

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 139
3237459

BETWEEN ELIZABETH ZHANG SHUYI
Applicant
AND KAWARAU SECURITY SERVICES
LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Kathryn McAuley, counsel for the Applicant
No appearance by the Respondent
Investigation Meeting: 12 February 2024 in Queenstown
Submissions Received: On the day
Determination: 8 March 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Elizabeth Zhang Shuyi was employed by either Jack Simon, also known as Jack Matiaha-Simon, or the company of which he is the sole director, Kawarau Security Services Limited (Kawarau Security) to perform security duties.

[2] The period when Ms Zhang performed security work was a short one of four weeks from 14 January to 12 February 2023.

[3] Ms Zhang undertook her work in accordance with a roster that would be provided from an automated system. She would advise in advance her availability. Occasionally the places where work was undertaken would be different in nature to the automated roster although the

hours appeared to remain consistent. On 12 February 2023 no further shifts were allocated to Ms Zhang.

[4] On 21 February 2023 a volunteer from the Citizens Advice Bureau (CAB) in Queenstown wrote to Mr Simon regarding Ms Zhang's employment with Kawarau Security. Concerns were raised in the letter that her employment agreement provided after employment commenced was not complete, the employment handbook referred to had not been supplied, there had been no payslips provided and there was no Inland Revenue record about payment made with PAYE deducted. The letter requested a written record of pay including hours worked, the gross pay rate per hour and any deductions made. The letter referred to an earlier telephone conversation between CAB and Mr Simon in which Mr Simon referred to issues with his business partner and said that new employment agreements were being drawn up.

[5] There was no response to that letter.

[6] On or about 3 March 2023 Ms Zhang requested assistance from Labour Standards Early Resolution but the advice on 28 March 2023 was that there had been no response to phone calls or emails on behalf of Kawarau Security.

[7] On or about 21 March 2023 Ms Zhang was removed from the Kawarau Security Facebook Messenger group. Ms Zhang's emails on 17 and 21 April 2023 in which she asked about her employment status remained unanswered.

[8] Ms Zhang wants the Authority to resolve a number of employment relationship problems that she says arose during the short period of employment. Ms Zhang says that the relationship ended by way of dismissal and the dismissal was unjustified. Further there were actions that disadvantaged her during her employment which were unjustified such as delays in receiving pay and the failure to provide pay slips, lack of training and issue with the provision of an employment agreement.

[9] Ms Zhang was not provided with an employment agreement before she commenced employment as required in s 63A of the Employment Relations Act 2000 (the Act). When an employment agreement was eventually provided on 6 February 2023 it was a template type document omitting most of the requirements in s 65(2) of the Act.

[10] Ms Zhang asked for wage and time records to show how her payments were calculated in the form of pay slips however these were not provided.

[11] Penalties are claimed for failure to provide wage and time records, failure to provide an employment agreement and then provision of a non-compliant employment agreement and for a breach of good faith.

[12] Ms Zhang asks the Authority to determine if she has been paid everything she is entitled to including holiday pay and if not to order reimbursement of wages and/or holiday pay.

The investigation process

[13] The respondent has not participated in the investigation process. The statement of problem when lodged initially named the respondent as Jack Te Auke Piripi Simon.

[14] There has been no statement in reply lodged. I am satisfied that the statement of problem was served on Mr Simon the director of the respondent whose address is the same as the registered office and address for service of Kawarau Security.

[15] During a case management conference on 4 September 2023 there was no attendance by Mr Simon.

[16] Following a discussion during the case management conference Ms McAuley sent an email dated 4 September advising that the name of the respondent should be amended to Kawarau Security. The Authority duly amended the name of the respondent.

[17] In its notice of direction dated 5 September the Authority noted the amendment to the name of the respondent and directed that service was to be at its registered office which was the same as the address for service and Mr Simon's address. I am satisfied that the notice of direction and notice of investigation meeting were served at the address for service of Kawarau Security. The Authority delayed the start of the investigation meeting for a short time in the event that there was some reason why there was no appearance on behalf of the company. In the absence of any good reason advanced for the non-appearance, the Authority heard evidence from Ms Zhang and there was a closing submission from Ms McAuley.

The issues

[18] Ms McAuley advised the Authority that it appeared that Kawarau Security was to be removed under s 318 of the Companies Act 1993 from the Companies Register. Ms McAuley intends to object to removal, but she asked on behalf of Ms Zhang to revisit the issue of the identity of the employer. The Authority needs to determine the following matters:

- (a) Who employed Ms Zhang?
- (b) How did the employment relationship end?
- (c) If the relationship ended by way of dismissal, was it unjustified?
- (d) Was Ms Zhang's employment affected to her disadvantage by unjustified actions of Kawarau Security?
- (e) Were there breaches of the Act in respect of good faith, the failure to provide an adequate employment agreement and the provision of wage and time records. If there were breaches, should a penalty or penalties be imposed? If a penalty is imposed, to whom should it be paid?
- (f) Was Ms Zhang paid for all the hours she worked and is holiday pay owing?
- (g) Should there be an award of costs

Identity of the employer

[19] There is a risk that Kawarau Security may be removed from the company register. Ms Zhang wishes Mr Simon to be held responsible for any awards made. The potential of the removal of a company is not a reason by itself to conclude that the company is not the employer. Ms Zhang has the onus of proving that Mr Simon was her employer. Kawarau Security was incorporated on 19 January 2022 before employment commenced.

[20] The Facebook advertisement Ms Zhang applied to for security work referred to Jack Matiaha-Simon but described him as owner and CEO at Kawarau Security Services. On 12 January 2023 Mr Simon sent a Facebook message to Ms Zhang following a question about whether he was hiring for employees to undertake security. He responded "they were" and in a later message on 12 January advised Ms Zhang that he owns and operates a security company based in Queenstown mainly doing bar security and events. Ms Zhang said that she understood

from Mr Simon that he operated a company because there was discussion with her about a competing security company in the Queenstown area.

[21] I do not find that Mr Simon held himself out as the employer. I have considered other factors on an objective basis.

[22] There was no written employment agreement provided at the outset of employment. The template employment agreement provided on 6 February 2023 identified the name of the employer as Kawarau Security Services Limited. The employment agreement did not refer to Mr Simon personally.

[23] The payments that were made to Ms Zhang for work performed to her bank account were shown as made by Mr Simon but referenced Kawarau Security. There were no pay slips provided.

[24] It did not appear from the earnings-related Inland Revenue summary that PAYE had been deducted from the earnings Ms Zhang received at Kawarau Security so there is no guidance from those records.

[25] On 21 February 2023 after shifts stopped being rostered an email was sent by the CAB in Queenstown to an email address for Mr Simon at Kawarau Security Services. It referred to employment 'paperwork' with Kawarau Security. Other letters from the community law centre also referred to Kawarau Security as the employer.

[26] It was only when the statement of problem was lodged that Mr Simon was referred to as the employer.

[27] Although a relationship of short duration I am not satisfied that the real employer was Mr Simon and not Kawarau Security.

[28] Kawarau Security Services Limited employed Ms Zhang.

How did the relationship end?

[29] There was a paid trial undertaken on 14 January 2023. Ms Zhang said she was then offered a full-time role by Mr Simon on or about 16 January 2023. She understood the

agreement was that she would be paid \$30 per hour and the hours rostered would be at least 30 per week.

[30] On 18 January 2023 Ms Zhang sent Mr Simon a message via Facebook to say she had been offered a part-time role in another job. She asked about the availability for part time work at Kawarau Security. There was agreement that Ms Zhang could then work for Kawarau Security on a part-time basis on Friday and Saturday nights.

[31] After the initial trial shift worked Ms Zhang worked shifts on 20 January and 21 January 2023.

[32] On 23 January 2023, Ms Zhang advised Mr Simon that the other job had fallen through, and she was available for full time hours for the week 30 January to 5 February 2023 to work for Kawarau Security. Ms Zhang wrote in a Facebook message to Mr Simon that she was considering undertaking the role full time and asked about hours for full timers. Mr Simon responded that the hours would be between 30 to 50 a week.

[33] Ms Zhang was rostered on for 27 January 2023.

[34] On or about 29 January 2023 Ms Zhang received a temporary certificate of approval to work in security whilst she trained.

[35] Ms Zhang was rostered on for work on 31 January, 1 February, 3 February, 4 February and 5 February 2023.

[36] On 6 February Ms Zhang advised that she was available that day, Tuesday, Wednesday, Friday, and Sunday. On 9 February she updated her availability to include Saturday from 10pm onwards.

[37] Ms Zhang was rostered for shifts on 6, 7, 8, 10, 11, and 12 February 2023. No further shifts were worked.

[38] I have focussed on the Facebook messages on or about 12 February 2023 to resolve the issue of how the relationship ended.

[39] Ms Zhang understood as at 12 February 2023 that there were some limitations on the shifts that she could undertake without further training. Another employee Wayne with whom

she had been working told Mr Simon that she needed more training before she went “solo.” Mr Simon stated in a Facebook message to Ms Zhang that perhaps a further two-week training was required before she went “solo”. Ms Zhang in response to that message said amongst other matters that she would like more sessions with Wayne if that could be arranged.

[40] She asked Mr Simon in another message about the following two weeks. She explained that she would be away 17 – 19 February (Friday to Sunday) and 24 -26 February (Friday to Sunday) and 3 – 12 March (two weekends within this period). Ms Zhang described the first two absences as trips planned before she heard about the role. She asked if there was much work or training for her on Monday - Thursday. Mr Simon responded that mainly double door training with Wayne and only on weekends for now.

[41] Ms Zhang asked again about what would happen for the next four weeks. Mr Simon said that she would need at least two more weeks training with Wayne and then he’ll get feedback, or if she feels comfortable, she can go solo.

[42] Ms Zhang then messaged that it sounded like there will not be any work for her until mid-March. Mr Simon responded “Yeah well to be honest until you solo only really weekend work.”

[43] Ms Zhang responded that she would still need her paperwork for the employment sorted as well as payslips for wages. She stated that she was looking forward to more training with Wayne once her weekends were available and will look for other jobs Monday to Thursday.

[44] Dismissal should not be construed narrowly.¹ A dismissal is a ‘sending apart’ or ‘sending away’ or ‘sending forth.’²

[45] Ms Zhang advised Mr Simon that she was unavailable to work for the next four weekends. In her evidence she said that there were shifts during the week that she could have undertaken. Mr Simon’s messages were that the work was mainly in the weekends. Ms Zhang said that she would look for other work Monday to Thursday until she had available weekends. She was not available for the last two weekends in February or for the first two weekends in March or for weekdays between 3 March and 12 March 2023.

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC) at 974.

² Above n 1 at 974.

[46] Ms Zhang's view was that the employment relationship was permanent and full time. The template employment agreement that Ms Zhang was provided with refers to a schedule for individual features of the employment agreement including the number of guaranteed and required hours of work and rate of pay but that was not attached. There is no mention of Ms Zhang's name on the template agreement. From what was stated about likely hours, between 30 and 50, permanent employment could not be ruled out. The employment agreement however was not in accordance with the Act. The description of the relationship is not to be treated as determinative.

[47] In reality the employment had features of a casual employment relationship. Ms Zhang told Mr Simon she was unavailable for work rather than asking and giving notice that she wanted to have leave. The period she was unavailable for work included four weekends as well as some weekdays in early March 2023. Ms Zhang could change availability at short notice for the rosters. The hours of work fluctuated and start and finish times were not always consistent. The Facebook messaging supports Ms Zhang identified when she was available to be rostered on and when she was not.

[48] From what was indicated in the Facebook messaging Ms Zhang was to resume undertaking work with Kawarau Security when she was able to work weekends from 13 March 2023. She did not. Pay slips provided in support of a claim for reimbursement of lost wages show work was undertaken by Ms Zhang with another employer from the period 13 March to 19 March 2023 including Friday, Saturday, and Sunday between those dates.

[49] Issues had been raised with Kawarau Security about wage and time records and an employment agreement before and after 12 February but not responded to. That information was important for Ms Zhang to assess whether the work availability and the payment was adequate for meeting her living costs in Queenstown. It was not until 17 April 2023 after removal from the work group chat that Ms Zhang asked about her employment status and whether she had been "laid off". There was no response from Kawarau Security.

[50] The casual employment relationship may have changed after Ms Zhang was sufficiently trained to employment that was continuous and of indefinite duration. There were however only two weeks in early February 2023 where the Authority is able to discern any regularity or pattern of work offered and accepted. Before then there had been advice from Ms Zhang that she wanted to work part-time as she had secured other employment and, when the other

opportunity fell through, she advised on 23 January that she was available from 30 January for shifts and was looking to undertake full time work. I set that out simply to indicate that Ms Zhang chose when she was available at that time.

[51] I could not be satisfied in the circumstances from the evidence there was a mutual expectation of continuity of employment beyond 12 February 2023.

[52] I do not conclude that the circumstances in this matter amount to a dismissal rather it was a casual relationship where there was no further offer of work after the last shift worked on 12 February 2023.

Were there actions that affected Ms Zhang to her disadvantage that were unjustified?

[53] There was some training offered and some undertaken. I do not conclude it was at an unjustifiable level given the very limited period of employment available for consideration. Issues were raised about late payments. The employment was four weeks in duration and four payments were made to Ms Zhang on 18, 27 January and 2 and 14 February 2023. There was a change explained in some of the Facebook messages from weekly to fortnightly payment. I cannot be satisfied that there were unjustified disadvantageous actions about the date of payment.

[54] No information about wages and time worked was provided. A penalty has been claimed for that matter and for the failure to provide an adequate employment agreement.

[55] In resolving this employment relationship problem it is more appropriate to assess these matters as breaches of statutory obligations than unjustified actions causing disadvantage.

Breaches of the Employment Relations Act 2000

Good faith

[56] Employers and employees owe each other obligations of good faith during the employment relationship. Ms Zhang asked on many occasions by Facebook message for information about her pay breakdown and for a proper employment agreement over the four-week period she worked. These matters are appropriately addressed by consideration of penalties under s 63A and/or s 65 and s 130 of the Act otherwise there is a risk of duplication of penalties for the same actions. Ms Zhang sent many Facebook messages about other matters

as well and most of these appear to have been appropriately responded to. The failure to respond to requests for information after 12 February was very unfortunate however the obligations of good faith require an employment relationship to be on foot. The statutory obligations of good faith end when the employment ends.³

Failure to provide an intended employment agreement and failure to provide an agreement that included the requirements of s 65 (2)(a)

[57] Ms Zhang should have been provided with an intended agreement before her employment commenced under s 63A of the Act and was not. When an agreement was eventually provided it was not in a form that complied with s 65(2) of the Act. There were requests for an employment agreement that did comply on multiple occasions. There was a breach of s 63A and s 65 of the Act. Both these sections enable an action to be taken by the employee for a penalty.⁴

Failure to provide a wage and time record

[58] Ms Zhang asked on many occasions for pay slips to understand how her pay was made up. She never received this information. Section 130(2) of the Act provides that every employer must when requested by an employee immediately provide access to the relevant wage and time records. The failure to provide pay slips per se is not a breach however had they been provided they may have gone towards satisfying this broader obligation to keep a wage and time record. There was a breach of s 130 of the Act.

Should there be a penalty awarded for the breaches

[59] It appeared from the Facebook messages that Mr Simon was in the process of engaging with others about employment agreements and setting up some of the appropriate paperwork at the time Ms Zhang was employed. It is important to signal that there needs to be compliance with these sections to build and maintain productive employment relationships in accordance with the object of the Act.

³ *Balfour v Chief Executive Department of Corrections* [2007] ERNZ 808.

⁴ Employment Relations Act 2000 s 63A(3) and s 65(4).

Penalty

[60] The maximum penalty for a company for each breach of the Act is \$20,000.⁵ The two breaches regarding the employment agreement should be viewed as one. I have had regard to the matters in s 133A of the Act in assessing an appropriate penalty. I have weighed the frequency of requests for a proper employment agreement and wage and time information. There was a degree of deliberateness I conclude in not properly responding to these requests. It was not inadvertent. Ms Zhang was left in a position where she was not able to properly weigh her employment status and whether she could earn a reasonable living at Kawarau Security. She was not able to establish properly what her pay was made up of and whether PAYE had been deducted. Mr Simon reassured her that he was deducting PAYE and keeping the amount aside for payment at a later date. The failure to provide wage and time records has continued notwithstanding an Authority direction that they be disclosed.

[61] I conclude an appropriate award taking all the breaches into account and other similar awards is the sum of \$4000. Of that amount Ms Zhang is to be paid the sum of \$3,500 because she has suffered harm as a result of the breaches which has not otherwise been compensated with the balance to the Crown within 28 days.

Was Ms Zhang paid for all the hours that she worked together with holiday pay?

[62] Ms McAuley provided a very helpful summary of hours worked. I accept her view that the likely total hours worked were 58.75 hours being the 4.5 hours worked on trial and the messaged hours. It is less likely the rostered hours which Ms Zhang did not message as hours worked were worked.

[63] I set the schedule below:

⁵ Employment Relations Act 2000 s 135(2)(b).

2023	From automated Roster	Hours worked - Roster	Messages to/from Jamie	Hours worked - messages
14 Jan	10pm-2:30am	4.5		
20 Jan	11pm-4am	5	11pm-4:30am	5.5
21 Jan	9pm-2:30am	5.5	10pm-1am	3
27 Jan	9pm-midnight	3	9pm-midnight	3
31 Jan	10pm-2:30am	4.5	10pm-2:30am	4.5
1 Feb	9pm-2:30am	5.5	9pm-2:45am	5.75
2 Feb	10pm-2:30am	4.5		
3 Feb	11pm-4:30am	5.5	11pm-2am	3
4 Feb	7pm-midnight	3		
5 Feb	7pm-midnight	3	6pm-10pm	4
6 Feb	9pm-midnight	3	5pm-6pm	1
			9pm-midnight	3
7 Feb	9pm-midnight	3	9pm-midnight	3
8 Feb	9pm-midnight	3	9pm-12.30am	3.5
10 Feb	9pm-midnight	3	9pm-midnight	3
11 Feb	midnight-4am	4	Midnight-4:15am	4.25
	9pm-midnight	3	9pm-midnight	3
12 Feb	midnight-4am	4	midnight-4:15am	4.25
TOTAL	Roster	67	Messages	53.75

[64] The pay rate was \$30 per hour. Ms Zhang was paid over four payments a total of \$1762.58.75 hours worked multiplied by \$30 per hour is the sum of \$1762.50. It appeared that Ms Zhang was paid \$30 per hour without deduction although she had been reassured that PAYE had been deducted and that payment would be made to Inland Revenue.

[65] I do not find there are unpaid wages owing to Ms Zhang for work performed.

[66] I cannot be satisfied that holiday pay was paid. Ms Zhang is entitled to 8% of her gross earnings which is the sum of \$141 gross.

Costs

[67] Ms Zhang is entitled to a contribution towards costs. An appropriate award in line with the daily tariff for one day of \$4,500 is half a day which is the sum of \$2,250 together with reimbursement of \$71.56.

Summary of findings and orders made

- (a) Ms Zhang was employed by Kawarau Security Services Limited.
- (b) The real nature of the employment relationship was casual.

- (c) Ms Zhang was not unjustifiably dismissed from, or disadvantaged in, her employment.
- (d) Kawarau Security is ordered to pay a penalty of \$4000 within 28 days of this determination for breaches of the Act for the failure to comply with the requirements for employment agreements and the failure to provide wage and time records.
- (e) The sum of \$3500 of the penalty is payable to Ms Zhang with the balance of \$500 payable to the Crown.
- (f) Ms Zhang was paid for the work she performed.
- (g) Kawarau Security is ordered to pay holiday pay in the sum of \$141 gross to Ms Zhang.
- (h) Kawarau Security is ordered to pay costs in the sum of \$2,250 together with reimbursement of the filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority