

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 32
3041613

BETWEEN HUILIANG SHAO
 Applicant

AND SHEEPERS COUNTRY
 GROUP LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Emma Moss, for the Applicant
 Ray Parmenter, for the Respondent

Investigation Meeting: 18 December 2018

Submissions received: 19 December 2018 from Applicant
 19 December 2018 from Respondent

Determination: 23 January 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sheepers Country Group Limited provides tour packages to Chinese students and their parents to visit New Zealand. Huiliang (Ocean) Shao was employed by Sheepers Country Group from 9 January 2017 in Sales and Marketing.

[2] Mr Shao claims that during his employment he suffered unjustified disadvantages to his employment by Sheepers Country failing to pay him all of the cash component of his salary, by it failing to make payment of all PAYE deductions to the Inland Revenue Department (IRD), and lastly by not reimbursing him for work-related expenses. He further alleges he was unjustifiably dismissed on 19 April 2018. His claim is denied by Sheepers Country.

[3] As permitted by 174E of the Employment Relations Act 2000 (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 but has not recorded all evidence and submissions received.

The issues

[4] The issues requiring investigation and determination are:

- a. Did Mr Shao suffer an unjustified disadvantage to one or more of his conditions of employment?
- b. Was Mr Shao dismissed? If so, was this unjustified?
- c. If Mr Shao was unjustifiably dismissed, or suffered an unjustifiably disadvantage, what remedies should be awarded?
- d. If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Shao that contributed to the situation giving rise to his grievance?
- e. Did Sheepers Country Group breach s13 of the Wages Protection Act 1983? If so, should a penalty be imposed?
- f. Did Sheepers Country Group breach the Holidays Act 2003? If so, should a penalty be imposed?

Preliminary Issue: Credibility

[5] Before turning to address these issues, I have considered the reliability of the evidence given by the witnesses who were called.

[6] When assessing the reliability of witness testimony, the Authority must carefully evaluate all the evidence, looking for inconsistencies between witnesses, and whether there are any external indications which can assist in a determination as to what has occurred. As has frequently been observed in the past, the evidence has to be evaluated in a common sense but fair way. All aspects of the evidence have to be assessed. It may be necessary to consider a range of factors. Important are contemporary materials, objectively established facts, and the apparent logic of events.

[7] In the present case I had reason to doubt each of the witnesses' veracity. These witnesses were Mr Shao, Jinyu (Kim) Chang – Mr Shao's business partner and a former employee of Sheepers Country, and Xinhua Yu – Sheepers Country's sole director.

Mr Shao and Ms Chang

[8] As will soon become apparent, the oral evidence that Mr Shao and Ms Chang provided to the Authority was inconsistent with the documentary evidence provided to the NZ Immigration Department in support of Ms Yu's application for an entrepreneurial visa and residency. Particularly the individual employment agreements that they each signed and the business plan Mr Shao assisted Ms Yu to prepare. In addition, Mr Shao and Ms Chang's evidence was inconsistent with each other. Mr Shao said Ms Chang was his business partner and was present with Ms Yu during important pre-employment discussions. Ms Chang denied this during the investigation.

Ms Yu

[9] Ms Yu's evidence throughout the investigation meeting was evasive. She consistently failed to answer questions. This was despite being provided with multiple opportunities to do so and a Mandarin interpreter translating each of the questions asked of Ms Yu and her answers. In addition, she had informed NZ Immigration on her application form that she met the minimum standard of English required and provided an International English Language Testing System (IELTS) certificate. IELTS assesses a student's ability in listening, reading, writing and speaking the English language.

[10] Where Ms Yu provided answers these, more often than not, conflicted with the documentation she had provided to NZ Immigration and/or with the transcripts of discussions she had with Mr Shao.

Finding on credibility

[11] In the foregoing circumstances, where a material dispute arises, I have largely relied upon the contemporaneous materials provided to me by the parties, which include the individual employment agreement signed by Mr Shao, and a transcript of

a conversation Mr Shao recorded with Ms Yu on 12 April 2018, to ascertain the relevant facts.

Relevant background

[12] Mr Shao and Ms Yu met in early 2016. At the time Mr Shao was operating a business that provided services to students who were looking to come to NZ during their holidays to study at NZ schools. This business operated under the company name Oceans Group Limited.

[13] Ms Yu used Ocean Group Limited's services to secure the placement of her daughter on a one-month study abroad program.

[14] After travelling to NZ with her daughter, Ms Yu decided she wished to immigrate to NZ with her family. She approached Mr Shao to sell her his business so that she could apply for an entrepreneurial visa. He did not agree. However, after further discussions, the parties formulated a verbal partnership agreement.

The partnership agreement

[15] The terms of the partnership agreement were partially in dispute. I am satisfied the following was agreed:

- a. The parties would set up a business together in China to carry out similar services as those currently performed by Oceans Group Limited.
- b. Ms Yu would incorporate a company called "Sheepers Country Group Limited" in NZ (Sheepers Country). The shareholding in this company would be held by Ms Yu.
- c. Sheepers Country would temporarily take over Oceans Group Limited's study abroad business in order to support Ms Yu's application for an entrepreneurial visa and thereafter New Zealand residency.
- d. Until residency was granted:
 - i. All of Sheepers Country's outgoings were to be funded by contributions from Ms Yu.

- ii. Mr Shao would not be responsible for any debts incurred by Sheepers Country during the time Ms Yu was its owner.
 - iii. Mr Shao and Ms Chang would be employed by Sheepers Country.
 - iv. Mr Shao would be paid a salary from Sheepers Country of \$32,320 and Ms Chang would be paid a salary of \$29,000.
 - v. Mr Shao and Ms Chang would also receive cash payments. I shall return to address this later in this determination.
 - vi. The parties would share the profit of the company. Mr Shao and Ms Yu would each receive 45% of the profit and Ms Chang would receive 10%.
- e. Upon Ms Yu's NZ residency being granted:
- i. Ms Yu would transfer the name "Sheepers Country Group" to Mr Shao.
 - ii. All fixed assets belonging to Sheepers Country would remain the property of Ms Yu.
 - iii. Mr Shao and Ms Chang's employment with Sheepers Country would come to an end.

[16] In June 2016 the parties formed a company called China (Beijing) Education Consulting Company Limited (the Beijing Company). The shareholdings in that company are held by Ms Yu as to 20%, Mr Shao as to 20% and Mr Shao's mother as to the remainder.

The Application to NZ Immigration

[17] On 9 August 2016 Ms Yu and her family applied to NZ Immigration for an Entrepreneurial Work Visa. Mr Shao assisted Ms Yu with preparation of the business plan that formed part of this application.

[18] Material to this investigation was the statement in the plan that the business would generate \$300,000 plus export turnover a year. To meet this target the forecasted profit and loss statement provided with the business plan showed the salary

and wages payable in the first year of operation were to be \$73,710. This figure was based on 3 full-time employment positions.

[19] I am told the Entrepreneurial visa was granted in or about October 2016.

The incorporation of Sheepers Country and execution of Individual Employment Agreements

[20] On 18 October 2016 Ms Yu incorporated Sheepers Country Group Limited. The shareholding in that company is held 100% by Ms Yu.

[21] On 9 January 2017 Mr Shao signed an individual employment agreement (IEA) that recorded he was to be paid a salary of \$32,320.

[22] Ms Chang was employed in May 2017. I have not viewed her IEA but there is no dispute that it recorded a salary of \$29,000.

[23] Between 9 April 2017 and 23 February 2018 Mr Shao received a number of cash payments from Ms Yu. Namely:

- a. 09/04/17 NZ \$3,000
- b. 24/04/17 NZ \$2,000
- c. 28/04/17 NZ \$2,000
- d. 12/05/17 Chinese Yuan 20,000 (approximately NZ \$4,360)
- e. 21/09/17 Chinese Yuan 2,000 (approximately NZ \$436)
- f. 23/02/18 NZ \$2,000

[24] On 31 July 2017 Ms Yu applied for NZ residency. To support this application she referred to the creation of 3 full-time employment positions for NZ local residents/citizens. A copy of Mr Shao, Ms Chang and a third employee's IEAs were attached to the application.

The deterioration in the parties' relationship

[25] In or about September 2017 Mr Shao began making demand for his share of the profits of Sheepers Country. Ms Yu provided Mr Shao with a copy of the

Company's financial records but Mr Shao was not satisfied these were correct as they showed the company was not deriving a profit.

[26] In or about early 2017 Ms Yu requested Mr Shao and Ms Chang to reduce the amount they were receiving in cash payments. They refused.

[27] By February 2018 the parties' relationship had become strained. Mr Shao said he felt that the partnership agreement was not being honoured and he wanted to protect his interests.

[28] On 26 February 2018 Mr Shao applied to register a copy of the trademark used by Sheepers Country on the basis that it belonged to him. A notice of opposition to his application was filed by Sheepers Country on 24 August 2018 and is subject to separate proceedings under the NZ Trade Marks Act 2002.

The meeting on 16 March 2018

[29] In March 2018 matters came to a head. Mr Shao and Ms Chang requested a meeting to discuss the partnership agreement. This meeting was held on 16 March 2018.

[30] The matters discussed at this meeting are largely in dispute. I find, on balance, the following was discussed:

- a. The financial status of the Beijing Company. The Beijing Company had exhausted initial capital contributions made by the parties and neither party was willing to contribute more money to assist with the running of the company.
- b. Ms Yu reiterated that she wanted to stop paying the cash payments to Mr Shao and Ms Chang. They refused.
- c. Mr Shao asked Ms Yu for his profit share from Sheepers Country. Ms Yu told him that the business had not made a profit. She refused his request for further access to the financial records.
- d. Mr Shao asked Ms Yu to return his intellectual property. She refused.
- e. The parties agreed that their "cooperation" was at an end.

- f. The parties agreed Mr Shao and Ms Chang would resign.
- g. Mr Shao asked to take annual leave.

[31] On 17 March 2018 Mr Shao travelled to China. There is a conflict as to whether or not this business was on behalf of Sheepers Country or not. I shall return to address this later in my determination.

[32] Following Mr Shao's arrival in China there were a number of messages exchanged between the parties in relation to matters to do with the Beijing Company including the non-payment of rent and wages and attempts by Mr Shao to rectify the situation.

The telephone conversation on 12 April 2018

[33] On 12 April 2018 the parties had a lengthy phone conversation. This conversation was recorded by Mr Shao and I have viewed the transcript. Materially, the parties discussed:

- a. Their agreement regarding the profit share division for Sheepers Country and Mr Shao's entitlement.
- b. The taking on of a new employee by Sheepers Country. Ms Yu requested Mr Shao to provide the password to enable the setting up of an email address for this employee.
- c. The parties stopping "co-operation" with each other on 16 March 2018.
- d. The date payment of Mr Shao's salary had been made to.
- e. The return of the company name to Mr Shao. Mr Shao wanted Ms Yu to change the company name and return this to him. Ms Yu agreed to do this once her immigration application was completed.

The Events that followed

[34] On 19 April 2018 Ms Yu emailed Mr Shao to advise that as he had been absent for more than three days without notification that Sheepers Country was terminating his employment on the grounds of abandonment.

[35] Mr Shao responded that day to advise that he didn't agree with what Ms Yu had said in her email. He said he had told her, and she agreed, he was to go to the tourism expo in Xian and then take his annual leave. I pause here to note that the content of Mr Shao's email was different to that stated by him during the investigation meeting. During the investigation meeting he said he did not discuss going to the Xian expo with Ms Shao before attending and paid for a table at the expo out of his own money. He said he did this because he was "treating the business as my own".

[36] Mr Shao returned to Auckland on 26 April 2018. The parties met. Again this conversation was recorded by Mr Shao and I have viewed the transcript. Materially, the parties discussed:

- a. The date payment of Mr Shao's salary had been made to.
- b. Mr Shao's annual leave entitlements and particularly how these had been calculated by Sheepers Country. Namely, he had previously taken 2 weeks' annual leave. A further 3 week period was paid for the period from 17 January 2018 to 6 April 2018.
- c. The cash payments paid to Mr Shao.
- d. Confirmation that they had agreed to stop co-operating on 16 March 2018.
- e. Mr Shao's position that Sheepers Country was his "from the beginning".
- f. The return of the company name to Mr Shao upon the granting of unconditional permanent residency.
- g. The transfer of shares in the Beijing Company.

Issue One: Unjustified disadvantage

The legal position

[37] Under s 103(1)(b) an employee may commence a personal grievance claim if one or more of the conditions of the employee's employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[38] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the

employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[39] Mr Shao alleges he suffered an unjustified disadvantage to his employment as a result of:

- a. Non-payment of wages
- b. Non-payment of PAYE deductions to IRD
- c. Not receiving reimbursement for work-related expenses

Non payment of wages and non-payment of PAYE deductions to IRD

[40] Mr Shao's bank statements show that he was paid the salary recorded in his IEA. However, he claims he was not paid all of an additional cash component of his salary that had been agreed to be paid to him. He said he agreed with Ms Yu that this component of his salary would not be included in his IEA, and would be paid in cash, so that NZ Immigration did not find out about it. He maintained this was because it would have affected the proposed turnover that was set out in the proposed business plan provided to NZ Immigration.

[41] There is no dispute that Mr Shao did receive some cash payments. However, Shepers Country denies these payments were salary for work undertaken on its behalf. Ms Yu said the cash payments were made by her to Mr Shao for work undertaken on behalf of the Beijing Company. These payments, she said, were cash advances made by her on behalf of that entity not Shepers Country.

[42] I was not persuaded by either Mr Shao or Ms Chang's evidence.

[43] I do not accept that the additional cash payments made to Mr Shao were for salary for work undertaken on behalf of Shepers Country.

- a. Mr Shao is an experienced businessman with multiple companies.
- b. He signed an IEA that stated his salary was \$32,320.

- c. Mr Shao assisted Ms Yu to prepare a business plan for NZ Immigration that incorporated a salary for him at that level.
- d. Mr Shao did not make any demands for payment of outstanding cash salary during his employment.
- e. There was no record of any cash payments to Mr Shao in the financial accounts of Sheepers Country. The cash book Ms Yu kept was a personal record of the payments she had made.
- f. Mr Shao said that a payment made by way of direct credit to him on 23 November 2017 of \$3,301.13 was a cash advance from Sheepers Country. Yet this figure matched receipts he gave to Sheepers Country for reimbursement of expenses.
- g. Mr Shao has not declared the cash he received to the Inland Revenue Department as income from Sheepers Country.

[44] Nor do I find it likely that Ms Yu made payments to Mr Shao on behalf of the Beijing Company. Firstly, I understand there are no records of any advances made by Ms Yu to Mr Shao in the financial accounts of the Beijing Company. Secondly, Ms Yu said she refused to advance money to the Beijing Company from January 2018 yet the cash book she produced shows a cash advance made to Mr Shao of \$2,000 on 23 February 2018.

Finding

[45] I find it more likely than not that the cash payments made by Ms Yu to Mr Shao formed part of a separate arrangement between the parties outside of the employment relationship with Sheepers Country. The cash payments made to Mr Shao did not form part of his salary with Sheepers Country.

[46] Mr Shao was paid all wages owing under his IEA. He did not suffer a disadvantage to his employment arising out of non-payment of wages and the deduction of PAYE from the cash payments.

Reimbursement for work-related expenses

[47] Mr Shao claims a sum of \$8,107 for expenses associated with his business trips.

[48] Sheepers Country maintains that all of Mr Shao's business-related expenses relating to Sheepers Country have been reimbursed except for some travel to China in December 2017 because they have been provided with no details.

[49] In support of his application Mr Shao produced a schedule of his travel history with costs (the claims schedule). The claims schedule shows some expenses were incurred in Chinese Yuan and some in NZ dollars. The combined total of expenses in Chinese Yuan is 34,641 (approximately NZ \$7,574). The combined total of expenses incurred in NZ dollars was \$408.82. Together in NZ dollars the schedule shows Mr Shao incurred expenses totalling \$7,982.82 based on current exchange rates.

[50] Mr Shao produced some documentary evidence of these expenses. These were all in Chinese and no English translation was provided. During the course of the investigation he took me through these expenses:

- | | | | |
|----|----------|----------|---|
| a. | 2/04/17 | Airfares | This document shows a charge of 215 Chinese Yuan (approximately NZ \$47). Mr Shao's claim schedule is for 2870 Chinese Yuan (approximately NZ \$627). |
| b. | 15/04/17 | Airfares | This document showed a charge of 408 Chinese Yuan (approximately NZ \$89). Mr Shao's claim schedule is for 380 Chinese Yuan (approximately NZ \$83) |
| c. | 22/04/17 | Airfares | This document showed a charge of Yuan 4,407 (approximately NZ \$960) |
| d. | 05/09/17 | Airfares | This document showed a charge of NZ \$408.82 (half share due to travel with wife) |

[51] Mr Shao also produced a further document that was in Chinese. He said he thought the document showed a charge of Chinese Yuan 2418 (approximately NZ

\$528) for airfares but he did not know where he went to or from. The document was undated and did not appear to correlate with any expenses claimed in the claims schedule.

Analysis

[52] The parties agree there was no written agreement in relation to the reimbursement of expenses although, where expenses were reasonably incurred and an invoice provided, Sheepers Country would reimburse Mr Shao for business related expenses.

[53] For the reasons that follow I find that Sheepers Country has reimbursed Mr Shao for all business-related expenses he has incurred:

- a. Mr Shao produced documentary evidence of business-related expenses totalling NZ \$1,504.82 (or NZ \$2,032.82 if the invoice referred to at paragraph [51] is taken into account).
- b. During the course of the investigation Mr Shao said he provided Sheepers Country with an invoice for \$3,301.13 for the expenses he had incurred. He said this invoice included the expenses referred to in the documents he had produced to the Authority.
- c. A payment for \$3,301.13 was paid by Sheepers Country by way of direct credit to Mr Shao's bank account on 23 November 2017.
- d. Mr Shao did not produce any receipts or other documentary evidence to support a claim for reimbursement of business-related expenses incurred in relation to his business trip in December 2017. No invoice for these expenses has been provided to Sheepers Country.

Finding

[54] I find Mr Shao did not suffer a disadvantage to his employment as the result of the non-payment of work-related expenses. He is not owed any amount for work-related expenses.

Issue Two: Was Mr Shao dismissed?

[55] The onus falls upon Mr Shao to prove he was dismissed.

[56] I am satisfied, on balance, that Mr Shao has not discharged this onus. I find that the employment relationship ended by way of mutual agreement. The arrangement between the parties was no longer working and they agreed to bring their relationship to an end.

[57] I am fortified in this finding by the transcript provided by Mr Shao of the discussion between the parties on 12 April 2018. For example:

a. Ms Yu said that she considered they had stopped co-operating so she did not believe she had a responsibility to send Mr Shao the financial accounts for the business. Mr Shao responded “even though we stopped cooperating with each other, we better have a nice ending”.

b. Later he stated “Since our cooperation was stopped, you should check the amount of money that I shall be paid”.

c. Later in the conversation:

S: You refused to sign the agreement we had about the intangible assets, and you were agreed that you will return the name “Sheepers Country” back to me. Now we stopped cooperating you still using the name that belongs to me, and the system etc”.

...

Y: I’ll change the company name once my application is done and return it back to you

...

S: But you are using my name free of charge, I don’t think this is good. Maybe we can negotiate a rental price. What do you think

Y: Ocean, are you lack of money? What does it mean? I invested Sheepers Country, I paid you salary, and I will return the company back you to. How about myself?

S: You invested because you wanted to immigrate to the country.

Y: No

S: We had an agreement Ms Yu, you will return the company back to me.

Y: Yes, Ocean, the company will be returned back to you, I said so, I will register a new company.

...

S: you can just return the company back to me right now, and you will register a new company with a new tax code, that's easier...

Y: I said I will change the company name when I can.

...

S: Ms Yu, you used the name which was ok cause we were cooperating, and now I want my stuff back, is there anything wrong? You still want to use it without my approval

d. And later in the conversation:

Y: You can just straight forward, tell me what do you want.

S: I just want my stuff back.

Y: Just straight forward

S: I've told you Ms Yu, Auckland is so small, it belongs to who it belongs to. I don't want to take advantage of you and you shall not fool me.

Y: Who is the one to fool?

S: Let's finish it perfectly. How about it?

Y: Ok who is got oppressed? I invested a lot of money, you didn't spend a penny and you took the salary away.

S: You invested money because of you are willing to immigrate to the country and who is the one making the frame work for you? If you didn't wish to invest money we could of just rented an office instead of purchasing. I invested all my knowledge which shouldn't be free. You wiped all the benefits gained from me and willing to kick out Kim.

Y: I'm not the one to kick her out, are you the one who suggested stopping cooperating?

S: No more cooperation.

Y: I'm telling you, you are the one suggested stopping cooperating.

S: Ok

Y: You are the one who suggested stopping cooperating

Y: Because you wish to downgrade the salary...

[58] This transcript evidences a common intention that the employment relationship was at an end and the parties had stopped "co-operating". Mr Shao said that the meaning he ascribed to the word "co-operating" in the context of this

discussion was that the Company was to be returned to him and their relationship was finished.

[59] For completeness, I did consider the circumstances surrounding Mr Shao's trip to China and the dialogue between the parties between 17 March 2018 and his return to NZ in April. I am satisfied that the events that took place were largely consistent with the parties having reached an agreement to end their relationship.

[60] I am satisfied that Mr Shao's trip to China was for personal reasons. He had requested annual leave before he left, had travelled to China with his wife, did not consult with Ms Yu about the purpose of his trip to China before he went and he did not report any business outcome to her. It is more likely than not that Mr Shao attended the Xian exhibition, and met with business partners, in order to pursue personal business opportunities based on his understanding that the partnership had ended and the business would be returned to him. He said he did not claim the exhibition costs because "I was treating the business as my own".

[61] I am not persuaded that Ms Yu's email of 19 April 2018 alters the position I have reached. By this time, the parties had already mutually agreed that Mr Shao's employment was at an end.

Finding

[62] I find Mr Shao was not unjustifiably dismissed. The parties mutually agreed to end his employment. His last day in the office was 16 March 2018 following which he took a period of annual leave that ended on 6 April 2018.

Issue Three: Breaches of the Wages Protection Act and Holidays Act

[63] There is no evidence of any breach of the Wages Protection Act or the Holidays Act. This aspect of the Applicant's claim is dismissed.

Costs

[64] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[65] If they are not able to do so and an Authority determination on costs is needed Sheepers Country may lodge, and then should serve, a memorandum on costs within

14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Shao will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[66] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹

Directions

[67] During the course of the investigation meeting it became apparent that NZ Immigration may have made decisions based on incorrect information. Evidence given to the Authority appeared to conflict with that provided to NZ Immigration to support Ms Yu and her families visa and residency application. For this reason I direct a copy of my determination be provided to the NZ Immigration Department.

Outcome

[68] The overall outcome is:

- a) Huiliang Shao did not suffer an unjustified disadvantage to one or more of his conditions of employment with Sheepers Country Group Limited.
- b) Huiliang Shao is not owed any wage arrears.
- c) Huiliang Shao was not unjustifiably dismissed.
- d) Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority

¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].