

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 62
3261679

BETWEEN	ZHOU XIULI Applicant
AND	HOMELAND CONSTRUCTION LIMITED Respondent

Member of Authority: Robin Arthur

Representatives: Lennon Xi, advocate for the Applicant
Phil Ahern, counsel for the Respondent

Investigation Meeting: 27 November 2024 at Auckland

Determination: 11 February 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Zhou Xiuli was issued a work visa to work for Homeland Construction Limited (HCL) on 11 July 2023. He sought an Authority finding that he had a personal grievance because HCL failed to provide him with work after his arrival in New Zealand on 10 August 2023.

[2] HCL said it was not aware Mr Zhou had arrived until he contacted its director Chen Wang on 17 September 2023. HCL said it asked Mr Zhou to start work on 25 September but he refused to do so. Instead Mr Zhou had returned to China on 28 September.

The Authority's investigation

[3] Mr Zhou, Mr Wang and HCL site manager Jimmy Ren lodged written witness statements for the Authority's investigation. An interpreter of Mandarin, arranged by

the Authority, assisted the witnesses with answering questions from me and the parties' representatives. The representatives also gave oral closing submissions.

[4] The Authority assesses points of difference in the evidence of witnesses on the balance of probabilities, that is by considering what was more probable or more likely than not to have happened. Relevant documents which corroborate points of fact assist in reaching that balance. In this case, those documents include the records of telephone calls and text messages exchanged in the WeChat app.

[5] As referred to in 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.

The issues

[6] The primary issue for determination was whether Mr Zhou was present and willing to work but denied the opportunity to do by HCL not providing work on the terms provided by his employment agreement.

[7] Because of the conclusions reached in this determination, it was not necessary to set out issues that would arise if he established grounds for a personal grievance.

How Mr Zhou was employed by HCL

[8] Mr Zhou said he applied for work in New Zealand through a neighbour, Meng Haifeng, in China. He said Mr Meng was in the "labour dispatch business" and made the arrangements for a job and a visa in return for payment of RMB 74,000, that is around NZD 17,500. While still in China and as part of the visa application process he signed an employment agreement with HCL for a position as a construction worker on 6 June 2023. The agreement said the employment started on 15 July 2023 and HCL would pay him \$29.66 an hour.

[9] Mr Wang said HCL had operated its residential building business in Auckland for 10 years, employing between five and 15 workers at any one time. In early 2023 he applied for approval for HCL to recruit workers through the Accredited Employer Work Visa scheme. He arranged for a Licensed Immigration Advisor, Jason Liu, to manage visa applications for HCL.

[10] Around this time Mr Wang was also contacted by Zhang Wenpeng, a China-based recruitment agent who had seen an HCL job advertisement posted on Skykiwi, a Chinese-language news and advertising website. Mr Zhang had subsequently sent an employment agreement for Mr Zhou which Mr Wang signed and returned.

[11] Mr Wang said he was not directly involved in the next steps in the recruitment and visa process as he had put Mr Zhang in touch with Mr Liu to make those arrangements of behalf of the company. He said HCL had offered five or six workers through Mr Zhang. He said HCL did not pay Mr Zhang for his services and Mr Wang did not know what fees the workers paid Mr Zhang.

[12] Mr Zhou said he had no knowledge of, or contact with, Mr Zhang before he left China in August 2023. He dealt only with Mr Meng. Mr Zhou said he only had contact with Mr Zhang after returning to China in September 2023 and learnt then of Mr Zhang's role in dealing with HCL over his visa and work arrangements.

[13] Mr Wang said he had not known, at the time, that Mr Zhou had successfully applied for a visa in July and had travelled to New Zealand in August 2023. Mr Wang said it was not unusual not to hear from applicants who had been offered jobs and been provided with employment agreements as part of their visa application process. He said this was because some applicants also applied for jobs and visas in other countries and, if successful elsewhere, did not come to New Zealand to take up a job with HCL.

[14] Mr Zhou said Mr Meng had booked the flight for his journey to New Zealand. He said Mr Meng told him someone from the company would pick him up from the airport but no-one did. He said he had no contact details for the company.

[15] Mr Zhou said he then arranged his own accommodation and later got help from someone who spoke English to help him find HCL. His first contact with HCL was a text he sent Mr Wang on 17 September.

Different accounts of contact about work

[16] Mr Zhou's application to the Authority said that he had "never been given any work" since he arrived in New Zealand and his employer "never contacted him".

[17] HCL's statement in reply denied that was correct, identifying several occasions when Mr Wang and Mr Ren had contacted Mr Zhou between 17 and 27 September about work arrangements.

[18] Mr Zhou's written witness statement for the Authority investigation then gave an account of his contact with HCL during this period which differed from his original application. He said he met Mr Wang in September 2023 but, when he asked for work, Mr Wang told him he would be paid only \$19 an hour in cash. Mr Zhou said he refused to work on that basis because it was less than the hourly rate of \$29.66 in his employment agreement.

[19] Mr Zhou's written statement also said he asked Mr Wang to "refund me the NZD 17,500 I paid for the job". He said Mr Wang told him he "would organise the payback if I go back to China". Mr Zhou returned to China in late September 2023.

[20] In his evidence Mr Wang said he first learned of Mr Zhou's arrival in New Zealand when he received a text on 17 September. He contacted Mr Zhou by telephone that day and arranged for Mr Ren to contact Mr Zhou about starting work on 25 September.

[21] Mr Ren spoke twice with Mr Zhou in the following days but, according to his evidence, Mr Zhou was unwilling to start work. He said Mr Zhou said he did not have transport or work gear. When told HCL would arrange those things, Mr Zhou still did not want to work. Mr Ren said he let Mr Wang know what Mr Zhou said and had no further contact with him.

[22] Mr Wang then rang Mr Zhou on 26 September and again asked him to start work. When Mr Zhou declined to do, Mr Wang arranged to meet with him in person. They met in a bar near Mr Zhou's accommodation on 27 September, talking for around two hours. According to Mr Wang, Mr Zhou said he did not want to work because the cost of living in New Zealand was too high, he felt he would not be making enough money and he had been told by roommates at his accommodation that "if he didn't work a single day then he could bring a personal grievance and he could make more money". Mr Wang said he told Mr Zhou that he did not understand what he was saying about a personal grievance claim, HCL needed workers for its business projects and Mr Wang wanted him to start work.

[23] Mr Wang insisted that he did not tell Mr Zhou he would be paid less than in his employment agreement. He said they did talk about tax in New Zealand which meant Mr Zhou's net pay would be less than the gross figure of \$29.66 an hour.

[24] When Mr Wang contacted Mr Zhou by telephone the next day to see if he had changed his mind and would come to work, Mr Zhou told him he had a flight booked to return to China on 29 September. Mr Wang heard nothing further of Mr Zhou until 10 October when his advocate sent a letter to HCL raising a personal grievance of unjustified dismissal and unjustified disadvantage on the grounds that the company had not provided any work to Mr Zhou. The grievance letter also said "information implied that the company has received a part of the agent fee".

Assessment of evidence

[25] Determination of this matter turns on the reliability of the differing accounts of Mr Zhou and Mr Wang on what they each had said about work arrangements. For the following reasons Mr Wang's account is relied on as the more likely description.

[26] Firstly, Mr Zhou's account was not consistent. He initially alleged there was no contact with the company at all. Faced with the company's account, supported by a phone record showing the dates, times and length of calls made from Mr Wang's phone to Mr Zhou's number, Mr Zhou accepted Mr Ren and Mr Wang had contacted him several times asking him to work. At this point, however, he changed his story to make a new allegation – that he did not start the job because Mr Wang had asked him to work for a lower pay rate than set in his written employment agreement. It is a serious allegation that, if correct, Mr Zhou more likely would have made when he first raised his personal grievance, not many months later in a written witness statement prepared for the Authority investigation meeting.

[27] Secondly, there is reason to believe Mr Zhou may not have understood the net pay he would receive would be less than the gross hourly rate in his written employment agreement. Asked at the Authority investigation meeting whether he knew he had to pay tax on his wages in New Zealand, Mr Wang said: "I did not know that. I found out about it later". It is probable that Mr Zhou misunderstood what Mr Wang said about after-tax pay as a suggestion that he work for a lower pay rate.

[28] Thirdly, WeChat text messages Mr Zhou exchanged with Mr Meng around this time do not support Mr Zhou's suggestion that Mr Wang induced him to return to China by promising to help him get back the fee paid to his agent. On 22 September, and perhaps earlier, Mr Zhou asked Mr Meng to confirm he would pay back the fee "when I am back in China". In messages on 27 and 28 September Mr Meng had replied: "I will pay you, do not worry". Those arrangements, and Mr Zhou's intention to return to China, appear to have been formed before he talked with Mr Wang on the evening of 27 September.

[29] Despite the reference in Mr Zhou's personal grievance letter to "information" implying HCL had received some of that fee, there was no evidence to support a conclusion that the company was aware Mr Zhou had paid that fee to Mr Meng or that HCL got any part of that money. This made Mr Zhou's claim that Mr Wang had induced him to return to China with a promise to help him get back that fee less likely. It was also not consistent with HCL's stronger interest in having Mr Zhou stay in New Zealand and work on one of its building sites rather than return to China.

[30] Fourthly, Mr Zhou had not adequately explained the long gap between his arrival in New Zealand on 10 August and first contacting Mr Wang by text on 17 September. Although Mr Meng may have misled him about arrangements for someone to meet Mr Zhou when he arrived at the airport in Auckland, later messages show Mr Zhou was still communicating with Mr Meng and could have sought company contact information.

[31] In light of those conclusions, Mr Zhou had not established that HCL had acted unjustifiably in its dealings with him. Rather, when contacted, HCL had made reasonable efforts to have Mr Zhou start work and to facilitate him doing so. Mr Zhou, for reasons of his own, opted not to take up the work offered. As a result he had not established a personal grievance of unjustified dismissal or unjustified disadvantage.

Outcome

[32] Mr Zhou's personal grievance application is declined. He was not unjustifiably disadvantaged or unjustifiably dismissed by HCL.

Costs

[33] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[34] If unable to do so, and an Authority determination on costs is needed, HCL may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, Mr Zhou would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[35] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹

Robin Arthur
Member of the Employment Relations Authority

¹ See www.era.govt.nz/determinations/awarding-costs-remedies.