

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 292
3276939

BETWEEN XIHUA (also known as
ANDY) LAN
Applicant

AND DRAPAC LIMITED
First Respondent

WEI SHU
Second Respondent

QUAN (also known as
MARSHALL) SHU
Third Respondent

Member of Authority: Peter Fuiava

Representatives: May Moncur, advocate for the Applicant
Marshall Shu for the Respondents

Investigation Meeting: 24 February 2025 in Auckland and by audio-visual link
(AVL) and telephone.

Determination: 26 May 2025

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Xihua ‘Andy’ Lan, a citizen of China and the former holder of a migrant exploitation protection visa (MEPV), has requested the Authority to investigate claims of unjustified dismissal, unjustified disadvantage, and an application for penalties against Drapac Limited (DL or the company). In addition, Mr Lan seeks leave from the Authority for Wei Shu and Marshall Shu to be declared persons involved in the breach of employment standards under s 142Y of the Employment Relations Act 2000 (the Act).

[2] Although Mr Lan initially sought the recovery of an illegal premium, that claim was abandoned during the investigation meeting as Ms Moncur conceded that this was difficult to prove. The concession is well made.

How has the Authority investigated?

[3] To assist with my investigation, I requested under s 160(1)(a) of the Act, which allows the Authority to call for evidence and information from the parties or any other person, a copy of Mr Lan's immigration file from Immigration New Zealand (INZ).

[4] Mr Lan's case comprised his written witness statement and supporting documents. He attended the investigation meeting by AVL from China due to his MEPV having expired in November 2024.

[5] Ms Shu was not actively involved with this investigation but Marshall Shu represented the company due to his involvement with its operations. By consent, he was joined to these proceedings as a third respondent following a case management conference held with Ms Moncur and Mr Shu on 23 October 2024.

[6] The respondents' case comprised a written witness statement from Mr Shu and a letter from Mr Shu's immigration advisor in New Zealand, Edison Sun, who also gave evidence at the investigation meeting attending by telephone. A Mandarin interpreter was present throughout the investigation meeting to assist with interpretation.

[7] All witnesses answered questions under oath or affirmation from me and the parties' representatives. As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What were the issues?

[8] The issues requiring investigation and determination were:

- (i) Was Mr Lan an employee of DL?
- (ii) Should leave be granted under s 142Y of the Act for Wei Shu and Quan Shu to be declared persons involved in a default of payment of wages or other money payable to an employee?

- (iii) If employed, was Mr Lan unjustifiably dismissed?
- (iv) If employed, was Mr Lan unjustifiably disadvantaged?
- (v) Should penalties be imposed against the respondents for a breach of s 134 of the Act and for a breach of the Wages Protection Act 1983?
- (vi) Should costs be awarded for the successful party?

What are the relevant facts?

[9] Mr Lan entered New Zealand as the holder of an accredited employer work visa (AEWV) on 31 May 2023. He used an immigration agent in China, Xinliang Wang, who is a consultant for Aomei Xinyang International Economic & Technical Cooperation Limited in Beijing, to apply for his work visa using a ‘job check’ that appears to have been directly or indirectly provided to Mr Wang by Mr Shu’s licensed immigration advisor in New Zealand, Mr Sun. A job check is a way for INZ to confirm that a job is genuine and that the employer has made a reasonable effort to recruit locally.

[10] Mr Lan’s AEWV stated that he would be working as a handyman. However, the difficulty with this was that Mr Lan has never previously worked as a handyman and has only ever worked as a cook. Upon arriving at Auckland International Airport, Mr Lan was not picked up by the respondents but by a man named ‘Mr Hai’ (his first name is not known) who charged Mr Lan a service fee of NZD\$200 to transport him to a residence in West Auckland where he lived in shared accommodation with other construction workers in poor conditions paying rent of \$130 per week.

[11] On 4 June 2023, Mr Lan contacted his immigration agent Mr Wang on WeChat to request his employer’s contact details. However, Mr Wang refused to give that information but had previously claimed that the employer (unknown to Mr Lan at that stage) had just opened a hotel which was yet to start operating.

[12] By August 2023, having been in New Zealand for over two months without income and living off his personal savings, Mr Lan repeated his requests to Mr Wang to contact his employer but these were ignored. When Mr Lan confronted his agent on WeChat, he was told that the employer was only responsible for providing the visa token and not employment. Mr Lan was further told that would need to find a job on

his own which made him feel cheated and helpless especially as he had paid Mr Wang RMB80,000 for his services.

[13] After several months in New Zealand undertaking cash jobs as a labourer, Mr Lan (with the assistance of newfound friends here) made a privacy request to INZ for his immigration file. When he was provided with a copy of his file, he discovered his individual employment agreement (IEA) with DL which was the first time Mr Lan was aware of his employer's identity.

[14] On 16 April 2024, Mr Lan applied to INZ for an MEPV which was granted in early May 2024.

[15] During my questioning of Mr Lan at the investigation meeting, he acknowledged that he had not signed his IEA with the company but that Mr Wang had copied his signature from his passport and pasted it into the agreement. For the respondents, Mr Shu stated that he has no knowledge of how Mr Lan's agent in China managed to obtain a copy of his company's employment agreement which the respondents have neither sent nor signed.

[16] Mr Lan acknowledged that he had no information or evidence that connected Mr Wang to any of the respondents and that when he applied for his visa in China, he had not communicated with any of the respondents in New Zealand. It was common ground that there was no job interview.

[17] When I asked Mr Lan whether he felt that he had been fooled by Mr Wang, he stated that he did not provide him with much information about DL and had refused his requests to contact his employer. Mr Lan went on to advise for the first time that upon his return to China, he had contacted the police but was told that there was not much they could do against Mr Wang because he had managed to get him to New Zealand.

[18] Mr Lan further stated that the police had not been able to connect Mr Wang to any of the respondents but they were nevertheless aware that he had 'scammed' a lot of other people in China. However, there was not much the authorities could do but for those affected to reach a private agreement with him. Mr Lan explained that Mr Wang

was not happy to refund him any money but because a police officer had accompanied him to see his agent, he was able to get RMB10,000 back from him.

[19] I asked Mr Lan whether his agent in China had admitted to him the respondents' involvement in what had occurred but he said 'no'. The only connection Mr Lan was able to find was his IEA that recorded DL's name. While he acknowledged that his agent had committed fraud, Mr Lan stated that had Mr Wang not been provided with an employment agreement from DL, he would not have been able to get a visa with which to travel to New Zealand.

[20] In cross-examination, Mr Shu asked Mr Lan why he had not telephoned anyone in his company for work. At this juncture, it may be noted that INZ's letter to Mr Lan (16 May 2023) in which he was approved an AEWV, does not record the name of his employer. Mr Lan confirmed that this was the reason why he was not able to contact DL because he did not know who he was employed by.

[21] Mr Shu explained that in May 2023, he had two restaurants on Dominion Road, Auckland both of which had been closed due to the COVID-19 pandemic. However, there was a need for suitable staff to be employed so that those businesses could be re-opened as soon as possible. Mr Shu explained that INZ had issued DL with job checks that showed that there were no suitable New Zealanders who could fill those jobs and therefore a migrant worker could be hired instead. However, the job checks were expiring in May 2023.

[22] Mr Shu further explained that he received a telephone call from a third party stating that he could provide the right person for him provided that a 'job check' was sent with Mr Lan's name on it in order to get him to New Zealand. Mr Shu requested his own immigration agent, Mr Sun, to forward the job check to the third party's email address in China, which he did. However, Mr Shu did not hear back from the third party or from Mr Lan and did not know of his arrival into the country until several months later.

[23] In approximately April 2024, by which time Mr Lan had been living in New Zealand since 31 May 2023, Mr Shu received a telephone call from a woman claiming to be Mr Lan's girlfriend. This was the first time Mr Shu knew of Mr Lan's

arrival in New Zealand and while he does not accept employing him (because no job interview had taken place and no employment agreement was provided) he was still in desperate need to employ staff so offered to employ Mr Lan in Rotorua. However, he was not able to take up his offer because by then, Mr Lan was already working for someone else.

[24] During my questioning of Mr Shu, he was adamant that neither he nor DL had provided Mr Wang with an IEA and that in any case, Mr Lan had not been through a job interview. Mr Shu further stated that, as an accredited employer, DL was issued with several job tokens by INZ. However, finding the right people was challenging. Mr Shu is of the view that someone who has knowledge of DL and its business has managed to obtain one of its employment agreements which was used (without authority) to support Mr Lan's application for an AEWV.

[25] Mr Sun attended the investigation meeting by telephone and confirmed that as instructed by Mr Shu, he had emailed Mr Lan's job check to an email address in China. However, that was all that Mr Sun did and he confirmed that he emailed no employment agreement because he had not been asked by Mr Shu to do so.

Discussion

[26] This is a sad case. Mr Lan's evidence in the Authority makes clear that the information he was provided by his immigration agent in China, Mr Wang, about his employer in New Zealand was actively being withheld from him by his own agent. This was because DL had only provided Mr Wang with a job check for Mr Lan and not an employment agreement or a signed offer of employment. Using a DL templated employment agreement with Mr Lan's electronic signature 'cut and pasted' from his passport, Mr Wang was able to successfully apply for an AEWV.

[27] This was possible under the "low touch" Accredited Employer Instructions at the time which simplified the accreditation process for many employers. However, the greater speed came at the cost of a much-reduced verification process that has allowed offshore agents and/or unscrupulous employers to take advantage of applicants such as Mr Lan. It was Mr Lan's evidence that he had not signed his employment agreement with DL and that he had no communications with any of the respondents in the leadup

to his application for an AEWV. I accept that evidence which was candidly given by Mr Lan.

[28] Although Mr Lan has claimed in his written witness statement to the Authority that Mr Wang informed him that his employer reviewed his resume and his chef work videos and had decided to hire him without a video interview, Mr Wang did not participate in this investigation to confirm that evidence.

[29] The present case can be distinguished from *Lin Guo, Shuai Zhang and Huaiyuan Kan v Victory Construction Limited & Curtis Tiau* [2024] NZERA 687, where the New Zealand employer, Victory Construction Limited (VCL), had engaged several immigration agents in China, including Sun Chao (Mr Sun), to undertake recruitment for it. VCL provided Mr Sun with his service fee, five job tokens, and blank agreement templates signed by VCL's company director. This resulted in the Authority finding at [68] of the determination that VCL had supplied Mr Sun with all the necessary requirements to apply for visas under the company's status as an accredited employer.

[30] While DL did provide Mr Wang with a job check, this was after Mr Wang or a third party had solicited Mr Shu first. Mr Shu did not pay Mr Wang a service fee to recruit Mr Lan for his company and DL never provided Mr Wang with an employment agreement which by his own admission, Mr Lan did not personally sign or see until he received a copy of his immigration file from INZ several months later.

[31] I note also Mr Wang's repeated refusal to contact DL despite Mr Lan's many requests that he contact his employer because he needed to work. I find that this was because Mr Wang knew he had acted without the company's authority and that the respondents were oblivious to Mr Lan's visa status and presence in New Zealand. Finally, had Mr Wang not done anything wrong and had applied for a visa for Mr Lan on DL's behalf, he would have furnished that information to Chinese police. However, he instead refunded Mr Lan RMB10,000 to settle matters with him privately.

[32] Not helping matters for Mr Lan was INZ's AEWV approval letter which did not record the actual name of his employer. Had this administrative error not been made, it may have been possible for Mr Lan to speak to DL sooner who, being short-staffed,

would have deployed him somewhere in the business thus avoiding much of the financial stress and anxiety Mr Lan experienced during his time in New Zealand.

Conclusion

[33] While DL provided Mr Lan's immigration agent in China with a job check, there was no job interview and the company did not provide Mr Wang with an employment agreement. The employment agreement on the INZ file was not sent by DL to Mr Wang and may have been an accredited employer template agreement that Mr Wang has re-purposed.

[34] For the reasons given above, the existence of an employment agreement with Mr Lan's electronic signature on it is not evidence of an employment relationship between the parties especially as neither knew of the other's existence until several months after Mr Lan had arrived in New Zealand in late May 2023. For these reasons, the application must be declined and is unsuccessful.

What about costs?

[35] Notwithstanding the general rule that costs follow the event and that the unsuccessful party make a contributing to the successful party's legal costs, the respondents were self-represented throughout the investigation process. As it has not been shown that they have incurred any legal costs, no order of costs shall be made against Mr Lan.

Peter Fuiava
Member of the Employment Relations Authority