

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 551
3079460

BETWEEN GUOZHOU SHI
Applicant

AND BOYUAN QIAN
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person
Respondent in Person

Investigation Meeting: 10 September 2024 in Auckland

Submissions and/or
further evidence 2024 from the Applicant
2024 from the Respondent

Determination: 12 September 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Guozhou Shi, claims he was an employee while working for the Respondent, Mr Boyuan Qian, and that he was not paid his full entitlement to wages during his employment, or annual leave entitlement upon termination of his employment.

[2] Mr Qian claimed that Mr Shi was working in a casual part-time temporary role during 2018 and that he agreed to be responsible for paying his own tax.

The Authority's investigation

[3] The Authority received oral evidence under affirmation from Mr Shi.

[4] Mr Qian provided a Statement in Reply but did not respond to the Authority's communications after that initial engagement.

[5] Mr Qian was not present at the start of the investigation. The Investigation Meeting was delayed while the Authority Officer attempted to contact him, but without success, and Mr Qian did not attend the Investigation Meeting.

[6] I was satisfied that no good cause had been shown for Mr Qian's failure to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Act.

[7] The Authority was assisted at the Investigation Meeting by the services of a Mandarin interpreter.

[8] As permitted by s 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. It has not recorded all evidence and submissions received.

Issues

[9] The issues requiring investigation are:

- In what capacity was Mr Shi working for Mr Qian?
- Is Mr Shi owed any monies by Mr Qian?

Background

[10] Mr Shi said he came to New Zealand in 2018, working initially on a fruit farm in Rotorua. He saw an advertisement on WeChat for a retail employee for a sports retailer. He applied for the position and was interviewed by Mr Qian.

[11] Mr Shi said his job involved selling sports equipment and advising customers who came into a shop run by the sports retailer (the Shop). He would assist with packing orders and checking for online orders. He worked alone in the Shop, but Mr Qian was present in the office of the Shop during the times he was working.

[12] During his employment Mr Shi said he realised the Shop would be transitioning from instore retail to online shopping because some of the gym equipment was being sold. This was suitable for him because he wanted to obtain alternative employment in his area of IT software.

[13] Mr Shi said he worked as required by Mr Qian during July and August 2018. He kept a record of his weekly hours. It had been agreed at his interview that Mr Qian would pay him the minimum wage of \$16.50 per hour.

[14] Mr Shi said he provided Mr Qian with his IRD and bank account details. His wages were paid into his bank account from Mr Qian's personal bank account, but he did not receive payslips. His understanding was that Mr Qian was deducting PAYE from his wages.

[15] No written employment agreement was provided to Mr Shi by Mr Qian. There were no rosters that appeared to have been produced, Mr Shi said there were no specific hours of work, and he worked when Mr Qian told him to do so. Mr Shi provided to the Authority a record of his hours which he had produced based upon the weekly record he had kept during his employment, and also provided bank records of the payments received from Mr Qian.

[16] Mr Shi said the job provided him with flexibility which was acceptable to him because he had told Mr Qian he was looking for alternative employment in his chosen area of IT software. He had also enrolled for an English language course and on those days his hours reduced to 3 or 3.5 daily.

[17] Mr Shi said he had no expectation of long-term employment with Mr Qian because Mr Qian knew he was looking for another job and also because Mr Qian told him that the operation would be moving to be wholly online and the Shop closing as a result. In addition, his visa was due to reach its expiration date.

[18] Mr Shi said he had been intending to stop working for Mr Qian before 18 August 2018, but had agreed to remain after an incident at the Shop, and he helped Mr Qian with the Shop closure. His employment ended on 18 August 2018. He did not receive any monies as annual leave entitlement.

[19] Shortly after the employment ended, Mr Shi's visa expired, and he returned to China. He tried to contact Mr Qian about the pay and leave entitlement issue, but he said Mr Qian blocked him on WeChat.

[20] In 2023 Mr Shi obtained a further Open Work Visa and returned to New Zealand.

[21] Upon contacting the IRD on his return, Mr Shi realised that Mr Qian had not made any PAYE contributions in respect of the work he performed for him during 2018.

In what capacity was Mr Shi working for Mr Qian?

[22] Mr Shi's evidence confirms that he was employed by Mr Qian. This appears to have been in the nature of part-time employment however there was a clear understanding between Mr Shi and Mr Qian that the employment was temporary because Mr Shi was actively seeking alternative employment and his visa had only a short time before expiry.

[23] The hours were variable because Mr Shi had enrolled in, and attended, an English language course.

[24] This manner of working appeared to be acceptable to Mr Qian which is explained by the fact that the Shop was winding down its operation as a preliminary step to moving wholly to an online retailing operation.

[25] One strong indicator of permanent employment is that there is a *mutual* expectation of continuity of work. In this case, Mr Shi did not have an expectation that the work would continue because he knew the Shop was closing and being replaced totally by an online operation, and himself did not intend working long-term in the Shop. Moreover, his work visa would be expiring and there was no guarantee that he could remain in New Zealand.

[26] Having examined the evidence, I find that the relationship between Mr Shi and Mr Qian was temporary and part-time in nature.

[27] I determine that Mr Shi was working as a part-time employee for Mr Qian during the period from 5 May to 18 August 2018.

Is Mr Shi owed any monies by Mr Qian?

Wages

[28] Mr Shi provided a detailed copy of the hours he worked for Mr Qian. During the period from 7 May 2018 until 18 August 2018 Mr Shi worked 193 hours and was paid \$2,563.22.

[29] During 2018 the minimum wage was \$16.50 per hour. This means that Mr Shi should have been paid \$3184.50 (calculated as 193 x \$16.50), a shortfall of \$621.28.

[30] Section 4 of the Wages Protection Act 1983 states:

.... An employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[31] The exception to this requirement is when deductions are made for a lawful purpose, i.e. PAYE payments.

[32] Deductions did take place from Mr Shi's wages which he understood were PAYE deductions, but these deductions were not paid by Mr Qian to the IRD.

[33] Accordingly, I find that Mr Qian breached the Wages Protection Act 1983 and this shortfall in his wages is therefore owed to Mr Shi who is in communication with, and will remit to, the IRD.

Holiday pay

[34] Mr Shi was employed by Mr Qian for less than 12 months. In this case, s 23 of the Holidays Act 2003 applies: "Calculation of annual holiday pay if employment ends within 12 months". Section 23(2) of the Holidays Act 2003 states:

An employer must pay the employee 8% of the employee's gross earnings since the commencement of employment

[35] Mr Shi was not paid any annual holiday by Mr Qian throughout, nor at the termination of, his employment and I find that annual holiday pay is outstanding.

[36] I determine that Mr Shi is owed monies in respect of his full wages entitlement and annual holiday pay by Mr Qian.

Remedies

[37] I have found that Mr Shi has not been paid correctly by Mr Qian and he is entitled to unpaid wages and to annual leave entitlement.

[38] I order that Mr Qian pay to Mr Shi the sum of \$621.28 in respect of unpaid pursuant to s 4 of the Wages Protection Act 1983.

[39] I order that Mr Qian pay to Mr Shi the sum of \$254.76 in respect of annual leave entitlement pursuant to s 23 of the Holidays Act 2003.

Filing Fee

[40] Mr Qian is also ordered to pay Mr Shi the Authority filing fee of \$71.55.

[41] The monies ordered are to be paid within 14 days of the date of this determination.

Costs

[42] Mr Shi represented himself and there is no order for costs.

Eleanor Robinson
Member of the Employment Relations Authority