

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 453
3192600

BETWEEN

WENJING HUANG
Applicant

AND

YOKE INSULATION LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
No appearance by the Respondent

Investigation Meeting: 15 August 2023 at Auckland

Other information received: 16 August 2023 from the Applicant

Date of Determination: 17 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Wenjing Huang, worked as a Sales Manager for Yoke Insulation Limited (“the Respondent”) from 1 November 2018 to 27 September 2022.

[2] Ms Huang was employed under an “individual employment contract” (referred to in this determination as “an individual employment agreement”) which provided for her to be paid an annual salary of \$60,000 gross. This was paid monthly directly into her bank account.

[3] Ms Huang’s last salary payment was paid on 31 May 2022 for the work she had done in May 2022. Although she continued working until the end of September 2022, she was not paid for that.

[4] Ms Huang said she continued working for the company from June to September 2022 although she was not being paid because she expected to be paid her salary arrears. However, she found out in September 2022 that other employees were being paid, while she was not.

[5] That resulted in Ms Huang exchanging WeChat messages with someone (name unknown) in the Respondent's Finance team. That person made derogatory comments to Ms Huang about her work and would not agree to pay her salary arrears for the work she had already done.

[6] As a result of that, and along with the continued failure to pay her her monthly salary, Ms Huang considered she had been dismissed at the end of September 2022. Her last WeChat message with the Respondent occurred on 27 September 2022.

[7] Ms Huang claims \$20,000 wage arrears from June to September 2022 and that she was unjustifiably constructively dismissed.

[8] The Respondent denied that the parties were in an employment relationship. It said that Ms Huang was an independent contractor, although it acknowledged that there was no documentation regarding that alleged arrangement.

The Authority's investigation

[9] The Authority held a Case Management Conference ("CMC") with the parties on 3 March 2023. Mr Qingliang (Liang) Zhang attended 23 minutes after it had started. The Authority was assisted during the CMC by a Mandarin interpreter who interpreted everything that was said.

[10] During the CMC Mr Zhang said that the employment agreement that Ms Huang had produced to the Authority was unsigned (the Authority notes it was actually signed by Mr Zhang), so could not be relied on. Mr Zhang said that there was a verbal agreement that Ms Huang would be an independent contractor, not an employee. The Authority noted that she disputed that.

[11] The Respondent confirmed that it did not have any documentation relevant to Ms Huang, whether employment documentation or documents regarding an independent contractor contract arrangement. The Respondent disputed the Authority's jurisdiction to investigate Ms Huang's claims.

[12] It was agreed that the Authority would investigate and determine the disputed jurisdiction issues at the same time that it investigated Ms Huang's substantive unjustified dismissal and wage arrears claims. The parties were advised to ensure that they included evidence in their witness statements that addressed the issue of whether or not Ms Huang was working as an employee or as an independent contractor.

[13] The Authority also identified to the parties the relevant documents that it expected to see. This included directing the Respondent to provide details of all of the payments it had made to Ms Huang during her last year of work for it. This was to show the date and amount she was paid, and whether payment was made to her via payroll or by invoicing.

[14] The Authority also directed the Respondent to provide any documents it had regarding the date and reason for its payments to Ms Huang being stopped and/or related to her alleged unjustified dismissal.

[15] The Authority also directed the Respondent to show what days and hours the Applicant had worked, that had not yet been paid for. Ms Huang was also asked to provide a copy of her IRD earnings printout, to show that what she had been paid by the Respondent along with income from all other sources during the period that she said she was employed by the Respondent.

[16] Mr Zhang indicated that he would be a witness for the Respondent along with Shaojian Huang, who was the Respondent's accountant who had paid Ms Huang and whose predecessor had likely sent Ms Huang the individual employment agreement that that parties had signed, and which Ms Huang produced to the Authority.

[17] An agreed timetable for the lodging of witness statements and relevant documentation was agreed with the parties. The Respondent was to lodge its evidence by 24 April 2023 and the Applicant was to do so with her evidence by 22 May 2023. The parties agreed that the matter would be set down for a one day in-person investigation meeting on 15 August 2023, during which the Authority would be assisted by a Mandarin speaking interpreter.

[18] The Respondent did not lodge its evidence by 24 April 2023, nor did it respond to the Authority's various attempts to contact it. The Authority sent emails and left voicemails for the Respondent. When contact was made by telephone with the Respondent, he would hang up.

[19] On 19 May 2023 the Authority made contact with Mr Zhang with the assistance of a Language Line interpreter. It was explained that the Respondent was overdue in filing its evidence.

[20] Mr Zhang apparently (according to the Authority Officer he spoke to) feigned ignorance regarding the need to file any evidence and/or regarding attempts by the Authority to contact the Respondent. The Authority Officer noted that the date for the Respondent to lodge its evidence had been agreed by Mr Zhang at the CMC he had attended.

[21] The Respondent was provided with a copy of Ms Huang's witness statement and the evidence that she had lodged on 24 March 2023. The Authority also sent a letter to the Respondent dated 26 July 2023 in an attempt to encourage it to engage with the Authority's investigation process.

[22] On 27 July 2023 the Respondent lodged a statement of the invoices which appeared to relate to Ms Huang's customers. It also lodged some statements from its business current account which showed automatic monthly wage salary payments to Ms Huang.

[23] On 31 July 2023 the Authority received an email from an unnamed and unidentified person, which appeared to have an email address associated with the Respondent's accountant which said that Mr Zhang's mother was sick and in hospital and he needed to go back to China, so could not attend the investigation meeting on 15 August 2023. The Authority was asked to arrange another date after September 2023.

[24] The Authority responded by saying that it was not prepared to adjourn the investigation meeting on 15 August 2023 based on the limited information that had been provided. It noted that Ms Huang's wage arrears claim dated back to the period from May to September 2022, the Respondent had not lodged its evidence in response to her claims and that it had failed to respond to the Authority's multiple attempts to communicate with it.

[25] The Authority said that because the Respondent had not engaged with its attempts to contact it, then how it could be assured the Respondent would participate in an investigation meeting that was rescheduled for after September 2023. The Authority noted it was concerned there could be further delay and/or an ongoing failure by the Respondent to engage in the Authority's investigation, if the August investigation meeting was vacated.

[26] Because the Respondent had not lodged the two witness statements that it said during the CMC it would be providing, the Authority did not know what Mr Zhang would be saying in response to Ms Huang's claims. He was asked to provide that information as soon as possible.

[27] The Respondent also had not explained why another witness such as the payroll person/Finance staff member who Ms Huang had exchanged WeChat messages with could not give evidence, as that was the person who had apparently stopped her salary payments and who had engaged with her in a way that caused her dismissal at the end of September 2022.

[28] The Authority also asked why the Respondent did not have other management staff/employees that Ms Huang said she had spoken to about non-payment of her wages available to attend the investigation meeting if Mr Zhang was going to be in China. The Authority enquired into whether there was another person who could attend as a witness for the Respondent, but did not get a response to that.

[29] The Authority said it would be prepared to review the request for an adjournment if:

- (a) The Respondent lodged its evidence (consisting of witness statements and relevant documents);
- (b) Mr Zhang provided a medical certificate for his mother;
- (c) Mr Zhang provides the specific dates he intended to leave and return to Mr Zhang;
- (d) Mr Zhang explained whether or not there was a remote attendance option available for him while he was in China, such as the ability to attend the investigation meeting by Teams or Zoom or other AVL; and
- (e) Who else can give evidence for the Respondent if Mr Zhang was unavailable.

[30] The Authority advised the Respondent that if/when it received this information then it would review the request for an adjournment.

[31] The Respondent sent another request for an adjournment, in exactly the same terms as the original request on 9 August 2023. The Authority gave the same response, by noting that none of the queries or requests it had raised in its decision that was emailed to the parties on 31 July 2023 had been responded to.

[32] On that basis the second request for an adjournment was declined. The Respondent was advised that the investigation meeting would be proceeding as scheduled on 15 August 2023, regardless of whether or not the Respondent attended.

[33] A third request for an adjournment was emailed on 10 August 2023. This was in essentially the same terms as the two previous requests. Once again, none of the information the Authority had asked for was provided. The request for an adjournment was again declined, and the parties were advised that the investigation meeting would be proceeding as scheduled on 15 August 2023.

[34] Ms Huang attended the investigation meeting in person. No-one attended on behalf of the Respondent. The Authority was assisted in its investigation by a Mandarin speaking interpreter.

[35] The Authority conducted an investigation of Ms Huang's claims. This included raising with her the information that Mr Zhang had conveyed to the Authority during the CMC, along with the information that had been recorded in the Respondent's Statement in Reply.

[36] The Authority's in-person investigation took half a day, because it included investigation of the status of the relationship between the parties, in addition to Ms Huang's wage arrears and unjustified dismissal claims.

[37] Ms Huang was asked to provide some additional information that she did not have with her at the investigation meeting, but which the Authority had identified as relevant. She lodged that information with the Authority on 16 August 2023, and it was copied to the Respondent. No response to this additional information was received from the Respondent.

[38] The Authority therefore proceeded to determine this matter based on the information it had available to it as at 17 August 2023.

The issues

[39] The following issues are to be determined:

- (a) Was the Applicant engaged to work as an employee or as an independent contractor?

- (b) Is the Applicant owed wage arrears, as a result of the Respondent stopping her salary payments at the end of May 2022?
- (c) Was the Applicant constructively dismissed?
- (d) If so, was her dismissal justified?
- (e) If not, what remedies should the Applicant be awarded?
- (f) What, if any, costs and disbursements should the successful party be awarded?

Was the Applicant engaged to work as an employee or as an independent contractor?

[40] The Authority only has jurisdiction (with some limited exceptions that do not apply here) to investigate claims involving parties who were or are in an employment relationship.

The law

[41] Section 6 of the Employment Relations Act 2000 (the Act) defines an employee as a person who is employed by an employer to do work for hire or reward under a contract of service.

[42] Section 6(2) of the Act provides that the Authority must determine “*the real nature of the relationship*” between the parties. This includes considering all relevant matters, including the intention of the parties, although a statement by the parties that described the nature of their relationship was not determinative.

Ms Huang’s evidence

[43] Ms Huang told the Authority that she was approached by Mr Zhang and his business partner, Connie Huang (no relation to the Applicant), to work for Yoke Insulation Limited which was a new company which was created in October 2018. She was taken on as one of the first employees.

[44] Ms Huang said she made it clear that she wanted to be employed as an employee so that she had a regular income. She said she was given an individual employment agreement which had been signed by Mr Zhang, who was a director of the company. She signed and returned it and that was the version she provided to the Authority.

[45] Ms Huang also provided the Authority with proof that the employment agreement had been sent to her by the Respondent on 21 March 2019, and this advice included handwritten notation that she had already signed it.

[46] There was no evidence of the Respondent ever querying the status of the parties' relationship prior to the CMC held to timetable Ms Huang's claims for an investigation meeting, which occurred in March 2023. Nor was there any evidence produced to the Authority that contradicted Ms Huang's claim that she was an employee.

Intention

[47] According to Ms Huang there was a mutual intention before she accepted the offer of employment that she would be an employee. She said that there was no discussion about her being an independent contractor, because such an arrangement would not have been attractive to her.

[48] Ms Huang pointed to the individual employment agreement which had been signed by the parties as evidence that there had been a mutual intention from the outset that she would be an employee.

Control

[49] Ms Huang said that the Respondent exercised control over her because it provided her with training on how she did her job and expected her to meet targets. She was also required to participate in team building exercises and to attend the office as required.

Independence

[50] Ms Huang was not acting independently because the work she undertook was on behalf of the Respondent's business, and she held herself out to customers as being an employee of the Respondent.

Tools of trade

[51] The Respondent provided Ms Huang with a tape measure and ladder which she used when attending appointments with potential customers. Ms Huang provided her own mobile phone and car.

Business expenses

[52] Ms Huang told the Authority that she normally paid for her own petrol, although on occasion she had presented the petrol invoices to the Respondent, who she said had paid them.

[53] When asked why she did not do that regularly, she said she was concerned that the Respondent may deduct the petrol costs from her wages and she did not want that to occur, which explained why she only occasionally presented the petrol invoices for reimbursement.

Documentation

[54] The relationship was recorded in the independent employment agreement (which was described in the document as an independent employment contract). This provided that Ms Huang was paid a salary, she was described expressly as an “*employee*”, and the Respondent was described as “*the employer*”.

[55] Ms Huang had set days and hours of work. She received an annual salary. She was entitled to Holiday Act 2003 (“HA03”) statutory entitlements which included four weeks’ paid annual holiday each year, the public holidays set out in the HA03 and the sick leave and bereavement leave entitlements provided for by the HA03.

[56] There were repeated references to “*employment*” throughout the agreement and it contained a problem resolution clause. There was nothing in the written agreement that contradicted Ms Huang’s claim that the parties had agreed to enter into an employment relationship.

Independent contractor documents

[57] There was no evidence produced in support of Mr Zhang’s claim that the parties had made a verbal agreement to enter into an independent contracting arrangement. Such an arrangement would have been fundamentally inconsistent with the documentation reviewed by the Authority.

Payment

[58] As per clause 4 of the individual employment agreement, Ms Huang was paid a salary of \$60,000 per annum before tax. This was paid monthly by direct deposit into her nominated bank account.

[59] The payments were recorded as salary in Ms Huang's bank account and they were recorded as "*salaries monthly*", with the relevant month recorded, in the Respondent's bank statements.

Taxation

[60] The Respondent deducted PAYE from Ms Huang's salary payments before the net amount was deposited into her nominated bank account.

[61] Her payslip described her as having the tax code "*M*". Her payslips recorded that she had PAYE deducted, which included the earners' levy and that the payments that were made to her were "*salary/wages*".

IRD records

[62] The IRD records that the payments that Ms Huang received from the Respondent were salary payments.

Payslips

[63] Ms Huang's payslips recorded her alternative holiday days entitlement, her annual leave days entitlement and her sick leave days entitlement as a running accrued balance. She provided the Respondent with her IRD number and the PAYE and earners' levy were deducted by the Respondent and remitted in her name to the IRD, against her IRD number.

Invoices

[64] Ms Huang did not invoice the Respondent in order to get paid. She was automatically paid her salary every month.

[65] Ms Huang did however invoice customers that she had sold product to, and when that occurred it was on the Respondent's letterhead, with the customers being required to pay the Respondent directly (not Ms Huang).

Public perception

[66] When Ms Huang visited potential customers or customers, these were customers of the Respondent's business, not of her own business. The people that Ms Huang interacted with would have viewed her as an employee because she produced a business card that showed she

was associated with the Respondent and was representing it regarding her dealings with customers and potential customers.

Uniform

[67] The Respondent provided Ms Huang with two jackets which had its logo on which she could wear when interacting with customers or potential customers. This branded uniform identified that she was an employee of the Respondent's.

Supervision/direction/instruction

[68] Ms Huang reported to the Respondent's managers, who had the power to pay her, approve leave and the like. If Ms Huang wanted to take annual leave then she let her managers know, likewise if she was unable to work due to illness or accident.

Ability to work for others

[69] Ms Huang did not undertake any work for others. Her role was a permanent full time job that required at least 40 hours per week of her time.

Substitution

[70] Ms Huang could not substitute another person to do the work she had been engaged to do for the Respondent. She was required to personally perform the work which she had been hired to do and which she was paid a monthly salary to do.

Ability to profit

[71] Ms Huang had no ability to profit from her endeavours, because she was paid a fixed salary for a 40 hour work week. She did not get paid bonuses.

Rewards

[72] Unlike the Respondent, Ms Huang did not have the ability to obtain any other financial rewards associated with running a successful business. Ms Huang had no ability to increase her earnings because she was paid a fixed monthly salary.

Business risks

[73] Ms Huang did not take on any business risk, because she was remunerated as an employee.

Work location

[74] Ms Huang worked in the Auckland region. She was mobile in terms of attending to customer visits on site in order to provide quotes for the Respondent's products. She was also able to conduct calls from her car on the road or send emails and take or make calls from home.

[75] Because her work office was about an hour away from her home, she did not attend the office every day but was instead usually out and about in the Auckland region making sales and visiting customers.

Integration test

[76] Ms Huang appeared fully integrated into the Respondent's business. Those using the Respondent's services would likely have seen her as the Respondent's employee because of the extent and level of integration that was evident.

Employment records

[77] The Respondent did not keep any wage and time records or holiday and leave records for Ms Huang.

Holiday Act 2003 entitlements

[78] Ms Huang received paid annual holiday when she went overseas or took holidays (leave) from her work. She also received ACC after injuring herself, which required surgery.

Autonomy

[79] Ms Huang was somewhat autonomous in terms of arranging her own work, identifying potential leads, following up with customers, creating the orders and invoicing customers, but she did that on behalf of the Respondent and not because she was in business on her own account.

Running a business on her own account?

[80] The evidence did not establish that Ms Huang was running her own independent business regarding the work she did for the Respondent. She provided the Authority with a copy of her IRD records showing all income over the period that she said she was employed by the Respondent, and she was not undertaking other business income generating activities.

Control test

[81] The Respondent exercised a level of control that would be expected and was consistent with an employment relationship.

Economic reality/fundamental test

[82] The economic reality was that Ms Huang worked as the Respondent's employee.

Real nature of the relationship

[83] Standing back and considering all of the relevant factors, the Authority was satisfied it was more likely than not that the real nature of the parties' relationship from 1 November 2018 until the relationship ended in September 2022 was an employment relationship.

[84] On that basis, the Authority had jurisdiction to investigate her wage arrears and unjustified dismissal claims.

[85] If the Respondent had genuinely believed that the parties were in an independent contracting arrangement, and not an employment relationship, then it had almost five years to have addressed that, but it did not do so.

[86] Throughout the relationship the Respondent acted in a way that was consistent with the parties engaging in an employment relationship. If the Respondent's position that the parties were not in an employment relationship was correct, then it has been provided incorrect information to IRD, because the information it submitted to IRD established clearly that Ms Huang was an employee.

[87] The Authority also noted that the Respondent failed to present any evidence that challenged Ms Huang's evidence.

Is the Applicant owed wage arrears?

[88] Ms Huang was entitled to be paid \$5,000 gross per month in accordance with clause 4 of her individual employment agreement.

[89] Ms Huang told the Authority that she was aware that the Respondent was experiencing financial difficulties, particularly regarding its tax obligations. However, she said that the Respondent never raised that with her directly and she just heard gossip and chatter (hearsay) around the office from others.

[90] Ms Huang said that she was not immediately concerned about the fact that the Respondent did not pay her, because she was expecting that it would make up the money shortly when it had resolved its financial issues.

[91] Ms Huang told the Authority she did not become alarmed until September 2022 when she heard from others that they were being paid their normal wages/salary when she was not. When she raised that with the Respondent, the response she got was unsatisfactory.

[92] As a result of some unpleasant WeChat messages that were exchanged with what appeared to be a financial controller for the Respondent, Ms Huang formed the view that the Respondent did not intend to be bound by its obligations to pay her salary or wage arrears, so she therefore treated her employment as at an end because she did not want to continue working for free.

[93] While it was open to the Respondent to have potentially explored whether it needed to make Ms Huang redundant, that did not occur. The customer invoices produced to the Authority showed she was working during the months she was not paid. The Respondent could also have negotiated with her to change her contractual salary entitlements, but again that did not occur.

[94] Ms Huang was therefore entitled to be paid her contractual salary. The Respondent's bank accounts showed that the last salary payment was made to Ms Huang on 31 May 2022 for the work she had done in May 2022.

[95] Accordingly she worked but was not paid from 1 June until the end of September 2022. Ms Huang is therefore owed \$20,000, being four months' wage arrears.

Was Ms Huang constructively dismissed?

[96] The obligation to pay an employee their salary is a fundamental one. The failure by the Respondent to pay Ms Huang her salary when it became due and owing, and the fact that it never consulted with her about that, was a fundamental breach of the trust and confidence inherent in the employment relationship.

[97] Although she was prepared to be tolerant for three months, when she started raising concerns in September 2022, the responses she received were clearly unsatisfactory. Once Ms Huang knew she was not going to be paid she stopped working.

[98] It was reasonable for Ms Huang to form the view that the Respondent did not intend to pay her particularly in light of her knowledge that others were being paid when she was not. The failure to pay Ms Huang therefore amounted to a constructive dismissal, because the initiative of ending her employment came from the Respondent, not from her.

Was dismissal justified?

[99] The Respondent is unable to comply with any of the elements of the statutory justification test in s 103A(2) of the Act.

[100] It did not engage with Ms Huang in a good faith manner, nor did it meet any of its procedural fairness tests as set out in s 103A(3) of the Act. The Respondent's actions, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances, in breach of s 103A(2) of the Act.

[101] Ms Huang's constructive dismissal was unjustified.

What remedies should Ms Huang be awarded?

[102] Ms Huang told the Authority that she did not seek a new job after she was constructively dismissed. She decided to take some time out and dealt with some family matters. She is therefore not entitled to an award of lost remuneration, as any loss was related to her failure to seek alternative work, not her dismissal.

[103] However, the evidence Ms Huang gave to the Authority established that she was humiliated, stressed, angry and upset that she was not paid and that there was no communication with her about that and no agreement to pay her for hours she had already worked for the Respondent, but had not been paid.

[104] Ms Huang is awarded \$10,000 under s 123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she suffered as a result of her unjustified constructive dismissal.

What costs and disbursements should Ms Huang be awarded?

[105] Ms Huang represented herself, so there is no issue as to costs. She is, however, entitled to be reimbursed for her filing fee of \$71.55.

Outcome

[106] Within 28 days of the date of this determination, the Respondent is ordered to pay Ms Huang \$30,071.55, consisting of:

- (a) \$20,000 gross wage arrears (June to September 2022);
- (b) \$10,000 distress compensation; and
- (c) \$71.55 to reimburse her filing fee.

Rachel Larmer
Member of the Employment Relations Authority