

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 369
3102812

BETWEEN RAN CHEN
Applicant

AND WNY GROUP LIMITED
First Respondent

AND LI WU
Second Respondent

Member of Authority: Marija Urlich

Representatives: Applicant in person
Jennifer Wickes, counsel for the respondents

Investigation Meeting: 1 June and 28 July 2021

Date of determination: 19 August 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Between May and October 2019 WNY Group Ltd (WNY) paid Mr Chen \$3,206.08 every month.¹ A few days after each payment Mr Chen paid that amount (rounded up to the nearest dollar) into a bank account of Li Wu, the second respondent in these proceedings and the sole director of WNY.² On 10 April 2020 Mr Chen contacted Mr Wu to ask him to apply for the Covid-19 government wage subsidy.³ Mr Wu declined this request. On 21 May 2020

¹ WNY made six payments to Mr Chen of \$3,06.08 (net) on 29 May, 27 June, 26 July, 26 August, 30 September and 29 October 2019 (totalling \$19,236.48).

² Mr Chen paid \$3207.00 into a bank account of Mr Wu and his wife on 30 May, 28 June, 29 July, 29 August, 30 September and 29 October 2019 (totalling \$19,242.00).

³ WeChat message exchange Mr Chen and Mr Wu 10 April 2020. WeChat is a messaging application.

Mr Chen lodged a claim in the Authority for unjustified dismissal seeking remedies of reinstatement, wage arrears and compensatory damages.

[2] WNY and Mr Wu say Mr Chen was never employed by WNY or Mr Wu. They say the payments (and pay backs) were an arrangement entered with Mr Chen at the request of Meizi Xu, who at that time provided accountancy services to WNY.⁴ Mr Wu said at all times he understood Ms Xu was Mr Chen's wife and because he (Mr Wu) had a close working relationship and friendship with Ms Xu he agreed to her request.⁵ He understood from Ms Xu the purpose of the arrangement was to secure the government kiwisaver contribution but that it could be for banking or some other purpose unknown to him. The arrangement stopped in October 2019 when Ms Xu told Mr Wu her relationship with Mr Chen had broken down and the arrangement should end. No further payments were made and Mr Wu heard nothing from Mr Chen, other than receiving a happy Chinese new year message, until April 2020 when the wage subsidy request was made. In the alternative, WNY and Mr Wu say Mr Chen failed to raise any personal grievances within the statutory 90 day time frame and they do not consent to the personal grievances being raised out of time.

The Authority's investigation

[3] The procedural history of this matter before the Authority is as follows:

- On 21 May 2020 Mr Chen lodged a personal grievance for unjustified dismissal in November 2019.
- On 17 June WNY filed a statement in reply which included Mr Chen had not raised his personal grievance within the 90-day statutory limit.
- On 30 June the parties were directed to mediation within 10 working days of that date. The Authority understands the parties have complied with the direction.

⁴ WeChat message Ms Wu to Mr Chen 22 May 2019.

⁵ A number of WeChat messages from Mr Chen and Ms Xu to Mr Wu thanking him for his hospitality on behalf of themselves and family members have been provided to the Authority. In a WeChat audio recording provided to the Authority Ms Xu describes Mr Chen to Mr Wu as her "laogong" which was translated to the Authority as "husband" or "partner".

- On 6 August the Authority contacted the parties to set down a case management conference to timetable the investigation of Mr Chen's application.
- On 7 August Mr Chen advised by email he was overseas, wished to change the date of the proposed case management conference and would notify the Authority as soon as possible of his return date to New Zealand.
- By minute dated 7 August the application was put on hold pending further advice from Mr Chen (First Minute).
- By emails dated 23 and 25 December Mr Chen advised the Authority he was in New Zealand and wished to proceed with his application.
- On 9 February 2021 a case management conference was held with the parties. An interpreter of the Mandarin language was in attendance. By minute dated 9 February (Second Minute) the timetabling directions to investigate the preliminary 90-day issue on the papers were recorded.
- The parties filed affidavits and submissions as directed. By minute dated 8 April the Authority proposed a further case management conference to discuss whether the preliminary issue was in fact suitable to be decided on the papers because it was apparent from the information filed a more fundamental dispute existed as to the nature of the parties' relationship (Third Minute).
- On 22 April the parties attended a second case management conference. An interpreter of the Mandarin language was in attendance. The discussed timetabling directions for an investigation meeting and issues to be investigated and determined were set out in a minute dated the same day (Fourth Minute).
- An investigation meeting was held on 1 June. It adjourned part heard. An interpreter of the Mandarin language was in attendance. By minute dated 2 June the parties were directed to file any information in their possession and control relevant to the issue of the nature of the parties' relationship and recorded that a witness summons would likely be issued to Ms Xu whose evidence had been part heard (Fifth Minute).
- On 28 July the investigation meeting resumed. Ms Xu did not attend the Authority as required by the summons served on her by email. She wrote to the Authority that

she was too unwell to attend. After hearing from the parties the Authority has not sought to enforce the summons against Ms Xu.

[4] The Authority has received evidence from Mr Chen, Mr Wu and Ms Xu along with information and submissions from the parties.⁶ I am satisfied the parties have had a fair opportunity to produce any relevant material in their possession and control which would assist the Authority to resolve the issues. 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. In determining this matter the Authority has carefully considered all the material before it, including all information received from the parties and their submissions.

Issues

[5] The following issues are to be investigated and determined by the Authority:

- (i) did an employment relationship exist between the parties?
- (ii) if an employment relationship existed did Mr Chen raise a personal grievance within the statutory 90-day period and if not, do grounds exist for granting leave to raise a personal grievance out of time?
- (iii) if a personal grievance was raised or leave is granted was Mr Chen unjustifiably dismissed? If so is Mr Chen entitled to any of the remedies sought?
- (iv) are either party entitled to costs?

Mr Chen's position

[6] Mr Chen says he was employed by WNY and/or Mr Wu because he received wages from WNY and the pay slips show PAYE deductions, kiwisaver deductions and contributions. He says this evidence is determinative of the issue of whether the parties were in an

⁶ The information includes, in addition to evidence and submissions of the parties received at the investigation meeting, the unsworn affirmation of Ran Chen 30 March 2021, email submission of Ran Chen 30 June 2021, affirmations of Mr Wu dated 8 March and 14 April 2021 and submissions and further information filed on behalf of the respondents 9 March, 14 April 2021 and 28 June 2021.

employment relationship or is so compelling that an employment relationship existed between the parties that the onus is on WNY and/or Mr Wu to establish otherwise.

[7] In addition Mr Chen says:

- though in their evidence to the Authority he and Ms Xu deny they were or had been in a relationship as understood by Mr Wu, Mr Chen says his relationship with Ms Xu is not relevant to whether he was an employee of WNY;
- during his employment he worked normally as requested by WNY and it is obliged to hold any relevant records;
- Mr Wu's claim that the arrangement was entered for the purpose of his receiving kiwisaver subsidies is not logical because an employment relationship is not required to receive that subsidy;
- the pay backs are a debt dispute not related to the employment relationship which will be pursued in another court;
- a number of the WeChat messages were provided after the Authority filing timeframe and the integrity of the messages must be determined because they could have been tampered with or edited;
- there is no evidence the employment relationship did not exist between Mr Chen and WNY; and
- WNY and Mr Wu's claims are false.

Were the parties in an employment relationship?

[8] Under the Employment Relations Act 2000 (the Act) employment relationships include those between "an employer and an employee employed by the employer".⁷ Section 6 of the Act contains a definition of employee.

[9] For the purposes of this determination the relevant parts of that definition are:

6 Meaning of employee

(1) In **this** Act, unless the context otherwise requires, **employee**—

⁷ Employment Relations Act 2000, s 4(2)(a).

- (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service;
- (b) includes-
 - ...
 - (ii) a person intending to work;
 - ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—
 - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[10] The elements of an “employee” as defined by s 6 include that the person is employed to “do any work” in exchange for “hire or reward” under “a contract of service”. A person “intending to work” would also meet the definition of employee. In assessing whether a person is an employee the Authority must determine the true nature of the relationship and in so doing consider all relevant matters including any indication of the parties’ intention as to the nature of the relationship and not treat as determinative how the parties have described their relationship.

[11] Section 6 requires further inquiry than just the bare application of s 6(1)(a). The leading authority is the Supreme Court’s judgment in *Bryson v Three Foot Six Ltd*.⁸ In that case the Supreme Court emphasised the importance of analysing the way in which the relationship has operated in practice, saying that it was “crucial to a determination of [the relationship’s] real nature.”⁹ In *Barry v C I Builders Ltd*, the Employment Court said this involved consideration of any features of control and integration and any indications as to whether the contracted person has been effectively working on his/her own account.¹⁰ Section 6(3)(a) refers to “the intention of the persons” which suggests the focus is not on what each individual party may have subjectively intended. The common intention of the parties, if it can be ascertained, is a factor in assessing the real nature of the relationship but is not determinative and must be assessed objectively.¹¹

⁸ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, at [32].

⁹ *Ibid*,

¹⁰ *Barry v C I Builders Ltd* [2021] NZEmpC 82 at [8].

¹¹ *Cowan v Kidd* [2020] NZEmpC 110, [2020] ERNZ 319; *Fleming v Attorney-General* [2021] NZEmpC 77 at [74].

[12] By Mr Chen's account this is not a situation where he was ready to start work but the work did not eventuate that is, that he was a "person intending to work".¹² Mr Chen said he did perform work for WNY (or Mr Wu) in exchange for the payments he received. I am not persuaded Mr Chen did any work for WNY (or Mr Wu).

[13] When asked directly what his job with WNY involved Mr Chen said "sales of financial products providing loans". When asked for more detail he was unable to describe with any degree of specificity the type of work he performed, how he did the work, the hours or days he usually worked, if there were other employees of WNY (or Mr Wu) and if so who they were and what they did, the location of the work place, to whom he reported and how. He was unable to describe the product sold by WNY or name a client or prospective client with whom he met during the course of his duties. He was unable to describe with any specificity the circumstances of his employment ending for example, when asked who told him his job was to end he said it was staff member, when asked who he said he did not know and then said it was an unidentified person purporting to represent Mr Wu. Mr Chen said he worked on a laptop but did not produce any electronic record or other record of any work or work related matter despite the parties being directed to do so.¹³ When he was asked what records of work performed he held he said there were no records because he held meetings and nothing was written down and it was not his obligation to keep such records. He did not produce a diary or calendar of such meetings or other record of such meetings.

[14] Mr Wu described WNY as a consulting company.¹⁴ He said he got involved in WNY in mid-2019 because it was a company his wife had invested in and the then director became unwell. He became the sole director on 11 September 2019. He said WNY had not conducted any business during his involvement (including the period Mr Chen was paid) and to his knowledge it had been involved in one business transaction in February 2018 regarding a loan. He said WNY had an accountant but has never employed any employees and there is no work for any employee to perform. He said there is no office other than his home office. Mr Wu said he first met Mr Chen in October 2018 at a social function hosted by Ms Xu's employer where he was introduced as Ms Xu's husband. They got along and he added Mr Chen's WeChat

¹² Employment Relations Act 2000, s 6(1)(b)(ii).

¹³ Fifth Minute of the Authority 2 June 2021.

¹⁴ Companies Office registration details for WNY Group Ltd record its industry classification as "business consultant services".

account to his own. I am satisfied from the WeChat messages of invitations and thanks in late 2018 and happy new year messages in early 2019 that Mr Chen, Ms Xu and their family socialised with Mr Wu and his family and that Mr Chen and Ms Xu represented themselves as married (or in a partnership) to Mr Wu and his family.¹⁵

[15] While it is clear on the evidence Mr Chen received regular pay in the relevant period and that on its face those payments could reasonably be understood to be for “hire or reward” there is insufficient evidence those payments were made in exchange for work Mr Chen performed any work for WNY (or Mr Wu).

[16] With respect to whether the parties’ intended to enter an employment agreement the only contemporaneous record of their discussions prior to the payments (and paybacks) commencing are WeChat messages between Ms Xu and Mr Wu and Mr Wu and Mr Chen. On 21 May 2019 Ms Xu and Mr Wu had the following translated WeChat exchanges:

Ms Xu: The money is paid every month. Those that have not changed are all the same. They only believe in money. That is my husband. He joined ‘KVC’ to say his money is underneath a ‘night mountain’. That money was paid to him then given to ‘KT’ then given to ‘KVC’. That is the staff’s portion from the staff themselves and also the portion of the employer. It should be employee ‘120’ and employer ‘120’.

Ms Xu: I will provide my husband’s IRD number to [Mr Wu’s wife] directly, also his bank details. Can you please advise your bank account details so that he can transfer the funds after payday.

Mr Wu: [bank account number]

Ms Xu: Thank you for your email

Mr Wu: Account Name [Li Wu and Mr Wu’s wife’s name]

Ms Xu: “Ok hand gesture”

[17] On 30 May Mr Chen and Mr Wu had the following WeChat exchange:

Mr Chen: Hi Director Wu, please confirm the bank details are correct [bank account number].

Mr Chen: Account Name: [Mr Wu and his wife]

Mr Chen: I will arrange the payment upon your confirmation

Mr Wu: Correct

Mr Chen: Please confirm the bank account details

Mr Wu: Yes

Mr Chen: Paid

Mr Chen: Please acknowledge receipt of payment

Mr Chen: Please confirm, thank you.

Mr Wu: \$3,207 right? Received. Thank you.

¹⁵ WeChat acknowledgement and thanks for hospitality 16 October, 4, 5 and 30 November, 1 and 25 December 2018 and Happy New Year greetings 31 December 2018, 4 and 5 February 2019.

Mr Chen: Yes, great. I'm still in China, back on the 12th.

Mr Wu: Let's catch up when you come back.

Mr Chen: Okay, no problem.

[18] These WeChat messages do not support Mr Chen's claim he entered an employment relationship with WNY (or Mr Wu). The messages do support the parties knowingly entered a payback scheme where money purported to be paid as wages by WNY to Mr Chen was almost immediately paid by Mr Chen to Mr Wu.

[19] When Mr Chen was asked in evidence why he was paying back the payments he said it was a loan arrangement. He provided no supporting evidence of such an arrangement such as the terms of the loan, to whom the loan was made, any repayments to him of loan sums or steps he had taken to enforce the loan. WNY and Mr Wu deny any loan arrangement was entered with Mr Chen. I am satisfied this was the case and that the pay backs were not a loan of money to Mr Wu (or WNY) by Mr Chen.

[20] Mr Chen has received net pay for a period of months from WNY and was provided payslips. The payments and payslips were processed by Ms Xu in her role as accountant for WNY.¹⁶ I accept these documents indicate Mr Chen was an employee of WNY. However, I do not accept they are determinative of the issue. For the reasons set out above I am satisfied there was no intention between the parties to enter an employment relationship, that the parties did not enter an employment relationship, that Mr Chen performed no work for WNY during the period he received payment and did not receive payment in exchange for any work performed. Though the arrangement has unusual features, I accept it is as described by Mr Wu - that it was an arrangement made by WNY's accountant, Meizi Xu, for the benefit of Mr Chen who she and Mr Chen represented to Mr Wu as her "laogong" and that because of Mr Wu's close business and personal relationship with Ms Xu he agreed to enter this arrangement. I accept this because the WeChat messages, which are a contemporaneous record of the discussions between Mr Wu, Ms Xu and Mr Chen, establish:

- Ms Xu and Mr Chen represented themselves to Mr Wu as being in a relationship of the nature of marriage;

¹⁶ The IRD records before the Authority record 'MeiziX' as having submitted the pay information on behalf of WNY and Mr Chen.

- they are the same people who set up a payment and pay back arrangement in May 2019 with Mr Wu because the WeChat profiles used for the socialising invitations and thank yours in late 2018 are the same;
- Mr Chen was aware of the payment (pay back) arrangement Ms Xu arranged with Mr Wu because he used information (Mr Wu's bank account details and account name) that had been provided to Ms Xu to confirm details of the arrangement in communications with Mr Wu;¹⁷ and
- there is insufficient evidence to establish Mr Chen ever performed any work for WNY (or Mr Wu), that the parties entered the arrangement with the intention that he would or that the payments received were in exchange for work performed.

[21] Given the above findings it is not necessary to consider and determine the balance of Mr Chen's claim.

Outcome

[22] Mr Chen's claim is unsuccessful.

[23] A copy of this determination is to be provided to the Inland Revenue Department.

Costs

[24] Costs are reserved. The parties are encouraged to attempt to resolve the issue of costs themselves. If this is not possible and WNY Group Limited and Li Wu seek a contribution to costs, they should file and serve a costs memorandum within 14 days of the date of this determination. Mr Chen should file any reply memorandum within 7 days of receipt of such.

Marija Urlich
Member of the Employment Relations Authority

¹⁷ Refer [17] above.