

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 611
3101314 & 3104492 &
3104512 & 3106497 &
3110412

BETWEEN	ZHANG SHANXIANG Applicant in 3101314
AND	XIE HONGWEI Applicant in 3104492
AND	GUO AIGUO Applicant in 3104512
AND	JIN JIANMING Applicant in 3106497
AND	ZHANG RUIJUN Applicant in 3110412
AND	LIANG TANG Respondent

Member of Authority: Robin Arthur

Representatives: Paul Young, advocate for the Applicants
Respondent in person

Investigation Meeting: 5, 20 and 21 July 2022

Determination: 21 November 2022

DETERMINATION OF THE AUTHORITY

- A. Zhang Shanxiang, Jin Jianming and Zhang Ruijun were employed by Liang Tang.**
- B. The applications of Guo Aiguo and Xie Hongwei are dismissed.**
- C. Within 28 days of the date of this determination Mr Liang must pay:**

- (i) to Jin Jianming, the sums of \$6,737.50 for wage arrears, \$539 as holiday pay and \$71.56 in reimbursement of the fee paid to lodge his application in the Authority; and
- (ii) to Zhang Shanxiang, the sums of \$4,800 for wage arrears, \$384 as holiday pay and \$71.56 in reimbursement of the fee paid to lodge his application in the Authority; and
- (iii) to Zhang Ruijun, the sums of \$7,255.50 for wage arrears, \$580.44 as holiday pay and \$71.56 in reimbursement of the fee paid to lodge his application in the Authority; and
- (iv) costs of \$8,000, for the joint benefit of Jin Jianming, Zhang Shanxiang and Zhang Ruijun.

D. Within 28 days of the date of this determination Mr Liang must also pay to the Authority the sum of \$6,000 as a penalty for breaches of employment standards in the Employment Relations Act 2000 and Holidays Act 2003. On recovery of the penalty the Authority must transfer that amount in full to the Crown account.

Employment Relationship Problem

[1] Zhang Shanxiang, Xie Hongwei, Guo Aiguo, Jin Jianming, Zhang Ruijun each worked on construction sites in Auckland in various weeks during late 2019 and early 2020. With the assistance of an employment advocate they lodged applications in the Authority seeking wages they said they were owed but not paid for work done on those work sites. They also sought penalties for breaches of the statutory obligations to pay them holiday pay and provide them with a written employment agreement.

[2] Two of the applicants, Jin Jianming and Zhang Ruijun also sought to pursue personal grievances in relation to the failures to pay them. They withdrew those claims during the course of the Authority's investigation, accepting they had not raised those grievances within 90 days of the relevant events.

[3] The applicants said their employer was Liang Tang. They did so because Mr Liang was the person who arranged for them to work on various construction sites and because any payments made to them were given to them by Mr Liang, in cash. Mr Liang denied he was their employer. He insisted his dealings with them, in both

arranging work and making payments, were on behalf of a company, Reno Smith Limited (RSL) and contractor companies on other sites where the applicants were also sent to work. If there was any employment relationship, he said it was with those companies, not him. However Mr Liang also denied the work was carried out under an employment relationship. He said the applicants were engaged as independent contractors.

[4] RSL was removed from the Companies Office register in September 2020. Its director Fan Wenchou is believed to have left New Zealand and returned to China.

[5] The issues arising for investigation and determination by the Authority about the applicants' claims were:

- (a) Was the work done carried out as employees or as independent contractors?
- (b) Who was the employer of the applicants?
- (c) If the relationship was found to be one of employment and that relationship was with RSL, could the applications proceed without action to restore the company to the Companies Office register?

Wage arrears

- (d) Are any wage arrears and holiday pay due to each applicant?
- (e) If so, of what amount and who should be ordered to pay them?

Penalties

- (f) Was the employer, whoever that was be found to be, liable to penalties for failure to pay holiday pay and/or failure to provide written employment agreements?

Costs

- (g) Should any party be ordered to pay costs to any other party?

The Authority's investigation

[6] The investigation meeting began on 5 July 2022 but Mr Liang did not attend as he had tested positive for Covid-19. The meeting was adjourned to 20 and 21 July.

[7] Each applicant had lodged a witness statement, written in English and Chinese, briefly setting out when they had worked and what they said they were owed by Mr Liang as wages and annual leave. Mr Liang did not lodge a witness statement. He relied on the contents of statements in reply lodged by two different lawyers who had

acted for him earlier in the proceedings and on the oral evidence he gave in the investigation meeting.

[8] The Authority arranged an interpreter of Mandarin to assist witnesses, as needed, to understand and answer questions asked of them during the investigation meeting.

[9] Jin Jianming and Zhang Ruijun attended the investigation meeting in person, affirming their written witness statements and answering questions asked of them.

[10] Guo Aiguo and Zhang Shanziang had returned to China and were unable to come to New Zealand for the investigation meeting. They were both given prior leave to attend by audio-visual link (AVL), subject to ensuring they arranged to do so with a suitable device, reliable internet connection and a quiet place from which to take part. Mr Zhang did so. By AVL connection from China Mr Zhang affirmed his witness statement and answered questions. He remained in attendance for most of the rest of the meeting.

[11] The internet connection with Mr Guo was not satisfactory. During an initial connection Mr Guo was distracted by other activities he was engaged in at a workplace and the sound quality was inadequate to communicate with him effectively. Later attempts to make a reliable connection and ask questions of him were unsuccessful. As a result it was not possible to test Mr Guo's evidence in a way sufficient to make any findings about his claim. Accordingly, having been given the opportunity to take part and not having used it satisfactorily, Mr Guo's claim is dismissed.¹

[12] Similarly, Mr Xie did not take part in the investigation meeting. On its first part-day, 5 July 2022, Mr Xie was reportedly busy with work in Tauranga. He was advised, through his representative, that he would need to attend in person during continuation of the investigation meeting on 20 and 21 July or his claim would be dismissed. Mr Xie did not attend on either day, again reportedly because he was busy with work in Tauranga and unable to make arrangements to attend the meeting in Auckland. Having had appropriate notice of the investigation meeting, and of the consequence of not coming to it, Mr Xie's claim is also dismissed.²

¹ Employment Relations Act 2000, s 173(2), Schedule 2 clause 12 and Notice of Investigation Meeting note 1: "If the applicant does not attend the investigation meeting, the matter may be dismissed."

² Above n 1.

[13] In respect of the claims from Zhang Shanxiang, Jin Jianming and Zhang Ruijun, this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. As permitted by s 174E of the Employment Relations Act 2000 (the Act), the determination has not recorded all evidence and submissions received.

[14] This determination has been issued outside the usual statutory period as the Chief of Authority decided exceptional circumstances existed for the delay.³

Arrangements for the work

[15] Mr Liang's experience in the construction industry in Auckland included working as a site manager for a large and well-known company and in a quality assurance role. In the later part of 2019 and early 2020 he arranged workers for a number of work sites for a number of contracting companies, using contacts he had developed from his work in his previous roles. On one of those sites, in downtown Auckland, RSL had a contract to do some work for a main contractor. Mr Liang said RSL's director Mr Fan had promised to pay him 20 per cent of the value of the project for arranging labour needed for floor installation, kitchen installation and some other carpentry work.

[16] Among the workers Mr Liang arranged to work on that project were Zhang Shanxiang, Jin Jain-ming and Zhang Ruijin. He also made arrangements for them to work for some time at other locations where they carried out work for other contractors. Jin Jain-ming said he worked on a North Shore site for two weeks. Zhang Ruijin was sent to work at a South Auckland site.

[17] The following three key findings are made from the evidence given by the workers and Mr Liang.

[18] Firstly, Mr Liang accepted each of those workers had worked the hours they said and had not been paid in full for them. He accepted this, in part, because he said he too was not paid amounts promised to him by Mr Fan from RSL.

³ Employment Relations Act 2000, s 174C(4).

[19] Secondly, the workers were not lawfully entitled to be working on those construction sites at that time. Jin Jiangming did have a work visa but it permitted him to work for only one named company. It did not permit him to work for RSL, Mr Liang or another entity that was involved in the sites where Mr Jin did work during December 2019 and January 2020. Zhang Shanxiang held a visitor visa which included a specific term stating the visa holder “shall not undertake employment in New Zealand”. Zhang Ruijun was on a tourist visa which also did not allow paid employment of the type he undertook.

[20] Thirdly, there was no documentation of the type required by New Zealand law regarding the employment arrangements and payment for work done by these three workers. There were no written employment agreements. There were no pay slips or records available regarding any payments made. There was no deduction or withholding of any tax. The workers’ wage claims in the Authority were made on the basis of records they kept themselves of hours worked.

[21] Taking the evidence of all witnesses as a whole it was clear the work was arranged entirely on an ‘under the table’ basis. Mr Liang and each of the workers involved knew, I find, that they were not following the requirements of New Zealand law. They all knew the workers were not entitled to carry out paid employment and any payments should have the relevant tax deducted, whether that was an employee or as an independent contractor.

[22] Each of the workers had their own reason for seeking and accepting work in that way. In Jin Jianming’s case the employment with the employer approved on his work visa had failed and he was having difficulty in making arrangements for lawful employment with a new employer. In Zhang Ruijin’s case he was working as a dishwasher in a restaurant as he could not get other work without a valid visa and wanted more reliable income. In Zhang Shanxiang’s case, although on a visitor visa prohibiting paid employment, he said he had a mortgage and a car loan he had to pay.

[23] While each applicant may, at the time, have acted unlawfully in making those work arrangements, they were nevertheless entitled to the statutory protection provided by the employment standards set in the Act and other legislation for the payment of wages and holiday pay.

The real nature of the relationship

[24] The questions of whether the applicants were employees or independent contractors and who they were actually employed by are interwoven. In this case, the real nature of the relationship is best addressed first.

[25] In determining whether the applicants worked under a contract *of* service (as employees) or contracts *for* service (as contractors), the Act requires the Authority to consider relevant evidence about indications of the intentions of the people involved but not to treat what they may have said, in writing or verbally, as a definitive answer to the issue.⁴ The Authority must consider the real nature of the relationship, which may be assisted by tests developed in case law about the degree of control exercised over the work done, how the people carrying out the work were integrated into the business of the alleged employer and the extent to which they were working on their own account.⁵

[26] In this case there were no written employment agreements or service contracts to provide an indication of the parties' intentions. The real nature of the relationship had to be discerned from the arrangements made and their actions.

[27] Each man made a verbal agreement with Mr Liang about the type of work to be carried out and an hourly rate of pay for it. Jin Jianming was offered and agreed to work modifying and installing kitchen fittings for \$24 an hour. Zhang Shanxiang was offered and agreed to work installing cabinets for \$22 an hour. Zhang Ruijin was recruited to carry out framing work, initially for \$20 an hour, later increased to \$21 an hour. Those arrangements were indicative of an employment relationship. There was no total price for the job, which is often an indicator of a contracting relationship.

[28] They were provided with some protective equipment, such as 'hi-vis' jackets, at the workplaces they attended. This usually bore the branding of the main contractor for the site. While they may have brought or used their own hand tools, the applicants were not required to provide any specialist equipment. A dispute which occurred over whether Zhang Ruijin or another worker was responsible for the cost of damage to a diamond drill supplied to them by Mr Liang indicated such equipment was provided by

⁴ Employment Relations Act 2000, s 6(s) and (3).

⁵ *Bryson v Three Foot Six Limited (No. 2)* [2005] NZSC 34 at [32].

the employer. Those arrangements also supported a conclusion that the relationship was one of employment.

[29] Each worker was expected to attend on the arranged days of work and to personally carry out the work for which they were to be paid. They were not able to substitute their labour for that of others or able to profit by making different arrangements about how the work was carried out. They worked as directed, which Jin Jianming was able to demonstrate through producing a WeChat message exchange. Those messages showed Mr Liang provided explicit instructions on how to modify kitchen cabinets which did not fit the space in which they were to be installed.

[30] The close direction of their work location and hours and being sent to different sites to work for different contract companies, assessed overall, indicated a level of integration and control that firmly placed the real nature of the relationship with the applicants as one of employment.

Mr Liang was the employer

[31] The evidence which pointed to the conclusion reached about the real nature of the relationship also gave a strong indication on who that relationship was really with.

[32] Mr Liang's evidence was to the effect that his role was solely as the agent of RSL, recruiting labour it needed to complete a sub-contract for the main contractor at the downtown Auckland work site referred to earlier. However each of the three applicants was deployed during their period of employment to carry out work for other sub-contractors or contractors. Mr Liang said that, in those instances, the employment relationship was then with the company for which the applicants did work at those sites. His explanation was inconsistent with his evidence that RSL was the actual employer.

[33] However, even if Mr Liang and that company intended RSL to be the employer, the evidence did not support a conclusion that the existence or role of the company as their employer was ever disclosed to the applicants. They each denied being told RSL was their employer. There was no evidence that indicated they should, objectively, have understood they were employed by RSL.

[34] Mr Liang said their employment should have been apparent from RSL timesheets filled in with their hours. However, as explained by the applicants and accepted by Mr Liang in his evidence, timesheets were prepared by team leaders and

not signed by the workers. As a result the applicants had not seen and signed timesheets bearing the name of RSL, or the names of other companies who were the sub-contractors or main contractors on other sites, from which they might have guessed the identity of their actual employer, if it was not Mr Liang.

[35] Rather, they understood Mr Liang to have directly employed them so he could then place them at worksites where he had agreements of his own to provide labour for the contractors on those sites to use. In that way Mr Liang was employing the applicants and acting as a labour agency. In his oral evidence Mr Liang accepted he understood that concept but firmly denied that was the nature of the arrangement.

[36] Mr Liang insisted that he simply placed the workers at the site and their employment was then actually with RSL, or whichever other company was the relevant contractor. This was not, I find, the actual nature of his relationship with Zhang Shanxiang, Jin Jainming and Zhang Ruijin. However, even if that conclusion was incorrect and Mr Liang genuinely acted solely as an agent of RSL, these three applicants were still entitled to pursue him for the remedies they sought under the doctrine of the undisclosed principal.⁶

[37] Even if they knew RSL was a sub-contractor on at least one of the sites where they were sent to work, no evidence established that company was identified to them as their true employer. They did not have written employment agreements showing RSL as the employer. They did not sign time sheets with its name at the head, as at least one potential indicator of who they were truly working for. What payment they did receive came as cash in plain envelopes with no paperwork, such as a payslip, noting the company as the payer and therefore, inferentially, the employer.

[38] In the absence of such disclosure, if it were the true situation, the applicants were entitled to pursue the person who seemed to them to be their employer, because he had made the arrangements for their employment, gave them some pay and directed where and when they worked. Accordingly, the applicants were entitled to pursue Mr Liang for payment of the arrears of wages and holiday pay owed to them.

⁶ *Cuttance (t/a Olympus Fitness Centres) v Purkiss* [1994] 2 ERNZ 321 at 332-333 and 338.

Action against RSL could not have proceeded

[39] Because of the findings and conclusions already reached, it was not necessary for this determination to resolve the potential issue of whether the applicants could have pursued RSL for remedies as it had been removed from the Companies Office register on 21 September 2020. The answer to that point, if one were needed, is no. The company would first have had to be restored to the register.

Arrears for wages and holiday pay

[40] Jin Jainming was paid only for his first week of work. Relying on his record of hours, which are accepted, he was entitled to payment of a further \$6,737.50 for hours worked from 5 December 2019 to 4 January 2020. Added to this is an entitlement of \$539 as holiday pay due on that amount. Accordingly, Mr Liang must pay Mr Jin \$7,276.50 as arrears for wages and holiday pay.

[41] Zhang Shanxiang was paid \$2,000 for his work from Christmas 2019 to 13 January 2020. He was not paid for work done up to 13 February 2020. Based on his account of hours worked, Mr Zhang was entitled to payment of a further \$4,800 as wages and \$384 as holiday pay due on that amount. Accordingly, Mr Liang must pay Mr Zhang \$5,184 as arrears for wages and holiday pay.

[42] Zhang Ruijun was paid only \$800 for 345.5 hours worked. Based on his account of hours, he was entitled to a payment of a further \$7,255.50 as wages and \$580.44 as holiday pay due on that amount. Accordingly, Mr Liang must pay Mr Zhang \$7,835.94 as arrears for wages and holiday pay.

Penalty for breach of employment standards

[43] The applicants asked for penalties to be imposed on Mr Liang for failing to pay their holiday pay and for failing to provide them with written employment agreements.⁷ He was liable to penalties on both accounts. As an individual he was liable to a penalty of up to \$10,000 for each breach. Treating the breaches of each provision in respect of three applicants as a single breach, Mr Liang was liable to a penalty of up to \$20,000.

[44] Factors set by s 133A of the Act have been considered in setting the penalty. Relevant objects of the Act require the Authority, when fixing the amount of a penalty,

⁷ Holidays Act 2003 s 23 and s 75 and Employment Relations Act 2000 s 65 and s 133.

to address inequality in bargaining and to promote effective enforcement of employment standards. Both those concerns favour a substantial penalty being imposed where the vulnerability of migrant workers has been used to deny them the benefit of statutory employment standards. The breaches in this case resulted from an intentional disregard for those standards. At least three workers were denied payments totalling more than \$20,000 owed to them for work done over a relatively short period. It was money they could not then use for basic living costs.

[45] No reparation or restitution had been made to mitigate the adverse effects of being denied use of that money although Mr Liang did give evidence that he had, at the time, made efforts to get contractors to pay for work done so that he could then pay the workers what they were owed.

[46] There was no evidence regarding prior breaches by Mr Liang.

[47] While Mr Liang had, on his account, also lost out in the arrangements he had made with RSL, there was no evidence that his financial circumstances were such that he could not, eventually, meet the cost of a reasonable penalty.

[48] Weighing those factors, along with proportionality to the money owed to the workers, the circumstances of this case warranted a penalty of \$6,000 being imposed on Mr Liang for the breaches of employment standards. It is an amount that both punishes his conduct and also serves as a disincentive for other people from engaging in such breaches.

[49] The applicants, through their representative, sought an order requiring part of any penalty awarded to be paid to them. They did not have a persuasive argument for such an order. While the applicants were vulnerable to exploitation in the arrangements they made to work for Mr Liang and were not knowledgeable about New Zealand employment law, neither were they naïve. Mr Jin and Shanziang Zhang were experienced builders. Zhang Ruijin had qualified in China as a health professional. Each man, as checked with them in the investigation meeting, knew they were agreeing to work in breach of their visa conditions. This, in part, explained the undocumented and 'under the table' nature of the arrangements they then made with Mr Liang. As things turned out they were poorly served by those arrangements but, having purposefully acted outside the terms of their visas, the merits did not favour them being paid part of the penalty imposed on their employer for his breach of employment

standards. Rather the public interest in punishment and deterrence of such behaviour by employers is promoted by having all the penalty ultimately paid to the Crown.

[50] Accordingly, Mr Liang must pay to the Authority \$6,000 as a penalty for breaches of the Holidays Act and the Employment Relations Act 2000. On recovery of the penalty, the Authority must pay that amount in full to a Crown Bank Account.

Costs

[51] The applicants sought an order for costs and for reimbursement of the fees paid to lodge their applications in the Authority. This was a case where an order for costs for the three successful applicants could appropriately be made on the basis of the Authority's usual daily tariff. While the investigation meeting began, briefly, on 5 July before being adjourned to continue on 20 and 21 July, it also finished by mid-afternoon on 21 July. The tariff is therefore applied for a total of two days.

[52] The tariff is currently set at \$4,500 for the first full day and \$3,500 for each subsequent day. In this case, the total for costs is \$8,000. That is the amount Mr Liang must pay as a contribution to the costs of representation incurred by Zhang Shanxiang, Jin Jainming and Zhang Ruijin.

[53] Mr Liang must also reimburse each of the three successful applicants for the sum of \$71.56 for the fee paid to lodge their separate applications in the Authority.

[54] Those costs and expenses must also be paid within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority