

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 362
5380580**

BETWEEN YAN PAN
 Applicant

AND PHILIP ZHANG
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Respondent in person

Investigation Meeting: 3 October 2012 at Auckland

Determination: 12 October 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Yan Pan, claims that he is owed wages by the Respondent, Mr Philip Zhang, in the amount of \$1,100.00.

[2] Mr Zhang denies that he owes Mr Pan any unpaid wages on the basis that Mr Pan was not an employee, but an independent contractor providing services during the period he was working for him.

Issues

Statutory entitlement to wages

[3] The Wages Protection Act 1983 governs the payment of wages between an employer and an employee. In accordance with s 4: *an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*

[4] Accordingly the preliminary issue for determination before the Authority is whether Mr Pan was an employee or an independent contractor during the period he was working for Mr Zhang. As an employee Mr Pan could bring a claim for unpaid wages pursuant to s. 4 of the Wages Protection Act 1983.

Background Facts

[5] Mr Zhang said that he operated a small painting business which was assigned sub-contract work by larger contractors when they were unable to resource the contract work they had obtained. In carrying out this work, Mr Zhang said he would take on workers as and when required.

[6] Mr Pan said that he had heard from a friend that Mr Zhang had work available on or about March 2012, and he had contacted him. Mr Pan said it had been agreed with Mr Zhang that he would be paid an hourly rate and he had initially been instructed to carry out painting work at a Coca Cola factory in Mount Wellington.

[7] Mr Pan said that he had advised Mr Zhang of the hours he had worked and he had been paid in cash. There was no documentation kept of these payments, and there were no timesheets completed. Mr Pan had not been issued with a written employment agreement.

[8] Mr Pan explained that there were other contracting teams working on the site and as Mr Zhang's work was dependent on other teams finishing a section of work, he was not required to work every day. Mr Pan said that he was not paid, and did not expect to be paid, for the hours and days he did not work.

[9] Mr Zhang said that he paid Mr Pan according to the actual hours he worked, and that Mr Pan determined the hours he worked with no set hours assigned. Mr Pan agreed that during the time when he was not working for Mr Zhang he could carry out other work should he wish to do so.

[10] Mr Zhang said, and Mr Pan agreed, that he had provided his own tools, but that Mr Zhang had supplied the paint.

[11] On or about April 2012 Mr Zhang said he had had a dispute with Mr Pan about his quality of work, and had not engaged him to carry out further work after this time.

[12] Mr Pan said that the work Mr Zhang had been contracted to carry out had reached an end and his services were not required any longer. Mr Pan said he had accepted this situation, however Mr Zhang had reduced the amount to which he believed he had been entitled and he therefore entered a Statement of Problem with the Authority for the recovery of lost wages.

Determination

[13] Mr Pan gave evidence to the effect that he was an employee when working for Mr Zhang.

[14] In deciding whether Mr Pan was working for Mr Zhang as an employee, I apply s.6 of the Act which provides:

“S.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;

2. In deciding for the purposes of subsection (1)(a) 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)... or the Authority-

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

(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 (No2)*¹ the Supreme Court stated the following:

“‘All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or

¹ [2005] 1 ERNZ 372

the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters' equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test".

Contractual basis

[16] In this case there are no written terms and conditions of employment on which to establish the contractual nature of the relationship. In *Cunningham v TNT Express Worldwide (NZ) Ltd*² the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship. This broad approach in *Cunningham* was held by Chief Judge Goddard in *Muollo v Rotaru*³ to apply to orally agreed terms, in that the relevant intention could be inferred from words or conduct at the time the contract was formed or subsequently varied.

[17] In the supporting documentation supplied by the parties, there are no documents which make reference to Mr Pan having employment status. There are no payslips indicating PAYE had been deducted from any payments made to Mr Pan.

[18] There is no evidence of any orally agreed terms or conduct such as to establish that the nature of the relationship between Mr Pan and Mr Zhang was that of employer/employee.

[19] I now turn to the way in which the relationship operated in practice by having regard to the features of control and integration, and to the fundamental test of whether Mr Pan was working on his own account.

Control and Integration

[20] Mr Zhang said that Mr Pan was assigned an amount of painting work to carry out, however he was able to decide when he carried out the work. Mr Zhang also said that Mr Pan had full flexibility as regards his working hours.

² [1993] 1 ERNZ 695

³ [1995] 2 ERNZ 414 (WEC64/95)

[21] Mr Pan said that he attended for work at 7.30 a.m. each day due to car parking spaces being limited unless he arrived at this time, and that he worked until 5 p.m.. However Mr Pan did not state that Mr Zhang had set down the hours when he had to carry out the work available.

[22] In circumstances in which Mr Pan accepted that he only carried out work when this was available and that he did not expect to be paid when it was not available; and given Mr Zhang's evidence that he was flexible about when Mr Pan carried out the work, I do not find evidence that Mr Pan was subject to the control of Mr Zhang in the provision of services, or that his position was integral to Mr Zhang's business operation.

The Fundamental Test

[23] Mr Zhang did not calculate, deduct or pay PAYE on behalf of Mr Pan for any services provided by him. Mr Pan said that Mr Zhang had not discussed the taxation position with him, or asked for his IRD number. Mr Zhang said that they had discussed taxation when he first met Mr Pan, but that Mr Pan had been evasive on the subject.

[24] Mr Pan did not submit invoices in respect of his hours worked. Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*⁴ that: "*Taxation arrangements, both generally and in particular are a relevant consideration.*"

[25] As regards the taxation situation between Mr Pan and Mr Zhang, I conclude whilst neither party appear to have given the matter more than a passing consideration, Mr Zhang in accordance with his stated belief that Mr Pan was an independent contractor and responsible for his own taxation matters, did not deduct PAYE from any payments made to Mr Pan.

[26] Whilst carrying out the painting work for Mr Zhang, Mr Pan used his own tools and equipment, and Mr Pan's evidence was to the effect that he considered himself at liberty to accept other work during the days when he was not required to carry out work for Mr Zhang, stating: "*I can use my own time as I wish.*"

[27] I find that there is sufficient evidence to indicate that Mr Pan was in business on his own account.

[28] In all the circumstances, I determine that Mr Pan was an independent contractor when working for Mr Zhang. As such Mr Pan cannot bring a wages claim pursuant to s. 4 of the Wages Protection Act 1983. I can assist Mr Pan no further.

⁴ [2010] NZEMPC 1

Costs

[29] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority