

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA507  
3247819

BETWEEN                      HAO ZHENG YIN  
   Applicant  
  
AND                                NANCY XU  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Michelle Yin representing the Applicant  
   Nancy Xu, Respondent  
  
Investigation Meeting:        20 August 2024 in Auckland  
  
Submissions and/or further    20 August 2024 from the Applicant  
evidence                        None from the Respondent  
  
Determination:                26 August 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Hao Zheng Yin, claims he was unjustifiably dismissed by the Respondent, Nancy Xu.

[2]     Mr Yin further claims that he was paid below the minimum wage rate by Ms Xu.

[3]     Ms Xu denies that Mr Yin was an employee, and claims he was a volunteer whilst working for her.

**The Authority's investigation**

[4]     The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Mr Yin.

[5]     Ms Xu provided a Statement in Reply and actively communicated with the Authority as to her availability to attend a case management conference. The Investigation Meeting was set down to take place on 24 May 2024.

[6] Ms Xu subsequently contacted the Authority requesting an adjournment until July 2024. Unfortunately, Mr Yin's representative, Ms Yin, was not available during July, and the investigation was rescheduled to 20 August 2024.

[7] Ms Xu emailed the Authority just prior to the date of the Investigation Meeting but did not advise that she would not be attending it.

[8] Ms Xu was not present at the start of the investigation. The Investigation Meeting was delayed while the Authority Officer attempted to contact her, but without success, and Ms Xu did not attend the Investigation Meeting.

[9] Given the difficulties encountered in progressing this case, I was satisfied that no good cause had been shown for Ms Xu's failure to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Act.

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

[11] 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**

[12] The issues requiring investigation are whether or not Mr Yin:

- Was an employee or a contractor whilst working for Ms Xu?

If Mr Yin is determined to be an employee,

- Who was the employer?
- Was Mr Yin paid below the applicable minimum wage rate whilst employed?
- Was Mr Yin unjustifiably dismissed?

## **Background**

[13] Mr Yin was seeking part-time employment and saw an advertisement for a part-time Chef on SkyKiwi, a Chinese Internet Media site which advertises vacancies.

[14] Mr Yin made contact with Ms Xu whom he believed to be the owner of the rest home in New Windsor in which the vacancy was based (the Rest Home). Following some telephone discussions and text messages, Mr Yin said he agreed to work for Ms Xu on two days a week, Tuesday and Wednesday, commencing work on 7 January 2023.

[15] Mr Yin said when the hourly rate was discussed, he told Ms Xu he wanted to be paid the market rate for a Chef.

[16] He said he worked eight hours a day at the Rest Home from 8.30 a.m. to 1.30 p.m. and from 3.30 to 6.30 p.m. His understanding from the outset was that it was permanent part-time employment.

[17] He knew when he would be working each week because Ms Xu would message all the employees each week with details of the days they would be working in the next week.

[18] Mr Yin said when he arrived at work, he would find all the ingredients for the meals that day waiting ready on the work bench in the kitchen area. From time to time Ms Xu left him written instructions on how the food was to be prepared. He had his own work clothes because none were provided for him. He used the equipment in the rest home kitchen to prepare the meals.

[19] Mr Yin was questioned about Ms Xu's assertion in the Statement in Reply that she had provided an individual employment agreement which he had refused to sign, and that she had asked him for his IRD and bank account details.

[20] Mr Yin said this was not correct, Ms Xu had not provided him with a written employment agreement or requested his IRD and bank account details. On the contrary, he had asked Ms Xu to deduct the tax from his wage payment, but she refused. Mr Yin said all the kitchen employees were paid in cash.

[21] Mr Yin commenced working on 7 January 2023 and worked two days a week until 2 February 2023 when he messaged Ms Xu about his pay:

DY: Hi Nancy, the minimum wage is 21.20 if you add 8 per cent it should be 22.90 per hour this is the current minimum wage .... I don't expect much, but to receive a minimum wage is not a ridiculous expectation, is it? Your work here is not easy either. ... If you need me next week, I can still come but if you can't even meet minimum wage then you should find someone else thanks.

NX: Ok thanks.

DY: Then please amend my pay for the last four weeks to meet minimum wage. It's approximately 3 and a half weeks in total 7 days you still owe me 160, when can I come to collect it?

NX: No, you wanted cash.  
Or else will be taxed.

DY: You can't avoid this, tell me when can I come to collect it!

NX: Taxed, without your permission, you cannot come to our rest home, we will call the police.

[22] Mr Yin said he went to the Rest Home on two occasions after this exchange, but Ms Xu had not been present. He had not gone back after that because Ms Xu had threatened to have him trespass.

### **Was Mr Yin an employee or a volunteer whilst working for Ms Xu?**

[23] In proceeding to determine whether Mr Yin was engaged by Ms Xu as a volunteer or an employee I apply s.6 of the Employment Relations Act 2000 (the Act). Section 6(c) excludes a volunteer from the definition of employee. Section 6 states:

s.6 Meaning of employee:

- (1) In this Act, unless the context otherwise requires, Employee –
  - (a) Means any person of any age employee by an employer to do any work for hire or reward under a contract of service; and
  - (b) includes –
    - (i) a homemaker
    - (ii) a person intending to work; but
  - (c) excludes a volunteer who –
    - (i) does not expect to be rewarded for work to be performed as a volunteer; and
    - (ii) receives no reward for work performed as a volunteer
- (2) In deciding ... 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.

### *Expectation of Reward*

[24] Mr Yin said he expected to be paid for the cooking services he was providing at the rest home. This is made clear in the text messages provided to the Authority.

[25] In the Statement in Reply Ms Xu states: "A contract of employment was offered" She states that she had offered Mr Yin a written employment agreement, but he refused to sign it because he was "happy to provide his services for free".

[26] I find that if Ms Xu had understood Mr Yin to be offering voluntary services, there would have been no requirement to provide him with an employment agreement since he would not be an employee.

[27] Ms Xu also stated in the Statement in Reply that Mr Yin “was asked for his IRD number and his bank account number,”

[28] A volunteer has no expectation of payment and therefore there would be no requirement to provide an IRD number or bank account number.

[29] Ms Xu does not deny that Mr Yin was paid, but that the payment was in cash rather than into a bank account. The fact that Mr Yin was paid in cash rather than into his bank account does not establish that Mr Yin was a volunteer because he was still being recompensed for his service by Ms Xu.

[30] I find that the offer of an employment agreement and the cash payments indicate that Mr Yin was not a volunteer but an employee whilst working at the Rest Home.

#### *Contractual basis and common intention*

[31] Mr Yin’s evidence was that his understanding from the outset was that it was a permanent part-time position to which he was applying.

[32] Ms Xu had agreed to him working two days and stipulated the days to exclude a Tuesday because of having a permanent chef on that day.

[33] I find it is clear that the intention at the outset was that the relationship would be one of employment.

#### *Taxation Situation*

[34] The Income Tax Act 2007 sets out the tax position of volunteers in s CW 62B (4) which defines a volunteer as a person:

... who freely undertakes an activity in New Zealand-

- (a) ...
- (b) That provides a benefit to a community or another person;
- (c) For which there is no purpose or intention of private pecuniary profit for the person.

[35] Section CW 62B(1) of the Income Tax Act 2007 states that when a person is undertaking a voluntary activity and receives a payment to cover actual expenses incurred by them, the amount received is exempt income of the volunteer and not subject to tax.

[36] I find the payments Mr Yin received were not to cover his actual expenses, Ms Xu provided all the ingredients he needed to prepare the rest home meals, and the equipment with which to cook.

#### *Control and Integration*

[37] Mr Yin worked as part of the Rest Home staffing team. He worked in the rest home kitchen preparing food for the residents. Ms Xu provided the ingredients for the daily meal and instructions from time to time on how Mr Yin was to cook it.

[38] I find Mr Yin was subject to the control of Ms Xu and integrated into the rest home operation.

[39] I determine that M Yin was an employee and not a volunteer when working for Ms Xu.

#### **Identity of the Employer**

[40] Mr Yin worked at a rest home. He said this was in New Windsor. There is a aged care facility in New Windsor, New Windsor 2017 Limited. I have determined that Mr Yin was an employee and not a volunteer when working at the Rest Home, and it is therefore necessary that the correct employer is identified.

[41] I consider that this is case in which the doctrine of undisclosed principle may apply. The doctrine is recognised in the case of *Cuttance (t/a Olympus Fitness Centres) v Purkis* and arises in circumstances in which a person, having authority to contract on behalf of another person, makes the contract in their own name, which then allows an applicant to choose whether or not to proceed against a person personally notwithstanding that he or she was only acting as an agent for another.<sup>1</sup>

[42] In this case Mr Yin responded to an advertisement offering employment as Chef. Ms Xu conducted the interview and employment discussions.

[43] Mr Yin and Ms Xu discussed the payment terms, the hours of work and the details of the work to be performed.

[44] Mr Yin commenced work on 7 January 2023 and worked the following weeks until 2 February 2023 when the employment reached a close. During those four weeks of employment

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<sup>1</sup> *Cuttance (t/a Olympus Fitness Centres) v Purkis* v [1994] 2 ERNZ 321.

Ms Xu did not disclose that she was not the employer, or that she was acting on behalf of the employer. Mr Yin understood her to be the owner of the Rest Home.

[45] In examining whether or not that belief was reasonable I note the following:

- It was Ms Xu who conducted the initial discussions about the days and hours of employment;
- It was Ms Xu who provided the tools and ingredients Mr Xu needed to perform his role as Chef.
- It was Ms Xu who paid Mr Yin in cash in recompense for the hours he had worked.
- It was Ms Xu whom Mr Yin contacted to request an increase in his rate of pay; and
- It was Ms Xu who told Mr Yin not to attend the Rest Home premises and threatened him with a trespass order if he did so.

[46] In consideration of all these factors I find Mr Yin's belief that Ms Xu to have been his employer to have been a reasonable one. I find all the contractual elements of offer, acceptance, and certainty of terms, intention to create legal relations and consideration exist in the interactions between Mr Yin and Ms Xu, such as to create an employment relationship between them.

[47] I note moreover and significantly that Ms Xu did not state in the Statement in Reply that she was not the employer, or acting on behalf of an undisclosed other party, nor did she do so at any stage in her communications with the Authority.

[48] I find the doctrine of undisclosed principal applies to this matter and Mr Yin is entitled to proceed against Ms Xu.

**Was Mr Yin paid below the applicable minimum wage rate?**

[49] At the time Mr Yin was employed, January 2023, the statutory minimum wage rate was \$21.20 per hour gross. For an eight hour day that would equate to \$169.60. According to Mr Yin's evidence, he was paid \$160.00 per day or \$20.00 per hour in cash. This is a shortfall of \$1.20 per hour, or \$9.60 per day.

[50] Mr Yin worked eight days between 7 January and 2 February 2023.

[51] I find that Mr Yin is owed monies in respect of wage arrears in the sum of \$76.80 gross (calculated as \$9.60 per day x 8 days).

### **Was Mr Yin unjustifiably dismissed by Ms Xu?**

[52] Justification for dismissal is set out in s 103A of the Act and states:

#### **S103A Test of Justification**

- (1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[53] A dismissal must be justifiable on both substantive and procedural grounds.

[54] I find the evidence supports that the impetus for the ending of the employment relationship came from Ms Xu after she told Mr Yin in the text message on 2 February 2023 that he could not go to the Rest Home, his place of work, and that if he tried to do so, the Police would be contacted.

[55] There was no evidence that any formal disciplinary process had been entered into with Mr Yin or that there was any basis for the dismissal other than his asking to receive payment at the statutory minimum hourly rate.

[56] I find there was no substantive justification for Mr Yin's employment to be terminated.

[57] It is also required pursuant to s 103A of the Act that a fair process is followed by the employer in the context of disciplinary action. The minimum requirements are that:

- (a) ... the employer sufficiently investigated the allegations against the employee ...
- (b) ... the employer raised the concerns that the employer had with the employee ...
- (c) ... the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[1] I note also that employers and employees are under a duty of good faith to behave towards each other in good faith pursuant to s 4 of the Act. In accordance with s 4(1A)(c) an employer who is proposing to make a decision that will, or is likely to have, an adverse effect

on the continuance of an employee's employment is required to provide the affected employee with:

- (i) Access to information relevant to the continuation of the employees' employment, about the decision, and
- (ii) An opportunity to comment on the information to their employer before a decision is made.

[58] I find that there is no evidence that Ms Xu followed any process, still less a fair one, in the case of Mr Yin. Ms Xu told Mr Yin he could not attend his place of work and therefore that there was no ongoing employment for him.

[59] I determine that Mr Yin was unjustifiably dismissed by Ms Xu.

### **Remedies**

[60] Mr Yin is entitled to wage arrears for the payments to him having been below the statutory minimum hourly rate.

[61] I order that Ms Xu pay Mr Yin the sum of \$76.80 as wage arrears.

[62] Mr Yin was unjustifiably terminated by Ms Xu. This caused him, particularly the threat that the Police might be called and he would be trespassed from the Rest Home, distress, and humiliation.

[63] I order that Ms Xu pay Mr Yin the sum of \$700.00 (the amount sought) in respect of hurt, humiliation and injury to feelings pursuant to s 123(1) (c) of the Act.

### *Contribution*

[64] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[65] Requesting that an employer recompenses an employee at the statutory minimum hourly wage is not objectionable and should be unnecessary in the case of a reputable employer.

[66] Accordingly, I find no contributing conduct by Mr Yin and there will be no reduction in the remedies ordered.

## **Filing Fee**

[67] Ms Xu is also ordered to pay Mr Yin the filing fee of \$71.56.

## **Orders**

[68] I have made the following orders:

- **Ms Xu is ordered to pay Mr Yin the sum of \$76.80 as wage arrears pursuant to s 4 of the Wages Protection Act 1983.**
- **Ms Xu is ordered to pay Mr Yin the sum of \$700.00 as compensation pursuant to s 123(1) (c) of the Act.**
- **Ms Xu is ordered to pay the Authority filing fee of \$71.56.**

## **Costs**

[69] There was no appearance on the part of Ms Xu and the Investigation Meeting took less than half a day.

[70] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point.

[71] **Accordingly, Ms Xu is ordered to pay Mr Yin the sum of \$2,250.00 towards his legal costs, pursuant to clause 15 of Schedule 2 of the Act.**

Eleanor Robinson  
Member of the Employment Relations Authority