

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 66
5526543

BETWEEN

JOHN KIRBY
Applicant

A N D

NEW ZEALAND CHINA
FRIENDSHIP SOCIETY INC
Respondent

Member of Authority: Helen Doyle

Representatives: John Kirby in person
David Bromwich National President of the Respondent

Investigation Meeting: At Christchurch

Date of Determination: 19 May 2015

DETERMINATION OF THE AUTHORITY

A John Kirby was a volunteer when he undertook work for New Zealand China Friendship Society Inc and his claim for unpaid wages and accounts is dismissed.

B I have reserved the issue of costs.

Employment relationship problem

[1] John Kirby says that he was employed by the New Zealand China Friendship Society Inc for a period between October 2009 and September 2010. Mr Kirby has been a member of NZCFS for about 40 years. I shall refer to the respondent as NZCFS or the Society from hereon. Mr Kirby seeks in his statement of problem payment of wages and accounts from NZCFS. A large number of documents were provided by Mr Kirby. I have had regard to them all even if they are not referred to in this determination.

[2] NZCFS was established in 1952 by Rewi Alley and other New Zealand associates. In the mid-1980s Rewi Alley re-established the Bailie School at Shandan China. One of the three model counties for establishing model cooperatives at that time was in Shandan. The work undertaken at Shandan and the school by Mr Kirby assumes importance in this matter.

[3] From the time that the Shandan Bailie School (SBS or the school) was re-established NZCFS supported the school. They provide equipment; books and resources for training programmes run by the school and have facilitated the placement of teachers at the school from 1987. Placement periods ranged from three months to two years.

[4] NZCFS do not accept that Mr Kirby was ever an employee of the Society. NZCFS say that to the best of their knowledge the Society have never employed any staff as all officers and members provide time on a voluntary basis. NZCFS says that its role is to source New Zealanders as teachers and to work in collaboration with the school to facilitate their employment by the school. NZCFS have also delivered a series of community development projects in Shandan based at the school since 2006.

[5] In or about late 2009 Mr Kirby expressed an interest in representing NZCFS in Shandan China. NZCFS says that they have an annual budget of \$2500 for airfares and associated travel costs for a teacher placement of one year.

[6] Mr Kirby was placed at the school in China between March and August 2010. He did not complete a full year at the school as was initially envisaged. The main reason was an issue with his visa. Mr Kirby was over the age of 65 in 2010 and therefore he was unable to obtain a work Z visa. He did apply in agreement with the school and NZCFS for an F visa, which is issued to those who intend to go to China

for exchanges, visits, study tours and other activities. The F visa was obtained. It is a 90 day visa which enabled Mr Kirby to get entry to the school and there was then an extension of the visa for a further 90 days. The school required a Z visa which was not able to be obtained.

[7] Mr Kirby was described variously in supporting documentation in September 2009 from NZCFS for a visa and other matters as being *in Shandan in the capacity of NZCFS representative* and in signed letters from the then National President Eric Livingston that he has made himself available to represent us *in Shandan in the capacity of a volunteer NZCFS representative for our projects there*.

[8] The evidence supported that the term NZCFS representative was in all likelihood used to get around not being able to secure a Z work visa.

[9] Mr Kirby was paid the monthly amount of 3000 yuan by SBS which NZCFS says was a salary from his employer SBS. SBS also provided him with accommodation. Mr Kirby says that that sum paid was for living expenses and suggested in his evidence that it is in fact NZCFS who pay this monthly allowance. I am not satisfied from the evidence including that from the National Treasurer of NZCFS, Christopher Goodwin, that this is correct.

[10] SBS is a Chinese government funded school and I find the most likely source of the payments made to teachers placed there by NZCFS is from Chinese government funding. Mr Kirby did not accept that he was ever employed by SBS and part of this was because he could never on an F visa have been lawfully employed by SBS. I accept that SBS have in the past and currently employed teachers placed there by NZCFS. I am not persuaded visa aside that there was any different relationship to employment with SBS contemplated with Mr Kirby. He was still paid the monthly allowance.

[11] SBS said that they could not find Mr Kirby's employment contract but they provided NZCFS with a certificate of employment for Mr Kirby that stated he was employed as an English teacher at SBS for a six month period in March through to August 2010. It also states that although Mr Kirby was in China with an F visa a special case was made for him to be employed by the school for the duration of the visa and its extension, but could not continue beyond this 6 month period.

[12] There are three subsequent events after August 2010 that I wish to record.

[13] On 20 November 2010 At an NZCFS executive meeting in Wellington it was agreed and recorded in an email to Mr Kirby dated 24 November 2010 that the remaining sum of \$730.00 from the \$2500 allocated by NZCFS to support a teacher art SBS for a one year placement be paid to him even though he was not there for the full year. There was a condition in that this payment was subject to Mr Kirby accepting this as the full and final payment from NZCFS or SBS that that no further discussion will be entered into on the matter of financial re-imburement. Mr Kirby was advised that if he accepted this then he was to inform Mr Bromwich and then payment of the sum would be arranged. Mr Kirby responded asking for payment to be made and I am satisfied it was.

[14] Mr Kirby then lodged an application with the Disputes Tribunal for payment of expenses that he says he incurred whilst in China. The hearing was in August 2011. The Authority has a document referred to by both parties of the Disputes Tribunal dated 24 August 2011 that is headed *Approved settlement of the Tribunal*. It was recorded the agreement determines the dispute.

[15] There was then another application by Mr Kirby to the Disputes Tribunal made in 2013 but after a hearing this was struck out on the basis of a lack of new evidence.

[16] The evidence supports that since 2010 Mr Kirby has sent a very large numbers of emails to NZCFS Officials. The current National President of NZCFS David Bromwich wrote in a document to the Authority that he had received over 1500 emails and Mr Goodwin said that since becoming treasurer three years ago he has received more than 1000 emails from Mr Kirby relating to payment for invoices that he says he is owed by the society.

[17] Mr Goodwin says that he has attempted to investigate the claims including a visit to Mr Kirby at his home but has been unable to conclude that the claims were ever sanctioned by Officers of the Society. He said that during that time Mr Kirby never said or wrote that he was an employee. I do want to record that Mr Kirby said that he would stop sending emails to NZCFS and that I am sure would be welcomed by NZCFS.

[18] Mr Kirby did not raise with NZCFS that he was an employee until on or about the time he lodged his statement of problem with the Authority on 7 November 2014.

Mr Kirby said that he had been provided with information at the Citizens Advice Bureau that led to him to conclude that he had rights as an employee.

The issues

[19] Mr Kirby is claiming that his is owed wages by NZCFS and further that he should be reimbursed for his expenses because he was an employee. The Authority only has jurisdiction to deal with the matter if there has been a default in payment from an employer to an employee under an employment agreement. If Mr Kirby was not an employee and rather a volunteer then the Authority does not have jurisdiction to consider his application.

[20] The issue to be determined is whether Mr Kirby was from late 2009 to August/September 2010 an employee of NZCFS or whether he was a volunteer.

Definition of an employee

[21] Employees are defined in s.6 of the Employment Relations Act 2000 (the Act). At an early stage of the proceedings I provided both parties with a copy of this section and the material parts are set out as follows:

6. *Meaning of Employee*

(1) *In this Act, unless the context otherwise requires, **employee** –*

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

...

(c) excludes a volunteer who –

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer; and

...

(2) *In deciding for the purposes of sub-section (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*

(3) *For the purposes of subsection (2), the court or the Authority –*

(a) Must consider all relevant matters, including any matters that indicate the intention of the persons; and

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

Was Mr Kirby an employee of NZCFS?

[22] A volunteer is a person who does not expect to be rewarded for work performed and does not receive a reward for work performed. The Employment Court in *Brook v Macown*¹ considered in some detail the concept of reward for the purposes of s 6(1) (c) of the Act including that an employment agreement or contract of service creates mutual obligations on both parties. There is an obligation on an employee to perform work and an obligation on the part of an employer to make payment for that work.

[23] *Brook* was a case involving the dance community. Mr Brook had held the position of Register of the New Zealand Dance and Dancesport Council and had received an expense allowance of \$1500 per annum. Judge Inglis did not consider that that allowance constituted a reward for the purposes of s 6(1) (c) and found Mr Brook was a volunteer who did not expect and was not rewarded for his work..

[24] In this case Mr Kirby was assisted with his visa applications, reimbursed for a train trip and for his airfare to China by NZCFS. NZCFS wrote a letter on Mr Kirby's behalf for continuation of his superannuation payments whilst in China although Mr Kirby said that his payments of his pension reduced by \$98.00 a fortnight when he was in China. The later payment made to Mr Kirby of \$730 by the Society was specifically stated to be the balance of the \$2500 funds allocated.

[25] Wealthier schools in China may pay or reimburse airfares for international teachers of English but SBS was in a poor area and was supported to get teachers placed by NZCFS paying for the airfares.

[26] In September/October 2009 Mr Bromwich was a National Executive member and I accept discussed the placement at SBS with Mr Kirby at that time. Mr Bromwich said that those who apply for placement at SBS need to be committed to volunteerism and have some affinity for Rewi Alley and his legacy. SBS is in a poor area of China and is isolated with temperature extremes. Mr Bromwich explained in

¹ [2014] NZEmpC 79

his evidence in Eastern areas of China, English teachers can receive a salary of 15,000 – 20,000 yuan per month.

[27] Mr Kirby had an interest in China and had previously undertaken other volunteer work. He had skills to offer and Mr Bromwich recalls was enthusiastic and helpful in preparation for his role at the school. Mr Kirby said that Mr Bromwich did not make it clear that any payment was limited to reimbursement of expenses for airfares and related travel costs to a maximum of \$2,500.

[28] Mr Kirby said that he was confused about the limit for reimbursement being \$2500. Mr Bromwich said he made this quite clear. If there was some confusion that I find it was limited to expenses to be reimbursed and not confusion over whether Mr Kirby would be paid by NZCFS a wage or salary for work he undertook in China. I do not find that the evidence supports any expectation by Mr Kirby that he would be rewarded for his work by way of a wage and salary from NZCFS. I find that payments discussed and made by NZCFS were limited to reimbursement of expenses.

[29] There was exploration of other activities that Mr Kirby could be involved in in China because teaching only occupies a small percentage of the time. Mr Kirby said in his evidence that he taught English language lessons for six hours a week at SBS and it was accepted that outside of this time Mr Kirby was active in the community and involved in a number of activities including visiting other schools.

[30] He was asked to oversee a project and part of his claim that he was an employee is about the project. The accounts though do not support any allocation of payment of fees to him on that project or any reimbursement of expenses. There was no evidence that Mr Kirby received any payment/ reimbursement of expense for that work and no evidence of any agreement that he would. There was a dispute as to when that project ended. I prefer Mr Bromwich's evidence that it ended in June 2010 and that there is no evidence that it was agreed Mr Kirby would participate in the project and there was no budget to support that participation.

[31] Mr Bromwich said, and I accept his evidence, that there was no obligation for Mr Kirby to do any other activities than teach at SBS if he did not wish to. I do not find that in performing additional activities Mr Kirby did so with any contractual or legal obligations to NZCFS. NZCFS had no control or legal remedy against Mr Kirby

if he did not undertake these additional tasks. Mr Kirby still received the monthly payment from SBS of 3000 yuan regardless of what other activities he undertook.

[32] Mr Kirby said that on 4 April 2010 he told Mr Bromwich, who was in Shandan at that time, that he wanted an employment agreement and Mr Bromwich said he would put that to the National Executive at their November 2010 meeting. The nature of relationships can change. Mr Bromwich did not accept there was a discussion about Mr Kirby in April 2010 about him becoming an employee of NZCFS. He said that he was quite clear that NZCFS do not employ people and he would have told Mr Kirby this. Further he was also confused about that matter as he said that there were National Executive meetings taking place before November 2010. There was a National Executive meeting in November 2010 but the only discussion was about invoices rendered by Mr Kirby for expenses. That was the meeting at which it was agreed there would be a \$730 payment to Mr Kirby. I am not satisfied that there was anything said to Mr Kirby to suggest that Mr Kirby's role changed with NZCFS from a voluntary role by agreement or indeed by practice after April 2010.

[33] I do not find that Mr Kirby expected to be rewarded for his work by NZCFS beyond having some travel expenses reimbursed. Once in China and at SBS he was, I find, regarded by the school as an employee although does not accept he had an employment relationship with the school. Mr Kirby was paid a monthly payment by SBS which he signed for each month.

[34] Disappointingly for Mr Kirby the placement with SBS did not last a whole year and as a result he says that he incurred some expenses which he has for many years tried to get NZCFS to reimburse. Finally in 2014 he claimed he was an employee of the Society.

[35] Mr Kirby undertook good work in China and this was communicated to him in correspondence by both SBS and NZCFS. I find though that Mr Kirby undertook work for NZCFS on a voluntary basis and did not expect to be rewarded for the work beyond reimbursement of expenses.

[36] His claim must therefore be dismissed.

Costs

[37] I reserve the issue of costs and application can be made by NZCFS. In a notice of direction dated 22 December 2014 I set out that the parties had been reminded there can be an award for costs and expenses against an unsuccessful party.

Helen Doyle
Member of the Employment Relations Authority