

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 609
3232839

BETWEEN BIAN LIQIANG
 Applicant

AND YA DONG LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Shang Yadong, director of the Respondent

Investigation Meeting: 24 July 2023 in Auckland

Further information: On 30 August and 21 September and 6 October 2023

Determination: 18 October 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Bian Liqiang applied to the Authority for orders requiring Ya Dong Limited (YDL) to refund money he paid an agent to get a visa to work in New Zealand. In this determination the agent is referred to as Ms G.

[2] Mr Bian said he paid the equivalent of about NZD 25,000 to Ms G's bank account in China. He provided a copy of a bank statement showing the transactions. He said he was then provided with a signed employment agreement and a work visa for a job as a carpenter for YDL.

[3] The company operates a painting and plastering business in Auckland.

[4] Mr Bian said Ms G's husband met him on arrival at Auckland Airport and took him to rental accommodation. Over subsequent weeks Mr Bian said he had asked

repeatedly when he would start work at YDL. He said Ms G eventually told him there was no work at the company.

[5] Mr Bian's application to the Authority said YDL should refund him the money he had paid to Ms G and pay for his air tickets and for three months' rent and living expenses in Auckland.

[6] YDL did not lodge a statement in reply. After being contacted by the Authority, its sole director and shareholder, Shang Yadong, attended the investigation meeting. Mr Shang said he had not authorised an offer of employment to Mr Bian and had not signed an employment agreement for him.

[7] Information gathered for the Authority's investigation showed Mr Bian was issued with an accredited employer work visa after YDL had been registered as an accredited employer. Mr Shang also denied any knowledge of those arrangements.

The Authority's investigation

[8] To investigate this matter the Authority:

- (i) held an investigation meeting where Mr Bian and Mr Shang, both under affirmation, answered questions from me with the assistance of an interpreter of Mandarin;
- (ii) called for and received, on 30 August 2023, documents from Immigration New Zealand accompanied by a statement from a warranted immigration officer explaining the documents provided;
- (iii) on 21 September, interviewed a licensed immigration advisor (referred to in this determination as Ms M) who the documents from Immigration New Zealand showed had made applications on behalf of YDL and Mr Bian; and
- (iv) on 6 October, interviewed Mr Shang in a separate, additional interview to discuss what the documents provided by Immigration New Zealand showed and to get additional comments from him.

[9] The information gathered from the investigation meeting, the documents and the two interviews was sufficient to determine Mr Bian's application. As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated

findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received.

[10] Findings are made on the balance of probability, that is what is more likely than not to have happened, based on an assessment of what those interviewed in the investigation meeting or separately have said and what can be corroborated from the documents provided by Mr Bian and Immigration New Zealand.

[11] Ms G and Ms M are referred to by initials only in this determination because matters touched on may still be the subject of further inquiries by Immigration New Zealand and neither person had an opportunity to comment on some findings which may be adverse to them. Accordingly, it was not appropriate for this determination to make their names a matter of public record at this stage.

How the problem arose

[12] In December 2022 Mr Shang was working on a painting job at a house in West Auckland. He was approached by Ms G who told him she lived on the same street. She introduced herself and asked if he needed any workers. Mr Shang told her he sometimes needed a casual or temporary painter or plasterer. He usually recruited this additional labour through advertisements he placed in local community and Chinese language newspapers.

[13] Ms G told him she could recruit someone for him from overseas. Mr Shang said he did not need a full-time or permanent worker but was interested in getting a painter or plasterer on a casual basis, provided she found other work for that person when Mr Shang did not need that assistance. Ms G asked for and Mr Shang provided a copy of his passport and a business card with his address and website address. He said Ms G also added him to a WeChat group on his phone.

[14] Ms G appears to have used that information to arrange for a recruitment agency in the North East China city of Daliang to commission Ms M, as a licensed immigration advisor in Auckland, to make two sorts of application to Immigration New Zealand.

[15] Ms M firstly applied for YDL to be registered as an accredited employer. The form authorising her to do so appeared to be signed by Mr Shang. Mr Shang, when shown a copy during the Authority investigation meeting, denied the signature was his.

[16] Ms M had no direct contact with Mr Shang during this process. She said all information and documents came to her from a person called Wang Yu at the agency in Daliang. She said the agency was called Huacheng Recruitment Limited.

[17] Immigration New Zealand asked Ms M for some additional information to establish YDL was an active business. Ms M said Ms Wang provided her with a photo of the residential address from which Mr Shang operated his business and two invoices for painting supplies from local trade stores. The photo showed a small banner Mr Shang had outside his house advertising himself as a master painter. After receiving that information Immigration New Zealand advised Ms M that YDL had been approved as an accredited employer.

[18] Ms M subsequently received instructions from Ms Wang at the Huacheng company in Daliang to apply for five work visas under the accredited employer scheme. She said she was told the jobs were for three painters and two carpenters. The scheme allowed an employer with “standard accreditation” to hire up to five migrants on temporary work visas for up to three years duration.

[19] Meanwhile Mr Bian, a resident of Daliang, had made contact with Ms G through TikTok. She told him she could arrange an employment agreement and work visa for New Zealand. In the Authority investigation meeting Mr Bian provided a record of bank transactions showing he made five payments to Ms G in the period between 28 October 2022 and 21 March 2023. The five payments totalled CNY 110,177.

[20] Mr Bian also provided a copy of an agreement he said he had received from a company called Daliang Huacheng Immigration Services. He understood this company was associated with Ms G. He said he was told by company staff that he dealt with in Daliang that he was one of five people who would be working for YDL.

[21] Ms M said she had provided Ms Wang with a check list of documents needed to apply for a work visa for Mr Bian. Those documents included an employment agreement. Ms M said Ms Wang sent her the agreement. Immigration New Zealand records show this was a standard form employment agreement in English, dated 24 February 2023, printed with the names of YDL and Mr Bian as employer and employee and bearing what appeared to be the signatures of Mr Shang and Mr Bian.

[22] Mr Shang subsequently denied ever seeing or signing any agreement for Mr Bian or for any of the other four workers who, on Ms M's evidence, she had applied to Immigration New Zealand for work visas with YDL.

[23] Ms M said she had no contact at all with Mr Shang or Ms G through any part of this process. Ms M said she could see that Mr Shang was part of the WeChat group set up to deal with Mr Bian's application but he "did not say anything". All communication was with Ms Wang in Daliang. Ms M said she knew of the Huacheng company from a visit she had made there in 2019 when looking into the international student market for another business she was involved in. Ms M said she also knew Ms G who she described as a client and said she had dealt with her over getting a visa for Ms G's brother-in law.

[24] Ms M said she had received a service fee of around NZD 2,000 for her services in arranging Mr Bian's visa. Two invoices for Immigration New Zealand fees were paid by the Huacheng company. One, addressed to YDL, was NZD 740 for the employer accreditation fee. The other, for Mr Bian's accredited employer work visa, was NZD 750. Mr Shang confirmed, in his evidence, that he had not seen those invoices and YDL had not paid those fees.

[25] Mr Bian arrived in New Zealand on 5 April 2023. He said Ms G initially told him the delay in starting working was because YDL's owner was overseas. After Ms G stopped responding to messages he sent through WeChat, Mr Bian said he made some attempts to contact YDL himself. He found an address in the Companies Office register and went to YDL's registered office address. However, because it appeared to be a private residence, he did not enter the property or knock on the door to ask about YDL or Mr Shang. Mr Bian said he had expected the company would be at commercial premises, not a residential address.

[26] Mr Bian provided a copy of WeChat messages he said were exchanged with Ms G between 10 April and 18 May 2023. On 18 May his message asked for confirmation that he could go to work for YDL or that Ms G would "sell the visa" (as translated by the interpreter) and return part of the money he had paid.

[27] Mr Bian said he had met with Ms G on 28 May at his flat and she told him there was no job with YDL. Despite the unsatisfactory arrangement regarding his own employment, he had continued to have contact with Ms G because he wanted her help

in progressing visa applications for his wife and children that he had paid the Huacheng company to assist with before he left China. He said Ms G had put him in contact with an immigration advisor in Auckland to apply for visas for his wife and child. Ms M confirmed that she was the advisor involved in those applications and said they had been approved in June 2023.

[28] Mr Bian, after initially making inquiries about applying for a Migrant Exploitation Work Visa, had since secured a job offer from another employer and applied for an open visa. That application was made through an agent provided by his prospective new employer.

Does YDL have any liability to Mr Bian for money paid to Ms G?

[29] The crux of Mr Bian's application to the Authority was whether YDL had any liability to him for money he had paid to Ms G for assistance in getting a job offer, an employment agreement and a work visa.

[30] The short answer is no, for the following reasons.

[31] Mr Bian and Mr Shang had not met until the Authority investigation meeting. After hearing what Mr Shang had to say in answer to questions, Mr Bian said he did not think Mr Shang was responsible for the situation. Mr Bian said he agreed it was not appropriate for the company to be required to pay any money to him. Instead, he said he wanted to find out more from Ms G "and make her accountable".

[32] There was insufficient evidence to support any finding Mr Shang had authorised Ms G to seek accreditation of YDL or to make arrangements through the Huacheng company in Daliang to apply for five work visas tied to jobs with YDL.

[33] Mr Shang was adamant he had received no money from Ms G from the transaction she made, through a bank in China, with Mr Bian. There was no evidence that Mr Shang had personally, or through YDL, received any part of the money Mr Bian paid or of money that may have been paid by other applicants in Daliang for the other four work visas that Mr Bian and Ms M referred to in the information they provided for the Authority investigation. Similarly, there was no evidence Mr Shang had engaged Ms G, personally or on behalf of YDL, to seek or receive any payment from Mr Bian

in respect of his employment. Consequently, the protection against premiums being charged for employment was not triggered by these circumstances.¹

[34] Accordingly, Mr Bian's application for orders against YDL is declined.

Further steps

[35] As discussed with Mr Bian and Mr Shang, some information gathered in the Authority's investigation raises potential concerns which may warrant further inquiry by Immigration New Zealand. Those concerns include:

- (i) whether an employer accreditation application and an employment agreement were provided to Immigration New Zealand with a signature falsely claimed to be that of Mr Shang;
- (ii) whether Ms G held herself out to be an agent and received a payment for obtaining a work visa;
- (iii) whether the licensed immigration advisor in Auckland had appropriately checked instructions received from an agency in China;
- (iv) whether Immigration New Zealand should have been done more to verify information provided in relation to both the accreditation application for YDL and the work visa application for Mr Bian; and
- (v) whether other visas were inappropriately issued for jobs with YDL which did not exist.

[36] The concern at subparagraph (iv) above relates to what Immigration New Zealand's own internal guideline shows in its record of Mr Bian's application. Its standard profile for applications from this region of China note this is "an area where fraud is common" and there is "a risk that citizens from China applying for work visa applications with an occupation in the construction industry may have provided fraudulent documents". The immigration officer making the assessment on this application recorded the following comment:

General internet search was conducted for the employer's business and no concerns have been identified. I am satisfied that the employer has offered a job to a suitable migrant worker and the risk has been mitigated for this visa application.

¹ Wages Protection Act 1983, s 12A.

[37] Mr Shang co-operated with the Authority's inquiries throughout. In the additional interview held with him, he gave an affirmed, signed statement summarising his evidence, with the understanding it would be referred to Immigration New Zealand.

[38] The Authority will also provide Immigration New Zealand with the notes made in the interviews with Ms M and Mr Shang and some documents provided by Mr Bian, along with a copy of this determination, in order to assist if the agency does deem any further inquiry about the activities of Ms G or anyone else is appropriate.

Costs

[39] The parties represented themselves in taking part in the Authority investigation so no order regarding costs was needed.

Robin Arthur
Member of the Employment Relations Authority