

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 358/09
5144655

BETWEEN ZHANPING YANG
 Applicant

AND L E BUILDERS LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Applicant In Person
 Jennifer Wickes, Counsel for Respondent

Investigation Meeting: 25 August 2009

Submissions Received: 7 September from Respondent
 25 September from Applicant

Determination: 9 October 2009

DETERMINATION OF THE AUTHORITY

[1] The sole issue for determination in this matter is whether Mr Yang was an employee or a contractor. Mr Yang worked for Mr Lawrence Lu of L E Builders Limited from 3 June 2008 to 30 August 2008. At that stage, he had an accident and was put onto ACC. The issue regarding whether or not he was a contractor or an employee seemed only to become pertinent at that stage when Mr Yang discovered that because he was being treated as a contractor, the amount he was paid by ACC was less than it would have been had he been classified as an employee.

[2] Mr Lu said he was not fluent in Mandarin so he had his secretary, who was fluent, present when interviews were done. Mr Lu said that the tax rate was explained to Mr Yang; he was told that withholding tax would be deducted from the hourly rate.

[3] Mr Yang signed a tax code declaration. The tax code was WT (withholding tax) and the withholding payment activity was listed as "Contracts wholly or substantially for labour only in the building industry". The tax code and the details

were not written in by Mr Yang. I am satisfied that Mr Yang was told he would be paying withholding tax and agreed to that. Mr Lu said all his builders were employed on a labour-only contract basis.

[4] Mr Yang said he got the information about the position from a newspaper but did not have a copy of the advertisement at the hearing. He supplied a copy later. The advertisement for the position does not state that it is for a contractor or an employee. It is simply for an experienced carpenter.

[5] Mr Yang said he worked 7.30am to 5pm six days a week. Mr Lu said that people normally started at 7.30am but the time of finishing would depend on the work available and they were not able to specify that with any degree of certainty. Mr Lu said also there was no guarantee of six days work a week, it would just be a matter of what work was available and how often Mr Yang would be required. Mr Yang said Mr Lu told him there would be two or three projects.

[6] Mr Yang's bank records do not show that he was paid a regular amount each week as would have been the case if he had been working regular hours. None of the payments were the same and the amounts varied from \$734.40 to \$244.80.

[7] Mr Yang said he supplied some of his tools and the company supplied others. Mr Lu said that if his contract employees wanted to supply tools, they were welcome to do so, but often they could not afford to buy all the necessary tools so the company had tools available for them to use.

[8] Mr Yang was paid on an hourly basis. The hours were recorded by the supervisor to Mr Lu's secretary. He did not submit invoices. A supervisor dealt with the forms listing the hours worked.

[9] No employment agreement was signed. No ACC deductions were made. No Kiwi Saver payments were paid. No holiday pay was paid. It was industry practice to employ people on a contract basis.

[10] Section 6(2) of the Employment Relations Act 2000 requires the Authority to determine the real nature of the employment relationship. In doing so, the Authority must consider all relevant matters including any matters that indicate the intention of the parties.

[11] In *Bell v. JHL Paint Management Services Ltd* (31 May 2005, D King Member, AA204/05) it was found that a labour-only contract could be a contract for services. In *Maley v. Thomson* (20 June 2006, H Doyle Member, CA90/06) the factors tending to show contractor status, including industry practice, slightly outweighed the factors indicative of an employment relationship. In *Cardy Business Ltd v. Bizaoui* (24 March 2005, Colgan J, AC16/05) the payment of withholding tax was not a neutral factor when determining the existence of an employment agreement but indicated against one. Withholding tax implied a contract for services as it is a form of provisional tax obtained at a lower rate than most PAYE deductions and it entitled the reimbursement of business expenses through tax returns. In *Taylor v. Superior Building Systems Ltd* (Goddard CJ, AC67/98), the fact that the withholding tax as opposed to PAYE was deducted and no ACC levies were deducted, was a factor in determining that the appellant was a labour-only worker who was not an employee.

[12] The fact that withholding tax was paid, that industry practice is for contract work, that no regular hours were worked, that some tools were supplied by the worker, that no employment agreement was signed, no ACC payments were made by the company, no holiday pay or sick pay was paid, all tend to indicate that Mr Yang was a contractor.

[13] Mr Yang was a labour-only contractor.

Costs

[14] If the parties are unable to resolve the issue of costs, the respondent is to file a memorandum within 28 days of the date of this determination and the applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority