

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 141
5613925

BETWEEN WENWEN ZHOU
 Applicant

A N D GOODEGO LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 Hayley Chen, Employee of Respondent

Investigation Meeting: 10 May 2016 at Auckland

Date of Determination: 11 May 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Ms Zhou claims she is owed wage arrears. Ms Zhou says she was not paid at all for the work she did for Goodego Limited (Goodego) from 03 September 2015 to 23 January 2016. Goodego is apparently like a travel agency in that it arranges accommodation, sightseeing and activities etc for Chinese travellers.

[2] Ms Zhou is a Chinese national. She came to New Zealand on a student visa which allows her to work for up to 20 hours per week.

[3] When Ms Zhou first came to New Zealand on 30 August 2015 she stayed in short term rental accommodation in Fontenoy Street Mt Albert (the Mt Albert residence).

[4] Ms Zhou told the Authority Ms Friday Li told her (Ms Zhou) that Goodego was running the accommodation which was offered to Chinese who needed a short term place to stay. Ms Li denies that.

[5] Ms Li is employed by Goodego as its Marketing Manager. Her boss Nan (Wayne) Yi is the sole director and shareholder of Goodego. Ms Li says Goodego had nothing to do with the Fontenoy accommodation.

[6] Ms Li told the Authority she was trialling the Fontenoy property (which was owned by a friend of hers) in her personal capacity to see if it could be profitable as short term accommodation for Chinese people and that if it was then Goodego would become involved. Ms Li says Mr Yi was aware of the trial but otherwise not involved.

[7] There is no dispute that Ms Zhou stayed at the Mt Albert residence from 30 August to 03 January 2016. Ms Zhou paid \$48 per day for the first week of her stay (ie total \$336 for the week). After that Ms Zhou then paid \$160 per week for one of the small rooms in the Mt Albert residence until she left when the environment became too noisy due to work going on in the yard.

[8] Ms Li claims that Ms Zhou's rent was reduced in exchange for her agreeing to help Ms Li with the housekeeping. Ms Zhou says Ms Li told her (Ms Zhou) that she would be employed as an intern for Goodego but would not be paid for the first three months she worked because interns weren't paid in New Zealand. Ms Li says she believed the offer to be an intern for Goodego was like an apprenticeship.

[9] Ms Zhou says that Ms Li told her she would get a positive reference, permanent employment and be paid by Goodego after she had worked as an intern. Ms Zhou says that as a new overseas student she saw that as an attractive offer because she believed Goodego was a big company so she says she was excited to get to work with it.

[10] Ms Li denies this. She says there must have been a misunderstanding. Ms Li says that she told Ms Zhou she would recommend her to Goodego if the work Ms Li had asked her to do went well. Ms Li says she did not have authority from Goodego to offer Ms Zhou employment.

[11] Ms Zhou says that she got good feedback on her work and it expanded at Ms Li's request from just housekeeping to checking guests in and out, translating

documents, answering queries from clients and prospective clients, drafting up booking schedules and lists, uploading information about the Mt Albert residence to websites and other related business activities.

[12] Ms Zhou says that she started asking Ms Li for a contract and for payment in December 2015. Ms Zhou says Ms Li told her no-one from Goodego was around to respond to Ms Zhou's requests because of the Christmas period. Ms Zhou says she continued working while this was being worked out believing Goodego would eventually pay her for the work she did.

[13] Ms Zhou met Wayne Yi on 23 January 2016. Ms Zhou says she was expecting to receive payment for the hours she worked and a contract but when that did not occur she decided to resign. Ms Li says that the meeting with Mr Yi was a job interview which did not progress because Ms Zhou did not have her Curriculum vitae with her.

[14] There is no employment documentation. Ms Zhou did not receive a written employment agreement in breach of s.65 of the Employment Relations Act 2000 (the Act).

Credibility

[15] The Authority was assisted by an interpreter. This matter is to be determined on issues of credibility. I have carefully evaluated the evidence I heard and have considered how reasonable, plausible and probable the evidence is. I have also taken into account what corroboration there is and in particular what documentation exists to support one version or another.

[16] The onus of proof is the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. I have preferred Ms Zhou's evidence over Ms Li's regarding what was said and agreed about the work Ms Zhou did. I consider that Ms Zhou's evidence is independently corroborated by documents, Wechat transcripts and phone messages which were played during the Authority's investigation meeting.

The issues

[17] The following issues are to be determined:

- (a) Were the parties in an employment relationship?
- (b) If so, what dates was Ms Zhou employed?
- (c) Is Ms Zhou owed wage arrears?
- (d) If so, what is Ms Zhou owed?
- (e) What, if any, costs should be awarded?

Were the parties in an employment relationship?

[18] The Authority only has jurisdiction¹ to resolve the employment relationship problems of parties who it finds are or were in an “*employment relationship*”. The term “*employment relationship*” is defined in s.4(2) of the Employment Relations Act 2000 (the Act).

[19] Section 6 of the Act defines an employee. Section 6(1)(a) of the Act states that an “*employee*” is any person employed to do “*any work for hire or reward under a contract of service*” (emphasis added). This definition excludes a volunteer who does not expect to be rewarded for the work they perform as a volunteer and who does not receive a reward for the work they do.²

[20] Ms Zhou bears the onus of establishing on the balance of probabilities that she falls within the definition of “*employee*” in the Act and that her employment relationship was with Goodego and not anyone else (such as Ms Li).

[21] I do not accept Ms Li’s or Ms Chen’s evidence that Goodego had nothing to do with Ms Zhou or the Mt Albert residence. I have preferred Ms Zhou’s evidence about what she was told about being employed by Goodego on the balance of probabilities.

[22] I therefore find that:

- a. Ms Li told Ms Zhou she (Ms Zhou) would be working for Goodego as an unpaid intern for three months then would get a contract for permanent employment and would be paid;

¹ Subject to s.134(2) of the Act regarding a claim against a person for inciting, instigating, aiding or abetting any breach of an employment agreement.

² Section 6(1)(c) of the Act

- b. Ms Zhou was told that she would be given a contract by Goodego, would be paid and would be given a reference;
- c. Ms Zhou acted consistently with that information by chasing Ms Li up for a contract and by asking to be paid after her three month 'internship' had ended;
- d. Ms Li deliberately lead Ms Zhou to believe that her requests would be actioned and resolved in her favour;
- e. Goodego provides short term accommodation to its clients such as that provided by the Mt Albert residence. I am not satisfied on the balance of probabilities that Goodego had nothing to do with the Mt Albert residence;
- f. Banking receipts show that the rent paid by clients who stayed at the Mt Albert residence was paid into Goodego's bank account. These receipts contradicted Ms Li's evidence that the money was paid into her personal bank account;
- g. When pressed about inconsistencies in her evidence Ms Li acknowledged that Goodego, from its bank account, paid Ms Li the money that was used to cover the operating expenses of the Mt Albert residence;
- h. Documents produced to the Authority show that Ms Zhou was included into the Goodego Wechat group which contained six Goodego employees including Mr Yi. It did not make sense for her to be in those group online chats if she was not also a Goodego employee;
- i. The fact Mr Yi was in the same Goodego work Wechat group as Ms Zhou suggests he knew or should reasonably have known about the work Ms Zhou was doing. Mr Yi could and probably should have had Ms Zhou removed from the group had she not been working for Goodego;
- j. Mr Yi sent an email to a number of Goodego employees, including Ms Zhou asking them to read the notes he had attached before "*work*" and

telling them not to be late for a Goodego work meeting he had scheduled. It would have been odd for Ms Zhou to have been included in this communication and meeting had she not been working for Goodego. There was no reason for Ms Yi to have emailed Ms Zhou about such matters if she was not involved with Goodego;

- k. Ms Zhou was not paying reduced rent in exchange for the work she did. The rent of \$160 was market rent for one small room for an ongoing rental (i.e not short term stay) situation;
- l. Ms Zhou undertook housekeeping, laundry, cleaning, document drafting, check in and check out of guests, responded to online queries, approached other organisations to promote the Mt Albert business, translated documents, drafted promotional material, set up records, processed receipts, prepared schedules, generated records and uploaded information to the website and kept that information updated (these activities are all supported by documentation she produced to the Authority).

[23] I consider Ms Li's evidence that Ms Zhou decided to "*help out*" to the extent she did in the hope that Ms Li would put in a good word with her employer Goodego unlikely.

[24] I am therefore satisfied on the balance of probabilities that Ms Zhou intended and believed that her working relationship was with Goodego and not with Ms Li personally. I accept Ms Zhou's evidence that she believed the work she was doing benefited Goodego not Ms Li personally because that is what she had been told;

[25] Ms Li says that Ms Zhou was given the "*reward*" of reduced rent for the work she did for Goodego. Ms Zhou disputed that she got reduced rent. However Ms Zhou was clear that she expected to be rewarded with wages for the work she did.

[26] I accept Ms Zhou's evidence that she had no desire to work for free and instead believed she had ongoing paid employment with Goodego. When Ms Zhou realised she was not going to be paid she immediately resigned.

[27] Ms Zhou's expectation of reward and Ms Li's concession that it was always intended that Ms Zhou would be rewarded (just not by paying her money) for the

work she did means that Ms Zhou does not fall within the definition of “*volunteer*” in the Act. I am satisfied that Ms Zhou falls within the definition of “*employee*” in the Act.

[28] There was no evidence that Ms Zhou was acting as an independent contractor. None of the well-established tests that apply to the Authority’s requirement under s.6(2) of the Act to establish “*the real nature of the relationship*” suggest that Ms Zhou was in business on her own account.

[29] I find that Ms Zhou has discharged the onus of establishing the parties were in an employment relationship so the Authority has jurisdiction to determine her wage arrears claim.

What dates did Goodego employ Ms Zhou?

[30] Goodego as Ms Zhou’s employer is required under s.130 of the Act to keep wage and time records for her. It failed to do so. In accordance with the Authority’s discretion under s.132(2) of the Act, I accept Ms Zhou’s evidence about the wages she received and the hours, days and times she worked because Goodego has not disproved that evidence.

[31] On that basis, I accept Ms Zhou’s evidence that she was employed by Goodego from 03 September 2015 to 23 January 2016.

Is Ms Zhou owed wage arrears?

[32] There is no dispute that Ms Zhou did not receive any money (wages) for the work she did.

[33] Like all employees who are working in New Zealand Ms Zhou is entitled to the minimum code statutory protections. This means she is entitled to be paid the applicable minimum wage rate (which was \$14.75³ at the material time) for the hours she worked.

[34] Section 7 of the Wages Protection Act 1983 (WP83) requires an employer to pay its employees’ wages in money only unless the employee gives written consent otherwise. The definition of “*money*” in s.2 WP83 does not include a rent reduction. There is no written consent in this case for Ms Zhou to be paid in other than money.

³ The minimum wage rate has subsequently increased.

[35] I am not satisfied that Ms Zhou actually received a genuine reduction in her rent she paid seemed to be more in line with ongoing accommodation costs for the area she lived in.

[36] However even if there was a \$160 per week rent reduction as Ms Li claims such an arrangement does not meet the minimum statutory requirement that every employee is entitled to be paid in money the minimum wage for all of the hours they work.

[37] In the absence of written agreement to the contrary Goodego was legally required to pay Ms Zhou money for the hours she worked. Under the Minimum Wage Act 1983 (MW83) Ms Zhou was not to be paid less than \$14.75 per hour being the applicable minimum wage at the material time. That did not occur so I find that Ms Zhou is owed wage arrears.

What is Ms Zhou owed?

[38] Because Goodego has not kept wage and time records for Ms Zhou, in accordance with s.132(2) of the Act, I accept her evidence that she worked 2 hours a day for five days a week. I find that Ms Zhou's evidence about her days and hours of work was not disproven by Goodego.

[39] Ms Zhou produced documents to the Authority that show the work she did for Goodego and these documents corroborated her evidence. Ms Zhou's evidence was also supported by another witness Mr John Fennell.⁴

[40] I find on the balance of probabilities that Goodego owes Ms Zhou \$2,950 being \$14.75 per hour for two hours a day for five days a week (i.e. \$147.50 per week for 20 weeks (being the period from 03 September 2015-23 January 2016)).

[41] Ms Zhou is also owed \$236 for unpaid holiday pay being (being her total gross earnings of \$2,950 x 8%).

[42] Ms Zhou did not provide evidence about what if any public holidays she worked so I am not satisfied on the balance of probabilities that she is owed unpaid public holiday entitlements.

⁴ I note Ms Zhou and Mr Fennell are romantically involved.

What, if any, costs should be awarded?

[43] Both parties represented themselves, so there is no issue as to legal costs. Ms Zhou as the successful party is entitled to be reimbursed for her filing fee.

Orders

[44] Within 28 days of the date of this determination Goodego is ordered to pay Ms Zhou:

- a. \$2950 wage arrears;
- b. \$236 unpaid holiday pay;
- c. \$71.56 to reimburse her filing fee.

Rachel Larmer
Member of the Employment Relations Authority