

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2024] NZEmpC 144
EMPC 347/2023
EMPC 376/2023**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER OF an application for leave to extend time to file
a challenge

AND IN THE MATTER OF an application for substituted service

BETWEEN A LABOUR INSPECTOR OF THE
MINISTRY OF BUSINESS, INNOVATION
AND EMPLOYMENT
Plaintiff

AND ELEMENTS THERAPEUTIC MASSAGE
LIMITED
First Defendant

AND XUAN ZHANG
Second Defendant

AND PING DU
Third Defendant

Hearing: On the papers

Appearances: G La Hood, counsel for plaintiff
No appearance for first and second defendants
A Douglass and S Gaskell, counsel for the third defendant

Judgment: 5 August 2024

**INTERLOCUTORY JUDGMENT OF JUDGE M S KING
(Application for substituted service)**

[1] In the Employment Relations Authority, the Labour Inspector lodged a claim against Elements Therapeutic Massage Ltd (ETM) for failure to pay minimum wages and annual holidays to three former employees. They also asserted that ETM had made unlawful deductions from the wages of a former employee and failed to provide an employment agreement to a former employee. Additionally, they asserted that ETM had failed to keep sufficient wage, time, holiday and leave records for the three former employees.

[2] The Labour Inspector claimed that Xuan Zhang, who was a director, shareholder and manager of ETM, was a person involved in the identified breaches of the employment standards, in that he allegedly aided, abetted, counselled, or procured the breaches, induced the breaches and/or was, directly or indirectly, knowingly concerned in or party to the breaches pursuant to s 142W(1)(a), (b) and (c) of the Employment Relations Act 2000 (the Act).

[3] The Labour Inspector also claimed that Ping Du, who was a manager of ETM, is a person involved in the identified breaches of the employment standards in that he allegedly aided, abetted, counselled, or procured the breaches, induced the breaches and/or was, directly or indirectly, knowingly concerned in or party to the breaches pursuant to s 142W(1)(a), (b) and (c) of the Act.

[4] In the Authority's determination of 26 August 2022, the Authority Member observed that Mr Zhang did not respond to the Labour Inspector's investigation prior to the Authority proceedings and did not participate in the Authority's investigation process at all.¹ The Labour Inspector had informed the Authority that Mr Zhang was currently living outside New Zealand. The Authority was nevertheless satisfied that Mr Zhang had been served with the Authority proceedings and had knowledge of them.²

[5] The Authority went on to determine that Mr Zhang and Mr Du were persons involved in the breaches of minimum employment standards.

¹ *A Labour Inspector v Elements Therapeutic Massage Ltd* [2022] NZERA 415 [First determination].

² At [7].

[6] Mr Zhang was found to have been involved in the breaches of minimum standards and “exclusively” liable for unpaid arrears as a result of his involvement in the breaches.³ He was ordered to pay the arrears of minimum wages and holiday pay owed to the former employees to the extent that ETM is unable to pay the arrears, due to it ceasing trading.⁴ He was also ordered to pay penalties of \$8,000 in respect of his involvement in breaches under s 142X.⁵

[7] Mr Du was also found to have been involved in the breaches of minimum standards under s 142W.⁶ He was ordered to pay \$4,000 for his involvement in the breaches under s 142X.⁷ However, he was not found to be liable for the arrears owed for his involvement in those breaches.⁸

[8] The Labour Inspector applied to the Authority for clarification in respect of its findings in its first determination. The Authority issued a second determination on 21 August 2023.⁹ That determination clarified that Mr Du was held jointly liable for involvement in the breaches of minimum standards but that he was not liable for the outstanding arrears as a result of those breaches.¹⁰

[9] The Labour Inspector has filed a challenge seeking to have the Court hear a non-de novo challenge to the Authority’s second determination and has applied for leave to extend time to file a non-de novo challenge to the first determination. The challenge and the application for leave to file a challenge out of time seek to collectively challenge the parts of the Authority’s first and second determinations where it found that the third defendant, Mr Du, was held jointly liable as a person involved in the breaches of minimum employment standards but not liable for arrears owed as a result of those breaches.¹¹

³ At [65] and [68].

⁴ At [65] and [100].

⁵ At [99].

⁶ At [66]–[68].

⁷ At [101].

⁸ At [68] and [99]–[101].

⁹ *A Labour Inspector v Elements Therapeutic Massage Ltd* [2023] NZERA 461 [Second determination].

¹⁰ At [9].

¹¹ *First determination*, above n 1, at [66]–[68]; and *Second determination*, above n 9, at [9].

[10] ETM (no longer trading) and Mr Du have been served with the challenge to the first determination and the application for leave to extend time to file a challenge to the second determination.

[11] The Labour Inspector has filed an affidavit setting out the efforts made to serve Mr Zhang, which have been unsuccessful. These include:

- (a) Mr Zhang was the sole director of ETM when the Labour Inspector began its investigation in 2018 for breaches of the Minimum Wage Act 1983 and the Holidays Act 2003. During its investigation, the Labour Inspector communicated with Mr Zhang via a Hotmail email address: zhangxuan0630@hotmail.com. However, more than three years have passed since the Labour Inspector last received any communication from Mr Zhang from this email address.
- (b) On 7 September 2021, prior to the Authority's investigation commencing, Mr Zhang travelled to China. He did not inform the Labour Inspectorate of his travel or provide a forwarding address or updated contact details. The Labour Inspector only became aware of Mr Zhang's travel on 28 October 2021, when they requested his travel information from Immigration New Zealand.
- (c) On 9 November 2023, Immigration New Zealand confirmed that Mr Zhang had not returned to New Zealand since his departure on 7 September 2021.
- (d) The Companies Office records show the following:
 - (i) On 20 August and 15 December 2021, Mr Zhang vacated his share allocation in ETM; and
 - (ii) On 15 December 2021, Mr Zhang was removed as a director of ETM.
- (e) On 31 October 2023, the Labour Inspectorate contacted the Ministry of Business, Innovation and Employment's (MBIE) Intelligence Unit to

enquire if it was able to find a forwarding address or other contact details for Mr Zhang; MBIE confirmed that it did not.

[12] Due to the difficulties in serving the Court proceedings an application for substituted service has been made.

[13] The Labour Inspector enquired from Mr Du whether he was able to assist with locating or contacting Mr Zhang; he was unable to assist. Mr Du has advised that he will abide by the Court's decision on whether to grant the application for substituted service or dispense with service.

[14] The Court may make an order for substituted service in the circumstances set out in r 6.8 of the High Court Rules 2016 which provides:¹²

6.8 Substituted service

- (1) If reasonable efforts have been made to serve a document by a method permitted or required under these rules, and either the document has come to the knowledge of the person to be served or it cannot be promptly served, the court may—
 - (a) direct—
 - (i) that instead of service, specified steps be taken that are likely to bring the document to the notice of the person to be served; and
 - (ii) that the document be treated as served on the happening of a specified event, or on the expiry of a specified time:
 - (b) when steps have been taken for the purpose of bringing, or which have a tendency to bring, the document to the notice of the person on whom it is required to be served, direct that the document be treated as served on that person on a specified date:

...

[15] The Labour Inspector, in their evidence, proposes sending the Court proceedings to Mr Zhang's Hotmail email address if it is operating. It is suggested that it is possible that this will bring the documents to Mr Zhang's notice. If the email address is no longer operating, the Labour Inspector requests that the Court dispenses with service of the documents on Mr Zhang.

¹² This rule is applied via reg 6 of the Employment Court Regulations 2000.

[16] It is clear, based on the affidavit evidence before the Court, that the difficulties the Labour Inspector has experienced in serving the current Court proceedings on Mr Zhang track earlier difficulties serving him in the context of the Authority proceedings. Those difficulties led the Authority to find, based on the information provided by the Labour Inspector, that Mr Zhang had been served with the Authority proceedings and evidence and had knowledge of them.¹³

[17] Based on the evidence before the Court, I am satisfied that reasonable efforts have been made to serve a copy of the Court proceedings on Mr Zhang and that those steps have been unsuccessful. I find that Mr Zhang was aware that there were important legal processes underway when he removed himself as a shareholder and director of ETM and moved to China without informing the Labour Inspector of his travel or providing a forwarding address. I find that Mr Zhang has chosen to make himself difficult to contact.

[18] I am not satisfied that, in and of itself, sending an email to Mr Zhang's Hotmail email address will likely bring the Court proceedings to his attention. In the circumstances, I consider that the following further steps should also be taken to draw the Court proceedings to the attention of Mr Zhang and his friends and acquaintances in New Zealand:

- (a) Notice of the Court proceedings is to be advertised in the main daily newspaper where Mr Zhang is believed to have resided prior to departing New Zealand.
- (b) Notice of the Court proceedings is to be advertised in a Chinese newspaper with a paper and any digital circulation that covers the area where Mr Zhang is believed to have resided prior to departing New Zealand.

[19] I am satisfied that the steps in [18] above will have a tendency to bring the Court proceedings to Mr Zhang's notice.¹⁴ The Court proceedings will be treated as served once these steps are completed.

¹³ *First determination*, above n 1, at [7].

¹⁴ High Court Rules 2016, r 6.8(1)(b).

Orders

[20] I am satisfied that it is in the broader interest of justice that the application for substituted service be granted, and the following orders are made:

- (a) The Labour Inspector will, as soon as reasonably practicable:
 - (i) email the statement of claim, the application for leave to extend time to file a challenge, a copy of this judgment and any other documents to be served on Mr Zhang as part of resolving the proceedings, to the following email address: zhangxuan0630@hotmail.com; and
 - (ii) cause publication of the notice of the proceedings to be advertised in the main daily newspaper where Mr Zhang was believed to reside prior to him departing New Zealand; and
 - (iii) cause publication of the notice of the proceedings to be advertised in a Chinese newspaper and its digital circulation (if applicable) that covers the area where Mr Zhang was believed to reside prior to him departing New Zealand.
- (b) The Labour Inspector will file an affidavit of service within 14 days of notice being published and service being effected on Mr Zhang's email address in [20](a)(i) above.

[21] Costs are reserved.

M S King
Judge

Judgment signed at 1 pm on 5 August 2024