

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 335  
3103293

BETWEEN

JIAN ZHANG  
Applicant

AND

AWING TRAVEL NZ LIMITED  
Respondent

Member of Authority: Philip Cheyne  
Representatives: Jian Zhang the Applicant  
No appearance for the Respondent  
Investigation Meeting: 21 August 2020  
Date of Determination: 24 August 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Awing Travel NZ Limited is to pay Jian Zhang \$4,070.00, pursuant to s 131 of the Employment Relations Act 2000.**
- B. Awing Travel NZ Limited is to pay Jian Zhang \$71.56, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.**

**Employment relationship problem**

[1] Jiang Zhang was contracted by Awing Travel NZ Limited as a tour bus driver. He was paid for his December 2019 work and for his January 2020 work, but has not been paid for work done in February and March. The claim is for arrears of \$4,070.00 for the February and March work.

[2] Awing Travel provided some information in reply, but did not appear at the investigation meeting. I am satisfied that Awing Travel NZ Limited has been served with both the statement of problem and notice of investigation meeting. To the extent it engaged with the investigation, Awing Travel says that Mr Zhang was a sub-contractor, not an employee.

[3] The Authority has jurisdiction to make determinations about employment relationship problems generally, including matters about the recovery of wages or other money.<sup>1</sup> An employment relationship problem is a matter arising out of an employment relationship, meaning (as presently relevant) a relationship between an employer and an employee employed by the employer.<sup>2</sup> If the claim is not an employment relationship problem, it must be struck out.

[4] Two issues arise:

(a) Was Mr Zhang contracted as an employee?

(b) If yes, has he proven any arrears?

#### **Was Mr Zhang contracted as an employee?**

[5] Awing Travel says that Mr Zhang was not an employee but was an independent contractor so that the Authority does not have jurisdiction to deal with the claim.

[6] I heard from Mr Zhang. He was engaged to work for Awing Travel at the rate of \$180.00 per day. He was also paid a breakfast allowance. His work involved driving Awing Travel's tour clients in accordance with itineraries supplied by Awing Travel. The bus was provided by Awing Travel who also gave Mr Zhang a fuel card in the company's name. Mr Zhang only provided his labour and did not supply or pay for any tools and equipment used in his work.

[7] Awing Travel paid Mr Zhang monthly for his work during the previous month. The payroll system used by Awing Travel generates payslips which show earnings for the pay period and include a PAYE tax deduction at the WT rate. Mr Zhang did not invoice or otherwise charge Awing Travel for his work. Awing Travel monitored Mr Zhang's work

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<sup>1</sup> Employment Relations Act 2000 s 161(1)(g).

<sup>2</sup> Employment Relations Act 2000 s 4(2)(a).

through the itineraries provided, GPS tracking information on their bus and access to Mr Zhang's driving hours logbook and running records.

[8] There was no written agreement between Mr Zhang and Awing Travel setting out these arrangements. However, Mr Bai for Awing Travel says that Mr Zhang is a sub-contractor working for Awing Travel and refers to the WT tax code shown on the payroll system.

[9] There is no evidence that Mr Zhang was in business on his own account when he worked for Awing Travel. He did not invoice for his work, was not registered for GST, was required to provide services personally and did not employ others. Mr Zhang did not brand or otherwise market his services. When working for Awing Travel, he was not free to do other work. The work done by Mr Zhang was central to Awing Travel meeting its contractual obligations to its clients. Mr Zhang had no opportunity or risk for profits or losses in his driving work for Awing Travel.

[10] I must consider the real nature of the relationship between Mr Zhang and Awing Travel in deciding whether the contract between them is one for services or of service.<sup>3</sup> The evidence points towards the relationship being a contract of service rather than a contract for services. The tests set out in decided cases lead to that conclusion. I find that Awing Travel contracted Mr Zhang as an employee. Mr Zhang's claim is within the exclusive jurisdiction of the Authority.

### **Has Mr Zhang proven any arrears?**

[11] Awing Travel explains how the Covid-19 pandemic has affected its business and revenue. It explains steps it has taken to ameliorate its cashflow problem. There is no reason to doubt any of that information.

[12] However, the arrangement with Mr Zhang was for him to be paid at the end of the month following his work. Payslips show this.

[13] Mr Zhang's evidence is that he has not been paid \$4,070.00 for his work in February and March 2020. This includes a meal allowance on top of his daily rate of pay. I accept Mr Zhang's evidence so find that he is owed \$4,070.00 in arrears.

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<sup>3</sup> Employment Relations Act 2022 s 6(2).

## **Summary**

[14] Mr Zhang has established arrears. There will be an order accordingly.

[15] Mr Zhang paid the application fee for this claim and is entitled to recover that from Awing Travel.

[16] As Awing Travel did not appear, there is no evidence that its financial position is such that it requires to pay the arrears by instalments. That does not prevent Mr Bai and Mr Zhang coming to an arrangement now that Mr Zhang has this determination.

Philip Cheyne  
Member of the Employment Relations Authority