

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

5079280  
CA124/08

BETWEEN

JIN XIAO  
Applicant

AND

ADVENTURE TOURS  
CHRISTCHURCH AND  
CANTERBURY NEW  
ZEALAND LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant represented himself  
Peter Hall, Advocate for Respondent

Investigation Meeting: 4 July 2008 at Christchurch  
Submissions: 11 July 2008 from applicant  
19 August 2008 from respondent

Determination: 21 August 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Jin Xiao, says that the problem he wants the Authority to resolve is that he was unjustifiably dismissed from his employment with the respondent company, Adventure Tours Christchurch and Canterbury New Zealand Limited, on 23 November 2006.

[2] Mr Xiao seeks reimbursement of travel expenses incurred in China in the sum of \$3,100 together with interest thereon from June 2006, compensation for humiliation and loss of dignity, unpaid wages and interest on the unpaid wages. Mr Xiao also seeks reimbursement of expenses with respect to his application for permanent residency in New Zealand from the respondent and reimbursement of his filing fee in the sum of \$70 together with costs.

[3] The respondent, Adventure Tours Christchurch and Canterbury New Zealand Limited (Adventure Tours) is a duly incorporated company with its registered office in Christchurch and carries on business as an in-bound tour operator.

[4] At the material time that matters arose Martin Cookson and Geoff Venning were both directors. Mr Cookson is no longer a director of Adventure Tours but does provide some accountancy services for the company. Mr Venning is still a director of the respondent company.

[5] Adventure Tours say that Mr Xiao's employment did not in reality commence. Although it accepts that it made a job offer to Mr Xiao in August 2006, it says that it did so to assist him obtain permanent residency in New Zealand and that both parties understood that the job offer was conditional upon Mr Xiao bringing in business from China to the company. Adventure Tours say that it could not set out this condition in the employment agreement that was signed by the parties and provided to the Immigration Service because that would have been insufficient for permanent residency purposes.

[6] Adventure Tours say that it is clear to Mr Xiao that the company could not afford to pay him without the generation of business in China by Mr Xiao.

[7] Mr Xiao in a statement received by the Authority after the investigation meeting asked that the Authority not take into account some documents attached to the respondent's evidence because they had not been received within the time line set by the Authority for the investigation meeting. Parties should comply with directions given by the Authority. In this case it appears part of the respondent's problem was caused by difficulties with technology.

[8] The Authority is an investigative body and has a role of establishing the facts in an employment relationship problem. Part of doing so is considering the documents prepared at the material time.

[9] I am satisfied that during the investigation meeting Mr Xiao did have an opportunity to give evidence about the documents and wanted to proceed rather than have an adjournment of the meeting. I do intend to consider the documents as part of my investigation.

## **The background**

[10] Mr Xiao was introduced by a friend to Mr Venning and there was some discussion about the possibility of him or his parents investing in Adventure Tours. Mr Venning was advised that Mr Xiao's father had a travel agency in China.

[11] In early 2006 Mr Xiao's mother invested in Adventure Tours as a shareholder. That matter has been the subject of other litigation between the parties in another forum and aside from setting this out by way of background, I do not intend to refer to it further.

[12] Mr Xiao provided the Authority after the investigation meeting with an original letter of offer of employment with Adventure Tours dated 23 March 2006. Mr Xiao signed the letter acknowledging that he accepted the offer on 1 April 2006.

[13] The letter from Mr Cookson dated 23 March 2006 offers Mr Xiao the position of Environmental Resources Manager at Christchurch, which is expressed to start when Mr Xiao is granted permanent residency, subject to New Zealand Immigration process and timeframe. It was proposed in the letter that the terms of employment be those set out in the individual employment agreement that was attached to the letter.

[14] Mr Cookson and Mr Venning in their evidence at the Authority investigation meeting, did not accept that they had made Mr Xiao a job offer until 18 August 2006. Mr Venning said in his evidence that there was no income to pay a wage and the gross income of the company to 31 March 2006 was \$872 with the expected income to be earned in the period November to March (the high season).

[15] In June 2006 Mr Xiao went to China. Mr Xiao said it was agreed that he be paid \$3,000 and a gift of \$100 for tour operators for that visit which he described as a marketing visit. Mr Xiao did not receive any payments.

[16] Adventure Tours say that Mr Xiao was not an employee at the time and that he was asked to email Mr Venning contact details of prospects that he visited. Mr Venning and Mr Cookson say this was not done, although some emails were received from Mr Xiao during this period.

[17] Mr Venning said that these emails would usually include an inquiry as to tours wanting the price to be based on margins from *kickback commissions* to be paid by

New Zealand retailers to whom the tour party would be taken. Mr Venning emailed Mr Xiao to say that was not how Adventure Tours wanted to do business.

[18] Adventure Tours say that no business was received as a result of the China trip. Mr Xiao was unable to point conclusively to any business being generated as a result of that trip.

[19] Mr Xiao said that because he did not receive any money from Adventure Tours he had to cut his tour short.

[20] Adventure Tours accept that it made an offer of employment to Mr Xiao in a letter of offer dated 18 August 2006. The offer was again to a position of Environment Resources Manager at Christchurch, but the start date was different to the original letter of offer in that it was expressed to be when Mr Xiao was granted either a work permit or permanent residency.

[21] Mr Cookson completed an employer supplementary form and an employment questionnaire to help the Immigration Service made a decision regarding Mr Xiao's application. Mr Cookson did not provide, as requested in the questionnaire form, any financial records to confirm that the business had the ability to financially sustain Mr Xiao's employment full-time. Mr Cookson said that he did not provide the records because it would have been clear to the Immigration Service that the business could not sustain Mr Xiao's employment.

[22] Mr Cookson and Mr Venning said it was clearly explained and understood by Mr Xiao that Adventure Tours could only offer a job and afford to pay him in that job if Mr Xiao introduced the level of business through his father's travel agency in China and other contacts that he said he had in China. Mr Cookson and Mr Venning both said in evidence that Mr Xiao knew that there was no money to pay his wages without that business being generated.

[23] Mr Xiao said in his evidence to the Authority that he did not realise anything about the financial situation of Adventure Tours at the time the offer of employment was received. He said that before he signed the agreement he was not aware that the employment opportunity was only viable if he generated the income from China. Mr Xiao is quite correct in his evidence that there was nothing to that effect in the employment agreement.

[24] Mr Cookson and Mr Venning said in their evidence that for the application for residency Mr Xiao needed to show an unconditional open ended job offer and that would not have been satisfactory if his offer of employment was subject to Mr Xiao generating income from China.

[25] As I understood the evidence, the Immigration Service would not have looked upon the requirement that Mr Xiao generate income for employment as an appropriate one for residency purposes.

[26] From time to time Mr Cookson and/or Mr Venning asked Mr Xiao after August 2006 whether there was any business opportunities from China.

[27] Mr Xiao said that after August 2006 he went into the office and performed some work, although said that he was given no training or proper equipment on which to do work. Mr Cookson thought initially that Mr Xiao did not attend at the office at all but said he was told by Mr Venning that Mr Xiao did in fact do some work for Adventure Tours.

[28] Mr Venning said that Mr Xiao's visits to the office were erratic and that he did not present for any extended periods. Mr Venning said that the only work completed by Mr Xiao was a basic draft of an application for Green Globe accreditation. He said that he would estimate that would be in the vicinity of 2 hours work on Mr Xiao's part. Mr Venning said that he did not expect Mr Xiao to be there between the hours of 8am to 5pm each day because whilst acknowledging they had some sort of relationship, Mr Venning did not really see Mr Xiao as an employee.

[29] Mr Venning and Mr Cookson said that there were meetings held in October and November 2006 during which it was put to Mr Xiao that there were problems about continuing to hold out to the Immigration Service that Adventure Tours intended to employ Mr Xiao in the knowledge that there was no income from which wages could be paid.

[30] Mr Venning and Mr Kookson also became concerned that Mr Xiao had been operating his own business. Mr Xiao did not accept that this was the situation.

[31] On 23 November 2006 Mr Xiao's employment was terminated for the reasons set out below:

*Dear Martin,*

*At a meeting this week Adventure Tours made the decision not to proceed further with your employment. In reality the arrangement never properly commenced. As you know, the arrangement centred around you coming on board to assist the company with obtaining certain environmental accreditations and that your family and business contacts in China would lead directly to a flow of business from that source. It was always the understanding between us that, without the business out of China, Adventure Tours would not have the income to enable it to pay your salary. It has been obvious for some time that you are not able to generate sufficient level of income to allow the arrangement to proceed and you have not done any work toward the environmental accreditations.*

*It seems best for both of us that we mutually agree to terminate arrangements between us and I would ask that you sign and return the copy of this letter by way of acknowledgment (including acknowledgment that no wages/salary payment is owing to you).*

*We regret that things could not have worked out better but wish you well in your future endeavours.*

## **The issues**

The issues for the Authority are as follows:

- Was Mr Xiao an employee in June 2006 when he travelled to China?
- Was it understood by both parties at the time of entering into the employment agreement in August 2006 that Adventure Tours did not have the income to pay Mr Xiao unless he obtained business for the company from China?
- Was Mr Xiao unjustifiably dismissed from his employment?
- If Mr Xiao was unjustifiably dismissed, then what remedies is he entitled to and are there issues of contribution?

### **Was Mr Xiao an employee in June 2006 when he travelled to China?**

[32] There was an offer of employment for Mr Xiao made by Adventure Tours in April 2006. The start date of that employment however was stated to be when Mr Xiao was granted permanent residency. Mr Xiao did not obtain permanent residency and therefore the condition for commencement of employment was never satisfied.

[33] I do not find that when Mr Xiao travelled to China in June 2006 he was an employee at that stage because the offer of employment that he had received prior to that time was conditional upon permanent residency.

[34] The Authority therefore does not have jurisdiction with respect to expenses incurred and/or money that Mr Xiao say that he was promised in terms of that travel.

**Was it understood by both parties at the time of entering into the employment agreement in August 2006 that Adventure Tours did not have the income to pay Mr Xiao unless he obtained business for the company from China?**

[35] Following the investigation meeting I requested some information from Immigration New Zealand. The parties understood that I was to request some information and when copies arrived from Immigration New Zealand they were provided to the parties.

[36] The only job offer from Adventure Tours that Immigration New Zealand was aware of was the offer in August 2006.

[37] I asked Mr Cookson why an offer of employment was made to Mr Xiao in August when it would have seemed prudent to wait a little longer to see if business came from China before entering into an employment agreement. Mr Cookson recalls, as did Mr Venning, that there was some urgency in terms of Mr Xiao's work permit and this does appear to be supported by the information received from Immigration New Zealand that Mr Xiao's work permit was to expire on 20 August 2006.

[38] It is clear from the company's financial statements at the material time that there did not appear to be any money to pay wages for a new position, however desirable a position of Environment Resource Manager may have been.

[39] Document AT5 which was an email from Mr Venning to Mr Xiao and dated 25 August 2006, provides, amongst other matters, that:

*I have spoken to Mark at MK .immigration re your P.R. application and employment with us.*

*Martin you do need to organise and confirm some Chinese tours for this coming summer tourist season to generate income for Adventure tours' account (and our records for Immigration to see!) therefore your wages.*

*Mark said NZ Immigration will check all this very carefully so we must not be unprepared nor make any mistakes, for your sake!*

*Either tours arranged and booked with deposits prepaid, not three months later! Or your Dad invests with us, this is another option, but whichever way please give this matter urgency for YOUR P.R.*

[40] From an early stage there is a clear link between the commitment by the company to employ Mr Xiao and his application for permanent residency. For example, there is an email dated 21 July 2006 from Mr Venning where he sets out a different view on assisting Mr Xiao with travel expenses in China to that of the others in the company. Mr Venning said amongst other matters in that email that *Mr Kookson and another person with some involvement in the company thought because we had assisted you with your P.R. we have spent a lot of our time and have committed to employing you even though we really cannot afford it at this early stage of Adventure Tours, then they think fair is fair.*

[41] The evidence does not support that from 18 August 2006 until the termination of his employment in mid November 2006 Mr Xiao requested payment of wages and/or worked to a normal pattern of work.

[42] Adventure Tours was concerned about the fact that there were no confirmed bookings coming from China and I find it more likely than not that they had a discussion with Mr Xiao about the risk if the company continued to hold out to Immigration Service that it intended to employ or employed Mr Xiao.

[43] The evidence supports that there was a discussion between Mr Venning, Mr Cookson and Mr Xiao in or about late October or early November 2006 about the situation and business from China.

[44] There was also some discussion between the parties as to whether Mr Xiao's wages could be paid by his father in China and then circulated through Adventure Tours to make it look as if the company was paying wages to Mr Xiao for the Immigration Service.

[45] There was an email to Mr Venning from Mr Xiao about that on 3 November 2006. In the email Mr Xiao said that *I understand that the company cannot pay me wages is because there is no income generated but I am still trying to work hard.*

[46] As it was, that avenue was not pursued by both parties as they recognised the difficulties in doing so.

[47] There is support for a conclusion from the evidence that there was an understanding on the part of both parties that the company had limited financial resources and would need to have Mr Xiao generate business in China.

[48] I find it is more likely than not that Mr Xiao understood the payment to him of any wages was dependent on him generating business for Adventure Tours from China. I find Mr Xiao was offered and accepted employment with Adventure Tours on that basis.

**Was Mr Xiao unjustifiably dismissed from his employment?**

[49] Mr Xiao did from time to time put forward that tour parties would/could come to New Zealand from China. The basis on which these matters were put forward was not acceptable to Adventure Tours. This was because Mr Xiao put forward that tour parties would come from China on the basis that all travel, accommodation, meal and related expenses were met by Adventure Tours and then those expenses reimbursed to Adventure Tours three months after the tour had ended and the tour parties had returned to China. Mr Xiao was advised that Adventure Tours could not afford to do business in this way. I do not accept Mr Hall's submission that Mr Xiao misrepresented that he could obtain business from China. The evidence did not go that far.

[50] It was clear that for somebody else to pay Mr Xiao's wages would be extremely risky and potentially fraudulent.

[51] There were also some other concerns for the company that Mr Xiao had been operating his own business. Mr Xiao denied this.

[52] Whilst it is most likely that the matter of running his own business was not put to Mr Xiao, it did not form part of the written reasons for his dismissal in the letter of 23 November 2006.

[53] I find that Adventure Tours could not afford to employ Mr Xiao in the absence of business opportunities from China which were not forthcoming. It did not therefore wish to continue with the employment relationship.

[54] A fair and reasonable employer in terms of the test of justification set out in s.103A of the Employment Relations Act 2000, would have advised Mr Xiao of this matter formally and the reasons behind it before termination of the employment relationship.

[55] In this case also, fairness required Mr Xiao be advised he could bring a support person or representative to the meeting. It appears that at least at one of the meetings Mr Xiao's immigration consultant attended, but I do not find that he attended as a support person for Mr Xiao.

[56] It appears that Adventure Tours had quickly reached a decision to terminate Mr Xiao's employment and no longer hold out to the Immigration Service that there was an offer of employment. It appeared from reading the emails and hearing the evidence that at least part of the reason for the decision was that Mr Xiao was conducting his own business and therefore Adventure Tours should no longer assume the risks of offering him employment when he had divided loyalties.

[57] I am not satisfied that this allegation was put to Mr Xiao clearly or investigated properly before dismissal. This was a serious allegation. Mr Xiao denied and provided an explanation in terms of these matters. It seems that any decision to terminate Mr Xiao's employment had essentially been predetermined and that he did not have a proper opportunity to persuade Adventure Tours in terms of his future employment.

[58] Although I accept that Adventure Tours could not afford to employ Mr Xiao and that termination of his employment was almost inevitable, the procedure that was adopted by Adventure Tours was not the procedure a fair and reasonable employer would have undertaken at this time. Mr Xiao was an employee and was entitled to a fair process in terms of his relationship ending with Adventure Tours notwithstanding the arrangements in this case which were unusual.

[59] In conclusion, I find that Mr Xiao was unjustifiably dismissed from his employment on 23 November 2006 because the process adopted in dismissing him from his employment was not a fair and reasonable employer would have done in all the circumstances that existed at the time.

[60] Mr Xiao has a personal grievance that he was unjustifiably dismissed from his employment with Adventure Tours.

## **Remedies**

### *Contribution*

[61] The only issue in my view where there could be any contribution concerns the allegation that Mr Xiao was carrying on other business. The investigation into that was limited and Mr Xiao denied that was the situation. Mr Xiao received no money whatsoever from Adventure Tours as an employee. I do not consider it appropriate in all the circumstances to reduce the remedies that I shall go on to award for reasons that he may have undertaken other work or business during this time.

### *June/July trip to China*

[62] I do not make an award reimbursing Mr Xiao for any work that he performed in China that may have been for Adventure Tours because I have not found that Mr Xiao was an employee at this time.

### *Reimbursement of wages*

[63] Mr Venning put the total work Mr Xiao performed for Adventure Tours at about 2 hours. Mr Xiao, on the other hand, said that he attended at the office regularly but was not given any equipment or assistance to be able to perform his job.

[64] I do not find however that Mr Xiao performed work in the usual way that an employee would and as was set out in the employment agreement. I have found that Mr Xiao understood that he would not be paid wages unless he generated business through China. It is unacceptable however for Mr Xiao to perform any work for Adventure Tours as an employee and not receive payment. It is unclear to me exactly what work Mr Xiao did perform and the time that it took to undertake it.

[65] I do not find that Mr Xiao lost three months of wages as a result of the grievance. Considering the matter overall, I am of the view that a fair and reasonable award for the work that he actually performed would be one week's wages.

[66] Mr Xiao wanted interest to be paid on this money but in the circumstances of this case I am not inclined to order interest be payable.

[67] Mr Xiao is entitled to one week's wages which at \$14 per hour for 40 hours work is a gross sum of \$560.

[68] I order Adventure Tours Christchurch and Canterbury New Zealand Limited to pay to Jin Xiao the sum of \$560 gross being one week's wages.

*Compensation*

[69] I accept that Mr Xiao suffered injured feelings and a deep sense of frustration when he was dismissed.

[70] I have reached a finding that it was almost inevitable that Adventure Tours would have to terminate Mr Xiao's employment because of a lack of funds to pay him and because the company could not continue to hold out that Mr Xiao was employed to Immigration New Zealand in those circumstances.

[71] Mr Xiao can be compensated therefore for the manner of the dismissal rather than the loss of the job itself.

[72] In all the circumstances, I find that a suitable sum for compensation for Mr Xiao under s.123(C1) of the Employment Relations Act 2000 is \$1,500.

[73] I order Adventure Tours Christchurch and Canterbury New Zealand Limited to pay to Jin Xiao the sum of \$1,500 without deduction being compensation.

*Compensation for failure of permanent residency application*

[74] The Authority may make an award of compensation for the loss of any benefit, whether or not of a monetary kind which Mr Xiao might reasonable have been expected if the personal grievance had not arisen.

[75] Given that Immigration Service would have required Adventure Tours eventually and before granting any application for permanent residency, to provide evidence of its ability to pay Mr Xiao, then I do not find I can conclude permanent residency was a benefit Mr Xiao would have expected to obtain if the personal grievance had not arise. Put shortly, Adventure Tours could not accord to employ Mr Xiao or demonstrate that they could for his residency purposes.

[76] In those circumstances, I make no award for the expenses that Mr Xiao incurred in making his permanent residency application.

**Costs**

[77] Mr Xiao sought \$2,000 costs.

[78] Costs are not generally available to self represented applicants and there is no reason why in this particular case I am persuaded an award should be made to Mr Xiao other than reimbursement of the \$70 filing fee.

[79] I order Adventure Tours Christchurch and Canterbury New Zealand Limited to pay to Mr Xiao the sum of \$70 being the filing fee.

**Summary of findings and order made**

- I have not found Mr Xiao was an employee of Adventure Tours Christchurch and Canterbury New Zealand Limited until 18 August 2006.
- I have that Mr Xiao was unjustifiably dismissed from his employment with Adventure Tours Christchurch and Canterbury New Zealand Limited on 23 November 2006.
- I have found that Mr Xiao knew the company could not afford to pay him wages unless he generated business from China and that he did not perform work as in a normal employment relationship for the period of employment.
- I have found that Mr Xiao should be reimbursed one week's wages for work actually performed in the sum of \$560 gross.
- I have awarded Mr Xiao under s.123(1)(c)(i) of the Employment Relations Act 2000 the sum of \$1,500 without deduction being compensation for humiliation.
- I have not found that the expenses incurred in the permanent residency application was a loss of a benefit that Mr Xiao might reasonably have been expected to obtain in all the circumstances.
- I have limited recovery of costs and expenses to Mr Xiao to the filing fee in the sum of \$70.

Helen Doyle  
Member of the Employment Relations Authority

