek leave. On balance, the consistent evidence before me from Mr Dong and Ms Yang is that Ms Yang advised at first Icey, and latterly Mr Dong and Ms Dong, what hours Ms Yang was available to work in the upcoming week, and a roster was set according to Ms Yang's advised availability. This does not suggest either the need to seek leave for a planned absence, or that Ms Yang was under an obligation to accept or carry out work just because it was offered. Ms Yang's own evidence shows that she was aware of her rights to turn down work and did so when convenient to her, being not just the time she took for dental surgery, but also the time when Mr Dong asked her to work 2 additional hours to cover a large booking, and she refused to do this. Neither of these instances had any impact on whether she was offered further work, consistent with Mr Dong's evidence that this was acceptable as part of a casual employment arrangement.

[42] Ms Yang's claim rests on the idea that, over time, her hours and pattern of work had changed to become so consistent that there was a mutual expectation that VR Voom would provide further work, and she would accept it. This claim is undermined by her own actions in turning down work when convenient for her. In addition, Ms Yang is unable to point to a change in the way she requested work, or how work was allocated to her, that might have suggested a change to the underlying casual agreement that she had originally accepted and said she wanted.

[43] While Ms Yang does give evidence of two changes from her perspective, first being her unilateral decision to give up her other work, and second, being Icey's resignation, neither of these changes are the sort that could impact Ms Yang's employment status with VR Voom.

[44] On balance, I find that there were no mutual obligations on the parties to provide a certain level of work, or to accept work when it was offered. Ms Yang was a casual employee in accordance with her employment agreement, and VR Voom was not obliged to offer her any particular hours of work.

[45] Ms Yang's claim of unjustified dismissal is not made out. No orders are made.

### **Costs**

[46] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[47] If they are not able to do so and an Authority determination on costs is needed the respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[48] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>4</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>4</sup> Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>