

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 35
5365515

BETWEEN

WANZHI HUANG
Applicant

AND

FEI LI TRADING AS ELAND
INTERNET CAFÉ AND
GAMES
Respondent

Member of Authority: P R Stapp

Representatives: Mr Huang in person
Graeme Ogilvie, Advocate for the Respondent

Investigation Meeting: 27 and 30 January 2012

Submissions Received: By 10 February 2012

Determination: 12 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Huang has made a claim for unpaid wages for a period that he says he worked for Mr Fei Li trading as Eland Internet Café and Games located in Wellington. Also, Mr Huang has claimed reinstatement, lost wages, compensation for future earnings and compensation for hurt and humiliation for an unjustified dismissal. Mr Huang's claims have been denied by Mr Li, the owner of Eland Internet Café and Games business. Mr Li and his wife Vicky Li claimed that Mr Huang never commenced work and they accept that he was never paid any money for any of the time that Mr Huang has claimed.

[2] An application for interim reinstatement was lodged in the Authority by Mr Huang. However, the matter has been dealt with at a full hearing where all the

substantive issues could be heard. The interim application was not pursued by Mr Huang when an early date was provided, and he consented to a full hearing instead.

[3] The employment relationship problem concerns whether or not Mr Huang ever worked for Mr Li before their relationship ended on 5 December 2011. Mr Li's wife has also been involved because she speaks English, whereas Mr Li does not. All of them are saying entirely different things about what happened and have accused each other of developing evidence to support their positions in the matter. The differences in their evidence, particularly on who wrote and signed various documents (including different employment agreements and email letters), have made this matter more difficult and complex. However, on some of the more contentious issues I have resolved the differences by relying on the areas where there is common ground and deciding what most likely happened.

The issues

[4] Was the applicant, Mr Huang, employed by Mr Fei Li?

[5] Did Mr Huang work, and if so, how many hours did he work and is he owed any wages, and how much? Mr Huang has claimed \$19,440 wages for the full period based on a 40 hour week that he claims he was employed by Mr Li to work.

[6] Was Mr Huang dismissed on 5 December 2011?

[7] Is Mr Huang entitled to reinstatement, one year's wages for future lost earnings, lost wages, compensation for hurt and humiliation in the sum of \$20,000 for emotional harm and distress?

Factual discussion

[8] Mr Huang is a Chinese national. He entered New Zealand on a visa sometime prior to May 2011. On 27 May 2011 Mr Huang obtained a work visa from Immigration New Zealand, which enabled him to work as an IT Support and Computer Technician for Eland Internet Café in Wellington. The visa was included in his passport. The application for the visa was supported by an offer of employment dated 10 May 2011 from Mr Fei Li the owner of the Eland Internet café. This offer was signed by Mr Huang, who agreed to accept the conditions of employment, and Mr Li. The offer was for appointment to the position of IT Support and Computer

Technician in a permanent full time position with a start date in the position of 1 June 2011. It was agreed that the rate of pay would be \$18 per hour and the hours of work from 9.30am to 6.30pm Monday to Friday. The agreement was for him to work 8 hours per day. Also, the terms were included in an individual employment agreement between Eland Internet Café (Mr Li) and Mr Huang and that the place of work would be primarily in Cuba Street, Wellington. This agreement (hereafter called the first agreement) was signed and dated by both parties (16 May 2011). It is common ground that the signatures on the document are the signatures of the parties.

[9] Mr Huang claimed that he started work on 1 June 2011. It is common ground that Mr Huang did attend the place of work, but according to Mr and Mrs Li, Mr Huang had to produce a copy of his work permit and also his Police clearance from China before they could allow him to start in the job that had been planned for him. They say they needed him to work because they planned to have a family and that would make it difficult for Mrs Li to continue working at the café. Mr and Mrs Li claim that Mr Huang never provided the documents they requested. Also they say that although he was going to be employed as an IT Support and Computer Technician he never did any of that work at the Café. It is common ground that Mr Huang was not given the passwords to the business's email address. Instead Mr Huang registered his own password using the name of the business for his own purposes. He never provided that password to Mr and Mrs Li. Nothing turns on this, except that the addresses go some way to explain Mr Huang's and Mr and Mrs Li's roles. Mr Huang was not given the pass word to the business email address because of the existence of confidential information. Also, Mr and Mrs Li were not able to access Mr Huang's address because he did not give them his password.

[10] It is common ground that Mr Huang had been provided with a key to the premises and he went into the Café most mornings and opened the premises, which he was seen doing. He was present at the café and observed by customers and the property manager when they were present. Mr and Mrs Li say that they were happy to let Mr Huang to have access to the internet free, that he was given drinks without charge, and that he would do some odd jobs and would sometimes help customers in return.

[11] On 15 July 2011 Mr Huang made an application to Immigration New Zealand for residence in New Zealand. Also during this time Mr Huang commenced work for

an organisation called MASH Trust, a mental health provider in Wellington. He did not tell Mr and Mrs Li and Immigration New Zealand about this work. He worked at MASH at night, involving overnight sleepovers.

[12] Mr Huang has claimed that he was never paid at all by Mr Li and that on 5 December 2011 he was dismissed without any proper cause.

[13] During the Authority's investigation meeting (on the second day) Mr Huang claimed that he left a copy of the work visa from his passport on some table at the premises of the café, for Mr and Mrs Li to view. Mr and Mrs Li denied ever seeing the document, but did learn of it when Mrs Li made a telephone call to Immigration New Zealand's call centre on 25 November 2011 when it was confirmed that Mr Huang could work.

[14] I hold that it was simply not plausible that Mr Huang left a copy of the work visa on some table at the premises of the business. This is because first he never directly addressed the issue before making the claim at the Authority's investigation meeting on the second day. Second, the transcript of the call centre discussion (produced during the Authority's investigation) makes it more likely than not that Mr and Mrs Li were correct that they did not know that he had a work permit until it was clarified on 25 November (telephone call with the call centre).

[15] Also it is not plausible that the purpose of written notices with Mr Huang's name on were left by Mrs Li at the premises to let him know that cookies had been left for him to eat. On the same notes were instructions that had to do with the premises and work. Mr and Mrs Li tried to explain that the notes with the instructions on were communications between them because Mr Li was working long hours and got home late and would sleep the next day. I did not find their explanations plausible, because Mr Huang's name was on the same notes and no one had said that cookies had been left for Mr Huang until new evidence was raised orally for the first time in the Authority's investigation meeting on the second day by Mrs Li. Also, the explanations were not reasonably provided earlier in evidence from Mr and Mrs Li and put before the Authority in advance of the investigation meeting. Given the significance of the information from Mr Huang that he had provided earlier, I hold that it would have been more plausible for the matter to have been addressed in advance of the investigation meeting by Mr and Mrs Li and or in their written briefs, given that they had representation to help them.

[16] Immigration New Zealand became interested in the relationship between Mr Huang and Mr and Mrs Li in early December 2011. First, Mr Huang informed Mrs Li that Immigration New Zealand required an organisational chart from Mr Li and her (which was provided) and their financial statements. As a consequence of the request for the latter Mrs Li decided to speak to the Immigration Service. Second, a meeting was held with Immigration New Zealand and Mrs Li on or about 14 December 2011. During the meeting Mrs Li became aware of documents being held by Immigration New Zealand that raised concerns for her as to where the documents had come from and who had signed them. The documents included more employment agreements and emails and letters. The additional employment agreements (third and fourth agreements) purported to be a change to the commencement date of the employment (1 December 2011). Both parties deny that they personally sent the documents to Immigration New Zealand and denied signing the documents, but accuse each other of doing so. It is agreed that Mrs Li provided a copy of the first employment agreement to Immigration New Zealand, but with the two last pages missing (hereafter called the second agreement). Third, Immigration New Zealand requested Mr Huang to provide certain details and further information for his application, including original documents that he had resisted providing earlier. Who sent the emails to Immigration New Zealand remains unexplained given the evidence from Mr Huang and Mr and Mrs Li.

[17] After the call centre discussion on 25 November 2011 Mrs Li asked Mr Huang to go to Immigration and get a copy of the work permit. He apparently did this, but resisted showing his passport to Mr and Mrs Li to witness.

[18] On 2 December Mrs Li and Mr Huang had another discussion about her opinion that he was hiding things and that he had lied about Immigration asking for the business's financial statements. They argued about whether or not Mr Li knew about the work permit being issued on 27 May and his application for permanent residency, which he had not informed them about earlier.

[19] On 5 December Mrs Li informed Mr Huang that she and Mr Li would not support him with the Immigration office any more because they had the view he had lied to them. He was not happy about that. Mrs Li asked him not to come into the café anymore and she informed him that she would tell Immigration New Zealand that they would not support his application for permanent residency. Mr and Mrs Li sent a

letter to Immigration New Zealand dated 6 December that did not support Mr Huang's application for residency.

[20] Subsequently, Mr and Mrs Li received some text messages from Mr Huang that caused Mrs Li to go to the Police because she felt threatened, and Mr Huang received a warning from the Police. He now regrets the action.

[21] Mr Huang's claims for reinstatement, his pay and compensation have not been able to be resolved between the parties, despite having attended mediation. It falls to the Authority to make a determination on the outstanding issues.

Determination

Was Mr Huang working for Mr Li?

[22] I have no hesitation concluding that Mr Huang was working for Mr Li. This is because:

- a. Mr Huang had been given an offer of employment;
- b. That the work permit had been approved on 27 May 2011 before the start of the employment agreement;
- c. That there was a signed off employment agreement starting from 1 June 2011;
- d. That Mr Huang's employment was sponsored by Mr Li;
- e. That Mr Huang attended the café and was seen working by various witnesses;
- f. That Mr Huang had been given the keys to the premises;
- g. That Mr Li more than likely permitted Mr Huang to work while he was waiting on the completion of the paperwork.

[23] Whether or not Mr Huang actually was doing the work prescribed in the role that he had a visa for is an entirely separate issue for someone else. Witnesses who were called by Mr Huang indicated that Mr Huang had various duties and took responsibility when Mr and Mrs Li were not present at the café. Also, he had been

given a key and opened up the café in the morning. Mr Li confirmed that Mr Huang did odd jobs and this was in anticipation of him producing the documentation that had been completed. In any event he had his work permit, but did not disclose that he had it. There was no requirement under the terms of employment for Mr Huang to provide the Police clearance from China that Mr and Mrs Li had requested. Their request for a Police clearance would not preclude him working and being paid for any work because there was no formal requirement in his employment for such a clearance, I hold. Any Immigration requirement for a clearance was an entirely separate matter, and does not seem to be an issue, because Immigration New Zealand had issued a work visa. I also add that although the work that Mr Huang was witnessed seen doing was not necessarily in accordance with the duties under the first employment agreement that does not exclude the likelihood that he was actually working. Indeed I am satisfied Mr Li condoned Mr Huang working in anticipation of the paperwork.

[24] I accept that Mr Huang's belated claim for wages should not be held against him for not making the claim earlier. This is because he had other employment, he had arranged accommodation, and was being provided with certain benefits, although the latter does not excuse the respondent's conduct.

[25] In the circumstances the third and fourth employment agreements purporting to start the employment from 1 December 2011 remain unexplained, and therefore I can not rely on them.

Arrears of wages and holiday pay

[26] Therefore, Mr Huang is entitled to the wages under his employment agreement for the agreed hours of work. The agreement for full time work had been entered into and Mr Huang was available to work as required. There was no evidence that there was any variation to the agreement at any time, or that Mr Huang's claim for hours and work are wrong and/or inaccurate. There were witnesses who came forward and said that they did see Mr Huang at the café in support of his case. According to witnesses Mr Huang carried out some chores and that he did fix some problems and dealt with customers' needs (scanning and faxing). Also, the witnesses were consistent and clear that when they saw Mr Huang, Mrs Li was not always at the café. He is entitled to be paid for his work from 1 June 2011 until 5 December 2011 as had been agreed. I will also include holiday pay to settle up all outstanding matters.

Based on the terms of the employment agreement Mr Huang's arrears of wages and holiday pay amount to \$19,440 and \$1,555.20 respectively.

The dismissal

[27] Mr Huang was dismissed on 5 December 2011 when he was asked to leave the café at the initiative of Mr and Mrs Li. Mr and Mrs Li formed the view that Mr Huang could not be trusted. There was no proper investigation about that opinion, because they had made up their minds. They both formed their view about Mr Huang based on what Mrs Li had seen and heard when she was interviewed by Immigration New Zealand and the conclusion that Mr Li was hiding something because he had not told them about the existence of his visa and had not provided a Police clearance. Given that Mr Li had sponsored Mr Huang's work in New Zealand and that Mr Huang had a work visa dated 27 May a fair and reasonable employer could not have come to an honestly held opinion that Mr Huang could not be trusted without a proper investigation.

[28] Mr and Mrs Li's actions on 5 December 2011 in bringing to an end Mr Huang's employment was not the action that a fair and reasonable employer could have done (s 103A of the Employment Relations Act applied). This section applies from 1 April 2011 since the dismissal occurred after that date. Under s 103 A (3) (a) of the Act there was no proper investigation in regard to the allegation about Mr Huang. Taking into account that the respondent runs a small business and that there are language difficulties, the resources available would have been limited, but in such a situation Mr and Mrs Li would be expected, like any business, to obtain advice and appropriate information before acting. Under section 103A (b)-(d) of the Act the concerns were not properly raised with Mr Huang in the context of him facing dismissal; Mr Huang did not have a reasonable opportunity to respond before Mr and Mrs Li decided that they could no longer trust him; and they failed to genuinely consider any explanation from Mr Huang, given they had made up their minds about him. These are not minor defects and the result was that Mr Huang was treated unfairly, I hold. There are no other relevant factors.

[29] Thus, Mr Huang has a personal grievance for unjustified dismissal. However his failure to properly communicate with Mr and Mrs Li means that his action has seriously contributed to the situation. Mr Huang has been evasive and uncommunicative on certain matters. If he had his permit on 27 May 2011 he has not

provided any suitable reason why he did not provide it to Mr and Mrs Li at the time. He says that he was frightened for his safety and security as a Chinese national. However he had a duty to provide Mr and Mrs Li with the visa when they requested it, I hold. As it was in his passport he had an obligation to show them the passport visa, I hold.

The remedies

[30] Mr Huang has asked for reinstatement. This is simply not practicable and reasonable. First the business is too small to absorb him successfully back as if nothing has happened. Second there is a major issue of trust between Mr Huang and Mr and Mrs Li. This is supported by Mr Huang not satisfactorily explaining his edited bank accounts produced that did not provide all the details of deposits and withdrawals. Mr Huang and Mr and Mrs Li all have made various allegations about each other and denied each other's allegations. All these matters have created tension that is not going to be sorted out smoothly and quickly. Reinstatement is therefore declined.

[31] Mr Huang has asked for twelve month's future salary. I also decline this claim because there is absolutely no certainty that he would have worked for Mr Li for this period of time. This is particularly so considering he has been working for another employer not named on his work visa. Although his work visa is valid until 13 May 2013 he applied for permanent residence that might have meant he would move on elsewhere given his work at the Trust. His application for permanent residence has been declined by Immigration New Zealand and his immigration status is uncertain given the events of 5 December and the involvement of Immigration New Zealand.

[32] He has been out of work since 5 December 2011 since his employment with Mr Li ceased. He did not mitigate his losses and did not make any arrangements with Immigration New Zealand about his circumstances that could have allowed for him to mitigate his losses. His claim for lost wages can only be for 7 weeks and 6 days from the date that he said he had been dismissed until the investigation meeting. Based on the contractual hours I have assessed that his lost wages amount to \$3,456, and must be reduced by 30% for contribution. The sum amounts to \$2,419.20.

[33] His compensation is at the lower end of the scale and at a modest level I hold. His claim for \$20,000 has not been established on the basis of his evidence and solely

on his assertions about the impact on him. I assess his evidence to warrant \$3,500 and this is to be reduced by 30% also.

[34] He is entitled to the filing fee of \$71.56 and hearing fee of \$306.66.

The Authority's orders

[35] Fei Li is ordered to pay Wanzhi Huang:

- 1) \$19,440 arrears of wages and \$1,555.20 holiday pay
- 2) \$2,419.20 lost wages from the date of his dismissal
- 3) \$2,450 compensation for emotional distress
- 4) \$71.56 filing fee and \$306.66 hearing fee.

[36] The claim for future lost earnings is dismissed. The claim for reinstatement is dismissed.

P R Stapp
Member of the Employment Relations Authority