

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 131
5468666

BETWEEN NICK (XIN) ZHANG
 Applicant

A N D EURO RENOVATION
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 No appearance for the Respondent

Investigation Meeting: 07 May 2015 at Auckland

Date of Determination: Oral delivered on 07 May 2015 and written record of it
 issued to parties on 08 May 2015¹

ORAL DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination Euro Renovation Limited (Euro) is ordered to pay Mr Nick (Xin) Zhang:**
- (a) \$4165.60 wage arrears;**
 - (b) \$894.08 unpaid holiday pay;**
 - (c) \$71.56 to reimburse his filing fee;**
 - (d) Interest at rate of 5% on \$5,059.68 from 13 April 2014 until that amount has been paid in full.**

No appearance by respondent

[1] Mr Zhang's Statement of Problem was served on Euro on 10 December 2014. No Statement in Reply was received within the 14 day required time period. On

¹ This written determination arose from a recording of the oral determination delivered at the investigation meeting on 07 May so the references to "today" in this determination refer to 07 May.

23 January 2015 the Authority wrote to Euro advising that a Statement in Reply had not been received within 14 days of service of the Statement of Problem and advised that if Euro wanted to defend Mr Zhang's claims then it had to seek leave to file its Statement in Reply out of time. There was no response to this communication.

[2] On 02 February 2015 the Authority again reminded Euro that there had been no Statement in Reply and that if Euro wished to defend Mr Zhang's claims it would need to seek leave to file a Statement in Reply out of time.

[3] On 12 February 2015 the Authority directed both parties to provide relevant documentation. Mr Zhang provided the information that he had been directed to but Euro did not. The Authority received no response from Euro.

[4] On 17 February 2015 the parties were directed to mediation which was unsuccessful.

[5] On 23 February 2015 the Authority issued further directions to the parties regarding Mr Zhang's claims. Euro was again reminded that it had not filed a Statement in Reply and had not sought leave to do so, so that if it wanted to defend Mr Zhang's claims it needed to address that omission.

[6] The Notice of Hearing for today's investigation meeting was served on Euro on 21 April 2015. It was signed for by Jamie McLean. Euro did not attend the Authority's investigation today. I am satisfied that it had received notice of Mr Zhang's claims, of the Authority's directions and of the notice of investigation.

Employment relationship problem

[7] Mr Zhang was employed by Euro from 30 January to 13 April 2014 as a carpenter. Mr Zhang claims he has been underpaid by \$4,165.60 for the hours he worked and was not paid any holiday pay when his employment ended. Mr Zhang claims wage arrears for these amounts together with interest on the unpaid wages and reimbursement of his filing fee.

[8] Although it was not raised by Euro, the documentation before the Authority suggests there may be an issue as to whether or not it has jurisdiction to investigate Mr Zhang's claims. The Authority only has jurisdiction in respect of employment

relationship problems. This requires the parties² to be in an employment relationship as defined by s.4(2) of the Employment Relations Act 2000 (the Act).

[9] Mr Zhang provided 10 invoices to the Authority and confirmed that he was paid by Euro upon production of a weekly invoice³ which can be indicative of a contracting arrangement and not employment relationship.

[10] The Authority only has jurisdiction to investigate Mr Zhang's claims if it is satisfied on the balance of probabilities (i.e. that it is more likely than not) that he was an employee as defined by s.6 of the Act. Mr Zhang bears the onus of proof of establishing to the required standard that he was an employee.

Issues

[11] The following issues are to be determined by the Authority:

- (a) Was Mr Zhang employed by Euro?
- (b) If so, is Mr Zhang owed unpaid wages?
- (c) Is Mr Zhang owed unpaid holiday pay?
- (d) Should Mr Zhang be awarded interest on any wage arrears?
- (e) What if any costs should be awarded?

Was Mr Zhang employed by Euro?

Relevant law

[12] In order for the Authority to have jurisdiction to investigate Mr Zhang's claims he must bring himself within the definition of employee contained in s.6 of the Act.

[13] Section 6(2) of the Act requires the Authority, in determining whether or not a person is an employee, to determine the real nature of the relationship between the parties. When doing so, s.6(3) of the Act requires the Authority to consider all relevant matters, including the intention of the persons involved, but it is not to treat

² With one limited exception in the case of a claim for aiding and abetting an employment agreement.

³ I note that the first invoice was for a 10 day period as it covered part of his first week and his second week. Thereafter all invoices were weekly.

as determinative any statement by the parties which describes the nature of their relationship. The labelling of the relationship is merely one of the factors to be considered within the overall mix. The intention of the parties is therefore relevant but not decisive of the question of whether or not Mr Zhang is an employee.

[14] The control test, integration test and fundamental/economic reality of the relationship are all relevant factors to consider along with other relevant matters such as industry practice. The Authority's inquiry into the real nature of Mr Zhang's relationship with Euro is intensely factual.

What do the relevant documents suggest?

[15] There is no employment agreement and no wage and time records. There is no independent contractor agreement. The only documentation that exists appears to be 10 invoices which Mr Zhang submitted to Euro in order to get paid.

[16] Mr Zhang says that after he had been employed for a couple of weeks Mr Andrius Mitalauskas (Euro's director and one of its two shareholders) approached Mr Zhang and told him that he had to complete invoices in order to get paid. This had not been discussed at the interview.

[17] On 11 February, Mr Mitalauskas emailed Mr Zhang an invoice template which Mr Mitalauskas had prepared which recorded the date, start and finish times, total hours worked, lunch break taken, rate of paid, workplace and job description. The invoice template also contained an area for Mr Zhang's address, IRD number and bank account number.

[18] Mr Zhang was required to go to Mr Mitalauskas' house where he was shown how to insert the relevant information into the template for each day that he worked. Mr Zhang then submitted invoices in order to get paid.

[19] Usually the issuing of invoices is associated with an independent contractor arrangement and employees submit timesheets. However, a review of the invoices that Mr Zhang provided to the Authority, shows that they are very similar to a timesheet in terms of the information they record.

[20] Mr Zhang's evidence was that he did not believe or understand that he was in business on his own account and he was not running any other business operations at

the time he worked for Euro. Mr Zhang's earnings from Euro were his sole means of income and he believed he was an employee.

[21] I consider that whilst it appears that Mr Zhang may have invoiced Euro the invoices were in fact more like timesheets. In these circumstances I consider the use of invoices to be neutral in terms of establishing the status of the parties' relationship.

What did the parties intend?

[22] The intention of the parties is a significant but not determinative factor in determining Mr Zhang's status. The key question is whether I am satisfied on the balance of probabilities that there was a mutual intention that Mr Zhang would be an employee. I am so satisfied.

[23] Mr Zhang says that he saw an advertisement on the Chinese language website *Skykiwi.com* advertising to employ a carpenter. Mr Zhang called the number in the advertisement and spoke to Mr Mitalauskas' wife who is a native Mandarin speaker (as is Mr Zhang). She told Mr Zhang to meet her husband at the Onehunga building site where he was working so he could be assessed for suitability for the advertised position.

[24] Mr Zhang did as directed and spoke to Mr Mitalauskas for about five to 10 minutes. Mr Mitalauskas wanted to know if Mr Zhang was qualified and Mr Zhang said that yes he had done a Unitech course which he had completed. Mr Mitalauskas wanted to know how much experience Mr Zhang had had and Mr Zhang told him approximately three years.

[25] After their brief discussion Mr Mitalauskas told Mr Zhang to come to work the following day so that he could see how good Mr Zhang's work was. Mr Zhang was told to go to Mr Mitalauskas' house after 5pm later that same day to collect some tools to bring to the building site with him the following day, which was to be Mr Zhang's first day of work.

[26] Mr Mitalauskas asked Mr Zhang how much he wanted to be paid and Mr Zhang indicated his expectation was \$22 per hour. Mr Mitalauskas agreed to that amount and said that as Mr Zhang became more experienced then that amount could potentially increase.

[27] Mr Mitalauskas told Mr Zhang that normal working hours were from 7am until 4pm Mondays to Fridays and that he would often have half a day's work on Saturdays but not necessarily every Saturday. Mr Zhang was told that Saturday work would be advised to him as required. Mr Zhang agreed to these terms.

[28] Mr Zhang's expectations after this discussion were that he had been employed in an employment relationship by Euro. Mr Zhang told the Authority that he believed Euro was his employer because that was the name in the advertisement he had replied to. Mr Zhang also told the Authority that the advertisement had specifically requested an employee so Mr Zhang believed he was obtaining employment and not conducting business on his own account.

[29] There is no evidence from Euro to contradict Mr Zhang's version of events which was given to the Authority under oath today.

[30] I am satisfied that it is more likely than not that the parties have a common intention to enter into an employment relationship because no other arrangement was discussed. There was simply no evidence of a mutual intention to enter into an independent contracting arrangement.

[31] I consider that if Euro had wanted to engage Mr Zhang as an independent contractor that would have been made clear at the outset. I would also have expected to have seen some associated documentation to reflect that Ms Zhang was not an employee, but that did not occur.

[32] I find on the balance of probabilities that Mr Zhang was offered and accepted work as an employee during his interview with Mr Mitalauskas at the Onehunga building site. I consider that this factor supports the existence of an employment relationship.

How did the arrangement operate in practice?

[33] Mr Zhang says that he was required to sign in and out of work each day. If Mr Zhang wanted to leave work he had to seek and obtain permission before leaving. He also had to sign in and out.

[34] Mr Zhang says his work was allocated to him by the site manager, Ryan⁴. Mr Zhang also said that on occasion Mr Mitalauskas would direct Mr Zhang to do specific work within a specific time and/or sometimes in a certain way. Mr Zhang said his work was closely monitored and checked. He says that he had no autonomy into what he would do or how he would do it – he merely followed specific instructions.

[35] Mr Zhang said that he would be assigned work to do each day by Ryan and that once he completed the assigned task he then needed to locate Ryan to ask for further instructions about what to do, where and how.

[36] There is no evidence that Mr Zhang was in business on his own account and he told the Authority that he was not running any other business or undertaking any other work during the period that he worked for Euro. I find there was a very high degree of control which is consistent with an employment relationship.

[37] I find that the way the relationship between Mr Zhang and Euro operated in practice strongly suggests the existence of an employment relationship.

Tax and associated issues

[38] Mr Zhang said that when Mr Mitalauskas agreed to pay him \$22 per hour it was on the basis that Mr Zhang would deduct and file his own tax. Mr Zhang said that when he asked why, Mr Mitalauskas said it was so he could receive tax back for tools and vehicles and the like.

[39] Mr Zhang said that he did not understand that this was indicative of an independent contractor relationship because he was not running his own business at that time and so was not aware of the tax benefits that are often associated with self-employment.

[40] On or around 11 February Mr Zhang says that Mr Mitalauskas said he would be deducting 20% withholding tax from Mr Zhang's wages. Mr Zhang queried that with his accountant who told him that it did not make any difference whether Euro or Mr Zhang paid the tax to the IRD, as long as it was paid.

⁴ Mr Zhang was unsure of Ryan's surname.

[41] I consider that the tax arrangements tend to support the existence of an independent contractor arrangement.

The control test

[42] The control test looks at the degree of control that is exerted over the work and the manner in which it is to be done. The greater the extent to which an individual is regulated and supervised then the more likely they are to be considered an employee.

[43] Based on Mr Zhang's uncontested evidence Euro exercised a high level and degree of control exerted over him. I find this is indicative of an employment relationship.

The fundamental/economic reality test

[44] The fundamental test looks at whether the person performing the services is in business on their own account. I find that there is no evidence that Mr Zhang was in business on his own account. He had no ability to profit from his own endeavours and he had not assumed any of the risks in terms of the operation of Euro's business or the way in which he provided his services.

[45] Mr Zhang had no autonomy in terms of how or when he would do the work he was required to do. I consider that Mr Zhang was paid for the labour that he provided and that was the extent of the arrangement between the parties.

[46] I find that the fundamental/economic test supports the existence of an employment relationship.

Integration test

[47] The integration test considers whether work performed by Mr Zhang was an integral part of the business and whether the individual has effectively become part and parcel of the organisation.

[48] I consider the evidence tends to suggest that Mr Zhang was integrated into the Euro business. Euro provided him with the equipment necessary to carry out his duties (apart from very basic tools) and he worked on its job sites for Euro's clients alongside Euro management. There is no evidence to suggest Mr Zhang was distinct in any way.

[49] Mr Zhang's work day and activities were monitored as were his working hours and he was required to report the duties that he had undertaken to the site manager and/or Mr Mitalauskas who would closely check them.

[50] I find the integration test favours the existence of an employment relationship.

Industry practice

[51] There is no evidence about this factor so it is inconclusive.

Outcome

[52] Standing back and carefully weighing all the various factors I am satisfied on the balance of probabilities that Mr Zhang has discharged the onus of establishing that he was in an employment relationship with Euro in terms of the definition in s.4 of the Act.

[53] I am therefore satisfied on the balance of probabilities that Mr Zhang was an employee in terms of the s.6(2) definition of employee in the Act so the Authority therefore has jurisdiction to investigate his wage arrears claim.

Is Mr Zhang owed unpaid wages?

[54] In accordance with s.132 of the Act it appears that Euro has failed to keep wage and time records for Mr Zhang. In terms of s.132(2) of the Act, I find that Euro has not provided any evidence to contradict Mr Zhang's claims or evidence to the Authority today.

[55] I therefore accept (in accordance with s.132(2) of the Act) as proved, all the claims that Mr Zhang makes in respect of the wages actually paid to him, the hours, days and times worked by him and the amounts that remain outstanding. I am satisfied based on the evidence that Mr Zhang has given the Authority today that he has not been paid \$4,165.60 for hours that he has worked. He is therefore owed that amount.

[56] Mr Zhang also told the Authority that although Euro told him it had deducted 20% of his total gross earnings as withholding tax, that amount has not in fact been paid to the Inland Revenue Department.

[57] I order, within 28 days of the date of this determination, Euro to pay Mr Zhang \$4,165.60 wage arrears.

Is Mr Zhang owed holiday pay?

[58] Mr Zhang's uncontested evidence was that he did not take any paid leave while employed but did not receive any holiday pay when his employment ended. Mr Zhang is entitled to 8% holiday pay on his total gross wages of \$11,176.00

[59] I order Euro, within 28 days of the date of this determination, to pay Mr Zhang \$894.08 in unpaid holiday pay.

Should Mr Zhang be paid interest on his wage arrears?

[60] The evidence produced by Mr Zhang to the Authority today satisfied me that from 23 February 2014 Euro had been short paying or not paying him his full wages for the hours he had actually worked. Although the employment relationship ended on 13 April 2014, Mr Zhang has still not received payment for all of the hours he has worked. When his employment ended, he did not receive a final pay and was not paid any holiday pay.

[61] I consider that Euro has had the benefit of retaining money which was due and owing to Mr Zhang and which should have been paid to him over a year ago. Mr Zhang has been deprived of the use of this money so he should receive interest for the lost opportunity he has incurred due to Euro's actions.

[62] I am satisfied that this is an appropriate case to exercise my discretion under s.87 of the Judicature Act 1908 by ordering Euro to pay Mr Zhang 5% interest on \$5059.68 (being the amounts that have been awarded to him).

[63] I order Euro to pay Mr Zhang interest of 5% on \$5,059.68 from 13 April 2014 until it is paid in full.

What if any costs should be awarded?

[64] Mr Zhang represented himself and so he has not incurred any legal costs. However Mr Zhang did incur a filing fee of \$71.56 so he is entitled to be reimbursed for that.

[65] I order Euro to repay Mr Zhang within 28 days of the date of this determination \$71.56 to reimburse his filing fee.

Orders

[66] I make the following orders:

- (a) The parties were in an employment relationship and so the Authority has jurisdiction to determine Mr Zhang's claims;
- (b) Euro is to pay Mr Zhang within 28 days of the date of this determination:
 - (i) \$4165.60 wage arrears;
 - (ii) \$894.08 unpaid holiday pay;
 - (iii) Interest at 5% on \$5059.68 from 13 April 2014 until that amount has been paid in full;
 - (iv) \$71.56 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority