

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 368  
5139910

BETWEEN                      TIAN HAN CHENG  
   Applicant  
  
AND                                JING WEI BAI  
   Respondent

Member of Authority:      R A Monaghan  
  
Representatives:            Tianhan Cheng in person  
   Jingwei Bai in person  
  
Investigation meeting:      27 June 2013  
  
Additional information  
provided:                      4 July 2013  
  
Determination:                16 August 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. The parties were in a relationship of principal and contractor, not of employment.**
- B. Orders made in favour of the applicant in earlier determinations of the Authority in this employment relationship problem are revoked.**

**Employment relationship problem**

[1] The Authority has previously made a determination of the substantive claims in Tianhan Cheng's employment relationship problem with Jingwei Bai,<sup>1</sup> and made an order for costs in the matter.<sup>2</sup> By a further determination the Authority granted Mr Bai's application for a reopening of the investigation<sup>3</sup>. This determination concerns the reopened investigation.

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<sup>1</sup> *Cheng v Bai*, Employment Relations Authority Auckland, 18 November 2009, AA 410/09

<sup>2</sup> *Cheng v Bai*, Employment Relations Authority Auckland, 14 January 2010, AA 8/10

<sup>3</sup> *Cheng v Bai* [2013] NZERA Auckland 222

[2] Mr Cheng says Mr Bai was his employer, and that Mr Bai dismissed him unjustifiably two months after the employment relationship began. He also seeks an order for the payment of four days' unpaid wages.

[3] The issues are:

- (a) were the parties in an employment relationship or a relationship of principal and independent contractor;
- (b) if the parties were in an employment relationship, did Mr Bai dismiss Mr Cheng unjustifiably; and
- (c) is Mr Cheng owed unpaid wages.

## **A. Was there an employment relationship**

### 1. Background

[4] Mr Bai owns a residential property at an address in Te Atatu Auckland. When he purchased the property it comprised a single dwelling on a site which was large enough to subdivide. In 2006 Mr Bai moved the dwelling to the rear of the site. He subdivided the site, and in January 2007 two separate titles were registered under the Land Transfer Act 1952. In 2008 construction began on a new two-storeyed dwelling on the front of the site.

[5] Although the work amounted to a development of the site, Mr Bai said he is not in business as a property developer. His business is that of importer and exporter. His property interests extend to the Te Atatu property and another residential property in New Lynn. He was working with an architectural designer on managing the construction of the new dwelling at Te Atatu. The steps in the construction process were being contracted out to successive tradespeople as required.

[6] On or about 5 May 2008 the architectural designer placed an advertisement in a Chinese-language newspaper for a builder and two labourers. Mr Cheng contacted the designer at one of the telephone numbers listed in the advertisement, and obtained the address of the site. Mr Cheng and Mr Bai met on the site the same day.

[7] Mr Bai said he told Mr Cheng the work concerned all framework and ancillary work for both levels. The two discussed a price, and Mr Cheng quoted the figure of \$7,000. That was the lowest of the quotes Mr Bai had obtained, so he accepted it. Because it was winter, and rain-related delays could be expected, Mr Bai told Mr Cheng he anticipated the work would take two months to complete. Mr Bai said Mr Cheng agreed, and asked for payment in cash in weekly instalments. Mr Bai agreed.

[8] Mr Bai says Mr Cheng was engaged as a contractor to carry out building work.

[9] Mr Cheng said he is a skilled and experienced carpenter. His account of the 5 May conversation was that Mr Bai told him he was to do carpentry work. He would work on the foundations for the new dwelling, renovating the original dwelling on the rear site, and building a fence. Mr Cheng said he was advised the hourly rate would be \$18 per hour after tax, and that there would be no sick pay or holiday pay. The required work would take up to 10 days to complete but, since Mr Bai had another property on which he intended to build three houses, work would be available to Mr Cheng for two years.

[10] Mr Cheng said he was taken on as an employee of Mr Bai's.

[11] Regarding the period of the relationship, Mr Bai denied that he owned a property on which he intended to build three more houses and denied any agreement or undertaking to make further work available to Mr Cheng. He also denied that Mr Cheng worked on the original dwelling on the rear site. He said the work on that dwelling was completed, and the dwelling was inhabited, by 2008.

[12] Mr Bai also says the parties' relationship ended on or about 14 July 2008, when the framing work was completed. The installation of the guttering was the next section of work scheduled to be carried out, and another person was contracted to do that work. Mr Bai provided Mr Cheng with his final outstanding payment on or about 14 July, and Mr Cheng left the site. The total amount Mr Bai had paid to Mr Cheng was a little in excess of \$7,000, with the difference being accounted for by what Mr Bai said was reimbursement for the purchase of nails.

[13] Mr Cheng says the relationship ended with his unjustified dismissal on or about 17 July 2008, when no ongoing work was made available to him.

## 2. Was there an employment relationship

[14] Section 6 of the Employment Relations Act 2000 reads in part:

*(2) In deciding ... whether a person is employed by another person under a contract of service, the ... Authority ... must determine the real nature of the relationship between them.*

*(3) For the purposes of subsection (2) the ... Authority –*

*(a) must consider all relevant matters, including any matters that indicate the intention of the person, and*

*(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[15] In *Bryson v Three Foot Six Limited*<sup>4</sup> the Supreme Court said ‘all relevant matters’ include:

- the written and oral terms of the agreement, including terms indicating the parties’ intentions,
- any divergences from those terms in practice,
- the day to day implementation of the contract, and
- the tests of control and integration, and whether the contracted person is effectively working on his or her own account (the fundamental test).

[16] Industry practice can also be relevant, but no industry practice is relied on here.

### *The written and oral terms of the agreement*

[17] There were no written terms of agreement.

[18] Regarding the content of the oral terms, I rely on assessments of likelihood and credibility. There was minimal relevant written material.

[19] In general Mr Cheng was inclined to prevaricate to an extent I do not find adequately explained by any difficulties with the translation of his evidence.

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<sup>4</sup> [2005] NZSC 34

Similarly, he was on occasion reluctant to answer, and eventually made only limited and grudging concessions in circumstances I again do not find adequately explained by any difficulties in translation. I also found to be inconsistent his oral account of his work history and the statements of his income generated by the IRD.

[20] In most respects I find Mr Bai's account inherently more likely. There was no evidence that he is in business as a property developer, although he has some investment in residential property. He wanted to build a house on one property, and engaged tradespeople for that purpose. As anyone in that position would be likely to do he sought indications of price, and accepted Mr Cheng's as the lowest price for the relevant building work.

[21] I have some difficulty with whether the agreement was for a contract price of \$7,000 or payment at an hourly rate of \$18. Relevant written material included Mr Cheng's weekly timesheets. Mr Cheng's weekly payments differed each week, in accordance with the hours of work he recorded in the timesheets. If the payments were weekly instalments of a contract price they should have been the same each week. The payments came to \$7,360 by the time the job was completed. The difference was small, but was not explained satisfactorily.

[22] On the other hand, I find it inherently unlikely (and there was no evidence) that Mr Bai agreed to pay Mr Cheng at an hourly rate whether or not the weather was affecting work. At that time of year it was inherently likely the weather would affect work significantly, and Mr Bai took that into account. Further, I do not accept there was any express agreement as to hours of work.

[23] Finally, Mr Bai says he accepted the timesheets provided to him, and in the form Mr Cheng provided, because he was acting pursuant to a request of Mr Cheng's. It was at least common ground that Mr Cheng asked for weekly payments in cash, and that he prepared the timesheets for himself. Mr Cheng did not follow a requirement of Mr Bai's regarding the format of the timesheets, and Mr Bai said he would not otherwise have required Mr Cheng to submit timesheets of the kind he did. Mr Bai did not necessarily accept that work was done during the hours specified in them, but simply made the weekly payment in cash and on production of the timesheets as agreed.

[24] Overall I find it inherently unlikely that a person intending to build a single house would employ a builder on the terms and conditions alleged by Mr Cheng. On balance I find it more likely that a contract price was agreed. Further - even if Mr Bai's other property was large enough for the construction of additional dwellings - I do not accept that any comment he made about the matter amounted to an undertaking to Mr Cheng to provide ongoing employment. At the time there were no plans to proceed with such construction.

[25] I also find it unlikely that the parties' agreement extended to the renovation of the original dwelling.

[26] For these reasons I find it more likely that the parties entered into a contract for the foundation work and framing for the new dwelling. There was no agreement to an employment relationship.

*Divergence in practice*

[27] There was no material divergence in practice from the terms of the agreement.

*Day to day implementation of the agreement*

[28] Nothing in the day to day implementation of the agreement differs from the matters discussed above.

*The control, integration and fundamental tests*

[29] Mr Cheng asserted that Mr Bai supervised the work closely. Mr Bai said he visited the site on a daily basis, and that he lived for part of the week in the original dwelling.

[30] I accept Mr Bai oversaw Mr Cheng's work, and exercised a degree of control over it. I find also that the level of oversight was consistent with the oversight a project manager or property owner might provide when the work in question was contract work. I do not accept Mr Bai went beyond this and issued instructions on a daily basis about what work was to be done and how. He is not a builder and was in no position to issue detailed instructions of that kind.

[31] The law has long recognised that requirements relating to service delivery do not necessarily mean the individual who is to observe the requirements is an employee. I find the nature and level of the control exercised over Mr Cheng was not indicative of an employment relationship.

[32] I apply the integration test to find that Mr Cheng's activities were not integrated with Mr Bai's business. Mr Bai's business was unrelated to the construction.

[33] I apply the fundamental test to find that Mr Cheng was providing building services on his own account. On his evidence he also undertook other activities in the building industry, and on behalf of his family who operated in a different industry. He deployed his services as and where he saw fit.

#### *Conclusion*

[34] In conclusion I find Mr Cheng was contracted with Mr Bai, and was not an employee.

#### **B. Was there an unjustified dismissal**

[35] The above finding means the Employment Relations Authority has no jurisdiction over Mr Cheng's claims, and it is not necessary to address whether there was an unjustified dismissal.

#### **C. Wages owed**

[36] For the same reason it is not necessary to address whether Mr Cheng is owed unpaid wages. Even so, I heard evidence on the matter and would have found Mr Cheng was paid the amount owed to him in full.

#### **D. Orders of the Authority**

[37] The earlier determinations of the Authority - being those dated 18 November 2009, AA 410/09 and 14 January 2010, AA 8/10 - are replaced by this determination.

[38] The orders contained in the two determinations just identified are revoked.

**Costs**

[39] Costs of this reopened investigation are reserved.

[40] If either party seeks an order for costs that party shall have 28 days from the date of this determination in which to send to the Authority and copy to the other party a written statement of what is sought and why. The other party shall have 14 days from the date of receipt of that statement in which to provide a written reply to the Authority and to the party seeking costs.

R A Monaghan

Member of the Employment Relations Authority