

D. Costs are reserved and a timetable set if the matter cannot be resolved by agreement.

What is the Employment Relationship Problem?

[1] From January 2018 to April 2019 Shucheng Zhang (also known as Candice Zhang) undertook tasks for one company and/or two associated with Johnston Fan (also known as Bo Fan). These were J C M International Trading Limited (JCM or the company) and Chen Expo Limited (CEL).

[2] Ms Zhang's position is that she was employed by JCM. JCM's response is that she was an independent contractor initially for CEL and then for JCM.

How did the Authority investigate?

[3] Unfortunately this matter has taken some time to conclude. It was originally set down for a one-day investigation meeting after discussion at a case management conference. Mr Fan could not be contacted to attend that conference. A meeting day was held on 1 November 2019. Mr Fan attended and indicated that he and one other witness would give evidence. Later he wished to call more witnesses.

[4] Attempts to arrange a further investigation meeting day were thwarted for an extended period by representatives and/or witnesses from both sides travelling to China. A further day was held on 9 March 2020. A later investigation meeting was adjourned due to one of those involved being unwell. Then shortly afterwards the COVID-19 lockdown began. Another investigation meeting day was held on 2 July 2020.

[5] What was intended to be a final telephone meeting to hear the remainder of Mr Fan's evidence and the submissions had to be cut short due to phone line and interpretation problems. JCM was given a last opportunity to file written evidence. Written submissions were provided by both parties.

[6] Over the meetings I heard oral evidence from Ms Zhang, Mr Fan, Lingling Zhou (formerly responsible for CEL's market development, also known as Jennifer). Zhijun Fan (Bo Fan's father and director of JCM, who I refer to as Mr Fan Senior) and Wenzhu Qiu (business associate of CEL). I was assisted by several interpreters of the Mandarin language.

[7] This determination has been issued more than three months after the day on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Employment Relations Act 2000 (the Act) was applicable.

[8] All the material provided has been carefully considered. As permitted by s 174E of the Act this determination does not record everything received from the parties but states findings of fact and law, expresses conclusions and specifies resulting orders.

What are the issues?

[9] The issues for investigation and determination are:

- (a) Was Ms Zhang an employee and if so, was she an employee of JCM?
- (b) Did JCM bargain unfairly with Ms Zhang, including breaching its duty of good faith and if so, should it be penalised?
- (c) Did JCM fail to provide Ms Zhang with an employment agreement and if so, should it be penalised?
- (d) Did JCM deny Ms Zhang work?
- (e) Does JCM owe Ms Zhang any wages?
- (f) Is Ms Zhang owed holiday pay?
- (g) Was Ms Zhang sexually harassed?
- (h) Should either party be required to contribute to the other party's costs?

[10] Entwined with a number of these claims was a promise Ms Zhang alleges was made to help her with her immigration visa. Mr Fan denies there was any such promise.

[11] When raising her grievances Ms Zhang's representative included a constructive dismissal claim. That was not included in the claim before the Authority and Ms Zhang's representative confirmed during the investigation meeting that no dismissal claim was being pursued.

[12] The statement of problem included a claim that wage payments were delayed and irregularly made but at the start of the investigation meeting the Authority was told that that claim was not being pursued because it had been dealt with at mediation.

Where should the investigation begin?

[13] Teasing out what happened was not entirely easy. The issues of whether Ms Zhang was an employee and if so, who her employer was, are somewhat interlinked. Limited documentation relating to CEL was lodged as the business is no longer operating and its owner was not involved in this proceeding.

[14] Even with JCM, neither Ms Zhang nor Mr Fan provided substantial business documents. Ms Zhang, despite using her own email address for business, did not produce many emails. Between the parties, a few photographs, some pages of bank records and WeChat messages were lodged.¹ In the absence of paperwork witnesses had difficulties specifying when events occurred.

[15] It was evident at the investigation meeting that the arrangement went through different phases. Ms Zhang was away from New Zealand several times during her involvement with Ms Zhou and Mr Fan.

What was the connection between CEL and JCM?

[16] CEL operated an export and general service business for trade to China. It had an export account with a sizable New Zealand winery. The sole director and shareholder of CEL spent some of her time in China.

[17] Ms Zhou had an employment agreement with CEL. Mr Fan was CEL's general manager. Bank statements show him being paid by CEL in early 2018. He also had an employment agreement with CEL.

[18] CEL ceased operating, at least as far as the wine business was concerned, in around late 2018. CEL was removed from the Companies Register from 13 September 2019. As far as I am aware no attempt was made to have it reinstated to the Register for the purpose of this proceeding.

[19] JCM had operated a scrap metal business for some years. Mr Fan and Mr Fan Snr were joint directors and shareholders. In about the mid-2010's that business declined and Mr Fan went to work for CEL.

¹ We Chat is a Chinese social media platform.

[20] Mr Fan describes his father as selling wine through JCM, mainly to Mr Fan Snr's friends and acquaintances in China. Mr Fan Snr would occasionally use spare capacity in a container ordered by CEL for freight to China.

[21] Ms Zhou recalled Mr Fan Snr from JCM also dealing with the same winery CEL dealt with. He would sometimes come into the CEL office to have tea with his son. Ms Zhou had occasional discussions with Mr Fan Snr about the wine business, sharing photos and information. She and Mr Fan both say the two companies did not do business together.

[22] From when CEL ceased operations, Mr Fan and Ms Zhou operated helping people to export wine to China or assisting e-commerce platform customers. At this stage Ms Zhou did not have a company so Mr Fan used JCM sometimes. Mr Fan was frank that he had not told his father about that, which is why Mr Fan Snr was surprised by Ms Zhang's claim to be a JCM employee.

What was Ms Zhang's background?

[23] Ms Zhang had previous marketing experience, including in wine. However, her job before coming to CEL/JCM was in retail. Ms Zhang was having a break from her previous job at the time she interviewed with Mr Fan.

What happened at the interview?

[24] Mr Qiu introduced his friend of a friend, Ms Zhang, to the possible work opportunity. He understood this was with CEL, for sales and marketing work. At that point Ms Zhang did not know the company's full name but knew the office was called something like the New Zealand Commodity Exchange Trade Centre. It seems there was no job advertisement.

[25] In about early 2018 an interview was held between Ms Zhang, Ms Zhou, Mr Fan and Mr Qiu. Ms Zhou asked questions about Ms Zhang's marketing expertise and connections. The title 'marketing specialist' was discussed.

[26] Ms Zhang was on a work visa sponsored by another company. It expired in June 2019. She was unable to lawfully work for CEL or JCM at that point. A change of visa condition would have been needed to one of those companies.

[27] Ms Zhang claims she mentioned needing a company to sponsor a new visa, asked if they were willing to sponsor her and they were positive. By contrast, Mr Qiu did not recall discussion at the interview about Ms Zhang needing support for a visa.

[28] Ms Zhang's evidence regarding the company name/s mentioned at the interview was somewhat variable. At one point she was unsure whether JCM was mentioned. Elsewhere she thought they mentioned CEL and JCM.

[29] Ms Zhou and Mr Fan say that they were looking for a full time CEL staff member to maintain the e-commerce platform customers, organise customers and do some promotion and administrative work. This was intended to be an employed role with a written employment agreement.

[30] At some point Mr Fan and Ms Zhou offered Ms Zhang \$500 a week for 30 hours' work. That was the current minimum wage rate at the time. They say that after her work trial, Ms Zhang was offered an employment agreement but she declined as her work visa was with another company. Mr Fan says the agreement was then that she would work as a contractor.

What happened with Ms Zhang's work?

[31] Ms Zhang began in early February 2018. After a week or two she left to visit China briefly. On her return she continued working.

[32] In April 2018 Ms Zhang asked for CEL's financial statements for her immigration advisor to look at. CEL's financial report was eventually provided. Ms Zhang later told Mr Fan that CEL was not qualified to help her get a work visa.

[33] In mid-2018 Ms Zhang went on a longer trip to China. On her return she says she was not offered work by Mr Fan or Ms Zhou. Ms Zhou had taken over dealing with the local online platform.

[34] In October 2018 Mr Fan and Ms Zhou left the country on fairly short notice to set up for an exhibition in China. One of them contacted Ms Zhang to ask her to take on maintaining the e-commerce platform customers, as she had done earlier in the year. By the time she went back to working on the platform, she had a partnership visa and so did not require employer support for a visa. She mentioned this to Mr Fan.

[35] Mr Fan says JCM offered Ms Zhang an employment agreement. He saw it as making things easier to report to the IRD. Some discussion occurred with Ms Zhang about the employment agreement but she raised some concerns and no outcome was reached.

What other information is there?

Payment

[36] Initially Ms Zhang was paid in cash by Mr Fan from money he was given by the CEL boss. Mr Fan referred to the payment arrangements as being Ms Zhang's choice. She did not dispute this.

[37] CEL paid Ms Zhou and Mr Fan into their bank accounts. Ms Zhang later asked to be paid into her Chinese bank account. This was agreed. This money came from CEL but was sent through Ms Zhou as she had a Chinese bank account. There was text evidence of Ms Zhang messaging Mr Fan an exchange rate conversion.

[38] From around November 2018 to April 2019 Ms Zhang continued to be paid through her Chinese account but the money did not come from CEL. Mr Fan arranged to have the money paid by JCM, mostly into Ms Zhang's Chinese account.

[39] In April 2019 two payments were received in Ms Zhang's New Zealand account; one identified as from "J C M International" and the other from "Mr B Fan". Ms Zhang acknowledged that she preferred payment from Mr Fan's account as she was worried that if she later applied for a visa sponsored by JCM it would be odd if she was already receiving JCM payments.

[40] Ms Zhang was not certain whether tax was deducted before payments were made to her. She did not think she had to pay her own tax. Ms Zhang did not submit invoices for her time. She was reimbursed when she occasionally handed in receipts for food bought for wine tasting events.

Title, tasks and reporting

[41] Ms Zhang suggested the title of marketing specialist. Her work included taking guests and potential clients to visit the winery. There were also occasional odd jobs for Mr Fan.

[42] There was no requirement that Ms Zhang worked particular hours although there were occasional concerns about her not being available during the morning for online customers. Some events required her presence at particular times. Mr Fan did not see her as having to work 30 hours necessarily although she was paid the same amount each week.

[43] Initially Ms Zhang worked more with Ms Zhou. This later changed to dealing more with Mr Fan. He gave her different instructions each day, for example, send two boxes of wine to person A or bring people to the winery on Friday. Mr Fan tended to provide the deals for WeChat customers with Ms Zhang writing up the content. She went with Mr Fan to shows or events to assist with marketing.

[44] Ms Zhou or Mr Fan would ask Ms Zhang for reports on her work. She talked to them fairly frequently although there was no requirement to report at any particular interval.

[45] Ms Zhang says she saw Mr Fan Snr several times. He asked her to do some translation for him. He watched her doing a winery tour. There is one January 2019 WeChat exchange between them with Mr Fan Snr asking for a price list and Ms Zhang supplying it.

Workplace

[46] Ms Zhang initially went into the CEL office to work. After a short time Mr Fan told her she did not really need to come in as her main job was out meeting customers and going to the winery. Ms Zhang lived in a different part of Auckland to the office. From then, she based herself at home.

[47] JCM had an office elsewhere.

Paperwork and equipment

[48] Neither CEL nor JCM provided Ms Zhang with an email address in her name associated with the company. She often used her own email address for work. In March 2018 Ms Zhang asked for access to the company's email address and was sent an email address "chenexportnz@ ..." and a password which also included reference to Chen. She sent emails from her personal address to that CEL email address. Neither Ms Zhou nor Mr Fan had a personalised CEL email address either.

[49] CEL provided Ms Zhang with its business cards in her name. Ms Zhang was not supplied with a work laptop. Although there was some talk of a work phone, none was supplied. She put a work sim card in her own phone. Ms Zhang used her own car for trips. Initially she did not charge for mileage but was doing quite a lot of travelling around Auckland so asked for expenses of \$200 a month, equating to \$50 a week. Her weekly payment went up to \$550 per week.

Emails

[50] An email from Ms Zhang to the wine company from 15 May 2018 has Ms Zhang referring to herself as “Candice from JCM” and using the footer “Candice Zhang J C M International Trading Limited”. There is no logo or other company information. This is the only email she provided to that effect despite having used her own email address.

[51] A January 2019 email from the winery to Ms Zhang refers to JCM.

Other documents

[52] Ms Zhang provided a photo showing her and Ms Zhou at the winery with a group of customers. The photo data referred to May 2018 although as Mr Fan pointed out, it is possible for other dates to be set in that data.

[53] Mr Fan gave Ms Zhang certificates to mark particular customers’ winery visits. They were pre-signed by Ms Zhou. The photo shows a certificate referring to JCM. Mr Fan remembered previous certificates having CEL on them but was unable to provide one.

[54] A late-2017 certificate of origin for CEL, was lodged. CEL is described as the exporter of the winery’s products. A number of bottles are listed.

[55] In December 2018 Ms Zhang asked Mr Fan via their WeChat group what the full name of the company was. Mr Fan replied that it was JCM International Trading Limited.

[56] Mr Fan signed a certificate of service under JCM’s name, drafted by Ms Zhang. This is hand dated 17 January 2018 although the parties agree it should have been 2019 when Ms Zhang was making a visa application to travel to another country. The certificate reads:

This is to certify that Ms Shucheng Zhang ... has worked in JCM International Trading Ltd since December 2018 as Marketing Specialist. Her monthly salary is 2200NZD/month. ...

[57] Mr Fan described this as doing Ms Zhang a favour and using JCM's name as he did not have another company at that time.

[58] The main e-commerce platform's business development manager provided a letter saying it sold the winery's products through CEL. Ms Zhang is described as being responsible for sales promotion and relationship maintenance. The manager met Mr Fan and Ms Zhang at activities organised by CEL.

[59] There was an invoice for wine in CEL's name to what appears to be the e-commerce company. The account number on the invoice is an account in the name of CEL.

[60] JCM's other director and shareholder, Mr Fan Snr, had met Ms Zhang a few times at the winery. He thought she was representing CEL and met clients in that capacity. Mr Fan Snr was representing JCM in his dealings at the winery. He was not aware of JCM making payments to Ms Zhang.

[61] There were occasional messages between Mr Fan Snr and Ms Zhang which suggest Ms Zhang having involvement with JCM although he provided other explanations.

What were the arrangements?

[62] Ms Zhang's witness statement asserted that she was employed by JCM from 29 January 2018. However, it was accepted by her representative that the evidence disclosed her undertaking work for both companies. It was submitted that Ms Zhang worked initially for both JCM and CEL but by October 2018 she was only working for JCM.

[63] Mr Fan considered that by her own choice Ms Zhang as a contractor rather than an employee and that this was initially to CEL and then to JCM.

[64] The bulk of the evidence supports Ms Zhang undertaking work for CEL for most of 2018, whether as an employee or a contractor. I do not need to make a finding on whether this was an employment relationship as CEL is not a party to this proceeding

and has been removed from the Companies Register. There is insufficient evidence to support there being any employment relationship with CEL and JCM at the same time. I conclude that until CEL ceased business Ms Zhang's relationship was with CEL. From October 2018 the relationship was with JCM.

Did JCM employ Ms Zhang from October 2018?

[65] I need to decide the real nature of the relationship.²

[66] What were the parties' intentions? Ms Zhang had been looking for a full time job to satisfy her legal requirements for her visa and gain a stable income. However, she later gained a partnership visa and so had no immediate need for an employer sponsored visa by late 2018.

[67] JCM's operation of the part of the business Ms Zhang worked in began relatively informally. However, Mr Fan decided to formalise things and offered Ms Zhang a written employment agreement. Discussion occurred but no conclusion was reached.

[68] Was Ms Zhang independent in her work or under JCM's control? Mr Fan on occasions directed Ms Zhang to do things above and beyond her marketing role. She reported fairly frequently. Although she could potentially have undertaken other work, there was no potential for making more money from JCM. On the other hand she did not have set hours nor have to work from an office.

[69] Was Ms Zhang integrated into JCM's business? At times she worked at least a little with everyone in the company including Ms Zhou and Mr Fan Snr. She worked fairly closely with Mr Fan with him leading sales approaches and her operationalising them.

[70] Standing back and looking at the whole picture, I conclude that the real nature of Ms Zhang's relationship with JCM was employment.

² The Act, s 6(2).

Did JCM bargain unfairly and breach its duty of good faith?

[71] Unfair bargaining involves a party entering into bargaining or an agreement with diminished capacity, reliance on the other party or being induced by oppressive mean, undue influence or duress.³

[72] Ms Zhang's original relationship was with CEL and I make no findings about unfair bargaining or a related breach of the duty of good faith as regards that company. Once Ms Zhang began working for JCM she no longer required an employer sponsored visa as she had a partnership visa. She could at that point have taken up work with other employers. What appears to have been the main plank of her unfair bargaining claim, namely her vulnerable immigration status, falls away. I do not find the claim against JCM established.

Did JCM fail to provide an employment agreement?

[73] Under s 63A(2)(a) of the Act JCM was required to provide Ms Zhang with a copy of the intended agreement.

[74] Mr Fan's evidence was that, albeit after Ms Zhang started in October 2018, she was offered an employment agreement. There were discussions but no agreement was ever signed. Ms Zhang did not dispute this.

[75] I conclude that JCM did provide Ms Zhang with a proposed agreement even though the parties were unable to agree on the final terms. The company did not breach s 63A(2)(a) of the Act.

Did JCM deny Ms Zhang work?

[76] This claim relates to August 2018 any relationship Ms Zhang had was with CEL. JCM was not her employer at that time. I do not need to determine the claim regarding CEL.

Is Ms Zhang owed wages?

[77] Under this head I consider a claim for Ms Zhang's final week's wages, as well as claims which arose in the course of the investigation meeting. The absence of wage

³ The Act, s 68(1) and (2).

and time records for Ms Zhang made the assessment of what she might be owed difficult.

Last week of work

[78] In the statement in reply JCM acknowledged that it owes Ms Zhang \$550.00 for the last week she provided services, albeit not accepting she was an employee. The suggestion was that she would be paid when she returned company merchandise which she had borrowed.

[79] JCM is to pay Ms Zhang \$550.00 gross as arrears within 28 days of the date of this determination.

Full time work

[80] During the second day of the meeting, the possibility was raised of the claim being amended to include a wage claim of \$10,725. This was based on Ms Zhang's evidence of an agreement at the interview that 30 hours would be worked during a trial period but that full time work (or 40 hours a week) would be available after that. I allowed the claim to proceed as all of those at the interview were to give evidence anyway.

[81] I do not find this claim sustained. The interview related to Ms Zhang's work with CEL. There was no evidence that Ms Zhang was promised full time work with JCM when she began in October 2018.

Wages at lesser than market rate

[82] It was suggested that Ms Zhang was paid at a lesser rate during her trial period than she would normally have received or possibly than she was promised. As I have found her initial relationship to have been with CEL I make no orders regarding pay during the trial period.

Commission

[83] Ms Zhang referred to several discussions about commission arrangements. Initially there was mention of a 5% commission but sales were low and did not reach the target for commission. Then another arrangement followed by a third stage of

discussions with Ms Zhou about a higher base salary plus commission but no exact agreement was reached.

[84] I cannot conclude that any commission is outstanding from JCM.

Is Ms Zhang owed holiday pay?

[85] Ms Zhang claims \$1,980 for holiday pay however that figure was based on her being an employee of JCM from January 2018 to April 2019. She was only an employee of JCM from 23 October 2018 to 26 April 2019. She had some weeks overseas but she was not paid for that time.

[86] In the absence of wage and time records, the best calculation I can make for the annual holiday pay outstanding is \$1,012, being 8% of \$550 gross per week for 23 weeks. I order JCM to pay Ms Zhang \$1,012 gross for holiday pay within 28 days of the date of this determination.

What about interest?

[87] Ms Zhang has been deprived of money she was owed for a considerable period. Interest is appropriate. I order JCM to pay interest on the wages and holiday pay sums from 5 May 2019 to the date of payment.⁴

What are the requirements for a sexual harassment claim?

[88] Sexual harassment in employment amounts to a personal grievance and is defined under s 108 of the Act as including:

the use of [*written or spoken*] language... or... visual material of a sexual nature... [*which*] directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee ...and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance or job satisfaction.

[89] The standard of proof is the balance of probabilities.⁵ As Mr Fan was a director of the company and thus a representative of the employer, the provision about making a complaint before the employer has responsibility, does not apply.⁶

⁴ The Act, Schedule 2, cl 11. Interest calculated as per <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

⁵ *Z v A* [1993] 2 ERNZ 469 (EC).

⁶ The Act, s 117.

[90] By way of background, Ms Zhang describes Mr Fan in 2018 telling her things about his own relationship. She told him this made her feel uncomfortable. She said she was in a committed relationship with her boyfriend; trying to use that as a rejection. She understood Mr Fan had separated from his partner who was then overseas.

[91] Mr Fan denies having told her about his own relationship and says his wife was in New Zealand. He did know that Ms Zhang was in a relationship.

What material does Ms Zhang regard as harassment?

[92] Her claim is based on WeChat messages which she saw as sexually provocative, including messages attaching what she believed to be nude pictures. These were all sent during her employment with JCM.

[93] Mr Fan denies that he acted inappropriately, saying he respected Ms Zhang.

16 December 2018

[94] On 16 December 2018 at 10.35pm Mr Fan texted Ms Zhang as follows:

What are you doing darling (*Alternative translation – what’s up dear*)⁷

You are the most beautiful in my heart

[95] Ms Zhang replied with “What? ?”. Mr Fan sent with an emoji referred to as “Face with hand weeping with laughter” or Facepalm.⁸ He then messaged:

oh no (*alternative translation – damn it*) I’m just being frank after I got drunk and now spilling my heart and the truth. Don’t mind every colleague in our company is the most beautiful and most adorable.

[96] This is followed by the Victory or Peace emoji.

19 December 2018

[97] Mr Fan and Ms Zhang were messaging about wine and e-commerce platforms. She said she needed a big screen shot for an advertisement of a wine’s anniversary. He sent her a screenshot and she replied “great” and asked him for another screenshot.

⁷ In some instances the interpreter offered two alternative translations.

⁸ www.emoji.com and <https://emojipedia.org>.

[98] Mr Fan messaged Ms Zhang screenshots from a wine website. He then retracted the messages and sent through some other wine pictures, then texted:

(Mr Zhang) Oh my I sent two pics of what I shouldn't send

(emoji – awkward)

Thankfully you didn't see it

All nudes *(alternative translation – completely naked)*

(Ms Zhang) *(emoji x 3 – speechless)*

(Mr Fan) Haha

If you want to see it, I'll send it to you again for you to look at

[99] Ms Zhang deleted two pictures without looking at them. She took them to be of a sexual nature. During the investigation meeting it became apparent that Ms Zhang had not actually seen nude pictures. Rather Mr Fan's reference to nude and associated comments made her believe that an explicit picture had been sent to her. She felt very uncomfortable.

[100] Mr Fan provided his phone to the Authority so that the WeChat messages could be seen without the deletion Ms Zhang had made. I accept that Mr Fan did not send a photo of a nude person.

[101] Mr Fan suggested that Ms Zhang deleted the pictures trying to cover up, for the purposes of her Authority claim, that they were not sexual. I do not accept that.

[102] Mr Fan told the Authority that in Mandarin the word 'nude' meant naked price, which is what he meant to say. It seems there are two separate characters for naked or nude. One of them can mean naked picture or naked price. Ms Zhang and her representative accepted that.

[103] Mr Fan's explanation was that he wanted to refer to all the information provided as nude, meaning the pictures did not show a price for the wine. Also, one version of a photo had some not very positive comments about the wine. So Mr Fan said that he sent some photos he should not have sent and then deleted those screenshots.

[104] I accept that the pictures sent were not of naked people. By itself, there could be an innocent explanation for the reference to nude. Mr Fan denied that he had attempted to joke about the possibility of a photo of a naked person, even without there being such a photo. He did accept that in the context of sending images his words could have been misleading.

[105] The original context of the exchange and the screenshots themselves are innocuous but I do not accept that was the spirit in which Mr Fan's comments were made or received. I find Mr Fan's combined use of wording and the emoji, his response to Ms Zhang's indication that she was speechless and offer to show her the pictures again, were intended to be sexually suggestive.

29 January 2019

[106] Starting at 8.46pm, the following exchange occurred:

Mr Fan: What are you doing in the evening?

Ms Zhang: Staying home

Mr Fan: Where do you live in North Shore?

Ms Zhang: Near Glenfield. Why?

Mr Fan: Evening, nothing to do, want to meet you but it's too late, never mind

Ms Zhang: Go to rest early

Mr Fan: Do you want to go for late night snacks?

Ms Zhang: I'm not going out, it's too late.

14 February 2019

[107] Ms Zhang was overseas in winter when she posted a photo of herself sitting in a coat with a fur collar by the sea. Mr Fan messaged:

There's lots of people who choose aesthetics over warmth, otherwise good body
(*alternative translation* – build) would be wasted

It's NZ Valentines Day

Happy Festivals eat lots candy

[108] Ms Zhang replied "Thank you - so to you". She then posted a picture and Mr Fan messaged "[s]o pretty". His explanation is that they were good photos with good scenery.

[109] The aesthetics and good body or build references can be seen as wording of a sexual nature in the context.

Invitation to Australia

[110] On 6 March 2019 after 1am Mr Fan messaged as follows:

(*Mr Fan*) - Missing you (*Alternative translation* – thinking about you).

Thinking when you'd be back (*my colleague*) isn't coming and you are not back, I'm just by myself I can't do this. (*Alternative translation – I'm like a commander without my troops*).

I think I'm a bit exaggerating. Once you are back then I have to go back to China Sigh my plans never catch up with changes

(*Ms Zhang*) [*Face with hand weeping with laughter emoji*] when you are you going back? Is [*the colleague's*] visa still not sorted?

(*Mr Fan*) I was going on the 9th.

There's no one here so the old man went by himself

I'm going to Australia at the end of the month, do you want to come with me?

I want to expand some new products in Australia

(*Ms Zhang*) I just visited Australia

Seriously, what's new idea?

(*Mr Fan*) Australian syrah

I had many plan

(*Ms Zhang*) Australian syrah wine is quite famous

[111] Ms Zhang did not see the trip as related to her work responsibilities. She was not aware of the business having anything to do with Australian wines before or Mr Fan having gone to Australia for work. She saw Mr Fan as using business as an excuse to ask her to go to Australia.

26 March 2019

[112] At 2.14am Ms Zhang and Mr Fan were messaging about her pay. He then messaged:

Good that you are not in the East District

(*Ms Zhang*) Why

(*Mr Fan*) Night owl are easy to be caught to be asked [*to*] come out for a late night snack

[*Smiley face emoji*] I'm going to bed

(*Ms Zhang*) Hahaha. Nowhere place still open this late

Good night

(*Mr Fan*) Dominion Rd

(*Ms Zhang*) They're all closed this hour. [*Face palm emoji*]

Take an early rest

Is sexual harassment established?

[113] I do not accept that Mr Fan's messages are all innocuous in the way he suggests. His text messages were, either explicitly or implicitly, of a sexual nature or involved inviting Ms Zhang out in circumstances and at times unrelated to work. These messages were unwelcome to her and as a result she did not want to meet him outside public settings. She had told Mr Fan that she was in a stable relationship already.

[114] Ms Zhang was uncomfortable receiving the messages and felt she had no one she could tell about them. I accept that the repeated messages of a sexual nature were unwelcome and had a detrimental effect on Ms Zhang's job satisfaction. Ms Zhang has established her grievance.

[115] Ms Zhang should receive compensation from JCM for the harassment. She provided some medical evidence of her low mood and insomnia although the letter is from late 2019 when she returned to China. She identified another factor as contributing to her mood, so the harassment was not the only cause.

[116] \$6,000 compensation is sought. Given that there are several instances of unwelcome sexual material I do not consider that the compensation should be any less. I order JCM to pay Ms Zhang compensation for sexual harassment of \$6,000 within 28 days of the date of this determination.

Should Ms Zhang be awarded any other compensation?

[117] In closing submissions in reply for Ms Zhang, compensation is sought for the difficulties Ms Zhang had been through because of the employer including the uncertainty of not knowing about her visa sponsorship and then unstable income due to irregular payments. Ms Zhang was said to have suffered hurt and humiliation from Mr Fan and his behaviour since she raised her personal grievance.

[118] I accept that Ms Zhang had a period of uncertainty about her visa sponsorship. While the Authority adopts an informal approach, focusing on the merits, I cannot see how she has an entitlement to what appears to be grievance compensation, other than as regards the harassment claim.⁹ No personal grievance claim was brought in regard to her visa issues. Even if it had been, it would likely have been against CEL.

Costs

[119] Costs are reserved and the parties invited to resolve the matter.

[120] Ms Zhang has succeeded in some of her claims and would likely be entitled to a contribution towards costs incurred. The parties are to discuss possible resolution of costs. If they are unable to agree Ms Zhang shall have 21 days from the date of this determination to file a memorandum on costs. JCM shall have a further 14 days in

⁹ The Act, s 157(1).

which to file a memorandum in reply. Submissions claiming costs should include a breakdown the costs and be accompanied by supporting evidence.

[121] The starting point for a consideration of costs is the notional daily tariff of \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day. In this case any award would be likely to take into account Ms Zhang's partial success.

Nicola Craig
Member of the Employment Relations Authority