

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 635
3178001

BETWEEN FIE XIE, HONGWEI WANG
and ZHUGUO XI

Applicants

AND DYLAN SOLUTIONS
LIMITED

Respondent

Member of Authority: Alastair Dumbleton

Representatives: Karen Keat, advocate for the Applicants
Peter Verschaffelt, advocate for the Respondent

Investigation meeting: 4 October 2022

Further information received: 1 December 2022 and 8 June 2023

Determination: 30 October 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants Fie Xie, Hongwei Wang and Zhuguo Xi, were recruited from China to work in New Zealand in the building and construction industry as carpenters and scaffolders. Before travelling to New Zealand in 2017, they each signed an employment agreement with Shalom Scaffolds & Renovations Ltd (SS&RL). They worked for that company in Auckland until December 2018, when it was put into liquidation by resolution of its sole owner and director, Marilyn Taufua, and removed from the register.

[2] While it existed and was trading SS&RL had several close connections with the respondent Dylan Solutions Ltd (DSL). DSL was incorporated in 2005 and its director currently is Taani Taufa, also known as Danny Taufa. DSL and SS&RL had the same registered office, an address at which Marilyn Taufa and Taani Taufa resided as spouses. Marilyn Taufa transferred a shareholding she had in DSL to Taani Taufa on 10 December 2018, when SS&RL was placed in receivership prior to liquidation.

[3] Some of the SS&RL employees from China resided at the Taufas' address at times. Some of the work they did while employed by SS&RL was under the control of DSL, at construction sites where DSL was a sub-contractor.

[4] The applicants claim they entered into an employment relationship with DSL at the end of November or in early December 2018, after they received from Marilyn Taufa written notice of termination of their employment with SS&RL.

[5] SS&RL and Marilyn Taufa were investigated on the application of six workers including the three applicants. The Authority found the company had breached their employment agreements and had failed to pay minimum entitlements under employment standards, as defined by s 5 of the Employment Relations Act 2000 (the ER Act)¹. As the company was in liquidation, orders were made against Marilyn Taufa as a person involved in a breach of employment standards, being the failure by SS&RL to pay its employees for annual holidays and public holidays.

[6] The applicants' claim against DSL is that during employment with that company they were not paid annual holiday pay, public holiday pay and, in the case of Zhuguo Xi, redundancy compensation. They seek resolution of their employment relationship problem by a determination of the Authority ordering DSL to pay the amounts they have calculated as due to them.

[7] The applicants first lodged their claim in the Authority in February 2020. It was served on the respondent DSL at its registered office and address for service, where 'A Taufa' signed for a delivery by courier.

[8] A statement in reply was not lodged by DSL.

¹ *Fie Xie and 5 others v Marilyn Taufa* [2023] NZERA 251

[9] The application was lodged again in July 2022 and was served again at the address for service. Again, no statement in reply was lodged.

[10] A response was lodged on 1 December 2022 by the respondent's advocate Peter Verschaffelt. This followed an investigation meeting held on 4 October 2022, at which directions were given to the respondent to provide a written response.

[11] At the conclusion of that meeting Mr Verschaffelt advised the Authority that DSL saw no need for further evidence to be given for the company or taken from any of the applicants.

[12] In giving this determination the Authority has considered all the information and evidence provided to it by DSL, including its response of 1 December 2022.

[13] The Authority has also considered DSL's response to directions given on 18 May 2023, which required records and other information to be provided.

[14] The Chief of the Authority has granted an extension of time beyond the normal three-month period for giving this determination.

[15] The determination is given in accordance with s 174E of the ER Act and does not record all the evidence or information considered by the Authority, or submissions received.

Were the applicants employed by DSL?

[16] This is a core issue. DSL, through Taani Taufu, has admitted employing Zhuguo Xi but denies employing Hongwei Wang and Fie Xie.

[17] The response lodged on 1 December 2022 on behalf of DSL contains a statement from Taani Taufu, who describes himself as the managing director of DSL, which includes the following;

2. Although offers of employment were made Hongwei Wang, and others of the claimants on the 1/12/2018 with an associated copy of Dylan Solutions Ltd's Health and Safety Policy however only Zhuguo Xi took up the offer.

[18] DSL's response acknowledged the Inland Revenue information which the applicants had produced to the Authority. It shows that Zhuguo Xi was employed by DSL between July 2019 and March 2020 and shows gross earnings and PAYE information.

[19] Taani Taufu rejected the claim that Fei Xie and Hongwei Wang were paid in cash by DSL, and he rejected their holiday pay claims against DSL.

[20] DSL was directed by the Authority to produce a copy of the employment agreement between the company and each applicant. Only one was produced, an unsigned agreement for Zhuguo Xi dated 25 November 2018.

[21] DSL was directed by the Authority to produce a copy of all Wages and time records, and all Holiday and leave records kept for the applicants. No records have been produced for any of the applicants.

Zhuguo Xi

[22] Zhuguo Xi said the DSL agreement dated 25 November 2018 was given to him to sign by Marilyn Taufu.

[23] The name Marilyn Taufu is typewritten on the document as 'Witness' to the signature of Taani (Danny) Taufu, Director of DSL.

[24] Marilyn Taufu told Zhuguo Xi she would continue to run her scaffolding business through DSL after the liquidation of her company SS&RL. His evidence is that he worked for DSL until May 2020, when Marilyn Taufu asked him to leave. He said he was not paid for annual holidays or public holidays during his employment with DSL. The employment agreement provides that the employment of Zhuguo Xi as a scaffolder is to commence upon issue to him of a work visa under DSL's name. Zhuguo Xi's work visa remained under SS&RL's name. His pay rate was expressed to be \$26 per hour.

[25] Also produced to the Authority was a printout of 'Income from myIR' for Zhuguo Xi. Under the name Dylan Solutions Limited, income and PAYE deductions are recorded for each month from July 2019 until March 2020, inclusive, to a total of

\$43,147.00 gross. The same information is given for SS&RL up to 30 November 2018, to a total of \$80,332.00 gross.

[26] The Authority finds that Zhuguo Xi was employed by DSL as a scaffolder from on or about 14 December 2018 until about 30 April 2020. His agreed rate of pay was \$26 per hour. The information contained in the Income from myIR report is convincing corroborative proof of the existence of an income earning relationship of some kind. DSL has admitted that relationship was employer-employee.

[27] The availability and production of the IRD records is likely to be the reason why DSL could do little else but concede it had employed Zhuguo Xi. Conversely, the apparent lack of IRD records for the two other applicants, is likely to be the reason why their employment has not been admitted.

[28] DSL has not positively rejected the claim that it did not pay for annual holidays or public holidays to Zhuguo Xi. It has maintained silence about that.

[29] Although DSL failed to keep records, the Authority concludes from the weight of evidence that Zhuguo Xi was not given or paid his holiday entitlements for both public and annual holidays.

[30] He has also claimed redundancy compensation. His employment agreement with SS&RL made provision for that benefit, at clause 14, but as his agreement with DSL did not, that claim cannot be upheld.

Hongwei Wang

[31] Hongwei Wang produced to the Authority an unsigned letter bearing the name of Taani Taufaa. It offered employment as a carpenter with DSL. Part of the letter reads;

The offer will continue as per the employment agreement signed by you and this offer is valid until your work visa is granted by Immigration New Zealand.

The commencement date will be as soon as the work visa has been granted.

[32] Hongwei Wang also received a comprehensive employment agreement in his name, which provided for annual and public holiday entitlements and a pay rate of \$24 per hour. It was dated 1 December 2018 and stated that the employment was to commence upon issue of a work visa under DSL.

[33] Hongwei Wang gave evidence that he signed the employment agreement with DSL, which was given to him by Marilyn Taufa. Her name is typewritten on it as 'Witness' to the signature of Taani Taufa, 'Director' of DSL.

[34] Hongwei Wang's evidence is that Marilyn Taufa kept the copy he signed. He continued the same work as a carpenter he was doing before SS&RL went into liquidation. He did not obtain a new work visa for DSL. He said he finished with DSL in about April 2019, when he found out that DSL had not been paying PAYE to the IRD.

[35] The Authority concludes on a balance of probabilities that Hongwei Wang became an employee at about the same time as Zhuguo Xi. His evidence is accepted. The absence of a work visa under DSL did not stop DSL from employing Zhuguo Xi and it is therefore unlikely to have stopped DSL from employing Hongwei Wang.

[36] The Authority accepts the evidence that Hongwei Wang was not given or paid his holiday entitlements, for annual and public holidays due to him from employment between December 2018 and April 2019.

Fie Xie

[37] His claim is based on very similar circumstances to those of Hongwei Wang.

[38] The Authority accepts the evidence of Fie Xie and finds that he too is entitled to recover pay for annual and public holidays.

Calculation of applicants' entitlements

[39] In the absence of a Wages and time record and a Holiday and leave record, monetary entitlements cannot be calculated precisely.

[40] The Authority notes that one page of Ms Keats calculations for the applicants is wage arrears for underpayment of a wage rate of \$24 per hour, although the claim overall was expressed to be ‘for unpaid public holidays and annual leave in full to three employees’. Another page of alternative calculations is only for unpaid public holidays and annual leave, based on the minimum wage.

[41] There is also expressly a claim for redundancy compensation for Zhuguo Xi.

[42] The lack of Wages and time records and Holidays and leave records, have made it difficult to determine with any accuracy what hours were worked over what period of employment, and what holidays were taken if any.

[43] The Authority has had to do the best it can with the evidence and try to reconstruct the details of an employment occurring several years ago. The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not ².

[44] As the arrangements between SS&RL, Marilyn Taufu and DSL had been fluid, the Authority takes the commencement date of employment by DSL of each applicant as on or about 14 December 2018. Marilyn Taufu had notified the applicants that SS&RL would be closing on 11 December. The employment of Hongwei Wang and Fie Xi is taken by the Authority to have ended on or about 31 March 2019. They said they left sometime in April, when they found out their PAYE was not being paid by DSL.

[45] The employment of Zhuguo Xi is taken to have ended on 30 April 2020. He said he finished in May 2020.

Public holidays

[46] The Authority accepts that the applicants normally worked on public holidays and that they were paid for those at time and one half. The Authority finds they were not given an alternative holiday for each public holiday worked, as required by s 56 of the Holidays Act 2003, and they were not paid for the alternative holidays remaining untaken at the end of their employment.

² Section 160(2) of the ER Act

[47] Hongwei Wang and Fie Xi are entitled to pay for 6 alternative holidays observed during their period of employment from 14 December 2018 to 31 March 2019.

[48] Zhuguo Xi is entitled to pay for 20 alternative days, from 14 December 2018 to 30 April 2020.

[49] In the absence of Wages and time records DSL was required by law to keep, the Authority will assume from the applicants' evidence a working day of 9 hours, not including an unpaid ½ hour meal break. The Authority will apply pay rates of \$26 per hour for Zhuguo Xi ³, and \$24 per hour for Hongwei Wang and Fie Xi ⁴.

[50] Public holiday pay owing for Zhuguo Xi is \$234 per day x 20 days = \$4,680.00

[51] Public holiday pay owing for Hongwei Wang and Fie Xi is \$216 per day x 6 days = \$1,296.00.

Annual holiday pay

[52] Hongwei Wang and Fie Xie worked for DSL for less than 12 months and are entitled to be paid 8% of their total gross earnings ⁵. Assuming a working week of 45 hours, and assuming 15 weeks paid between 14 December 2018 and 31 March 2019, annual holiday pay owing is 8% of 45 hrs x \$24 x 15 weeks = \$1,296.00.

[53] The calculation for Zhuguo Xi, who worked for longer than 12 months, requires a comparison of his average weekly earnings for the 12 months before his last pay, and his ordinary weekly pay as at the end of his employment. Payment is to be made at the greater of the rates ⁶.

[54] Using an assumed weekly gross pay of \$1,170.00 (\$26 x 45 hrs) for the months May 2019 to June 2019 inclusive, and April 2020, and using the gross monthly figures shown in the IRD report for the months July 2019 to March 2020

³ Clause 4.1 of the employment agreement of Zhuguo Xi

⁴ Clause 4.1 of the employment agreement of Hongwei Wang

⁵ Section 23(2) of the Holidays Act 2003

⁶ Section 24(2) of the Holidays Act 2003

inclusive (total \$43,147.00), average weekly earnings were \$1,099.75. Assumed ordinary weekly pay is \$1,170.00 which is more than \$1,106.00.

[55] Using the higher figure for 5.5 weeks, the annual holiday entitlement for 16 ½ months employment (i.e., 4 weeks holiday for 12 months and 1.5 weeks holiday for 4 ½ months), annual holiday pay owing to Zhuguo Xi is \$6,435.00.

Conclusion

[56] Under s 131 of the ER Act and s 74(1)(a) of the Holidays Act, DSL is ordered by the Authority to make the following gross payments;

FIE XIE

Public holiday pay - \$1,296.00

Annual holiday pay - \$ 1,296.00

Total payment due - \$2,592.00

HONGWEI WANG

Public holiday pay - \$1,296.00

Annual holiday pay - \$1,296.00

Total payment due - \$2,592.00

ZHUGUO XI

Public holiday pay - \$4,680.00

Annual holiday pay - \$6,435.00

Total payment due - \$11,115.00

[57] Interest is to be paid on the above amounts due to each applicant, calculated from 1 June 2020 until paid in full.

[58] The calculation of interest is to be made using the Civil Debt Interest Calculator available at www.justice.govt.nz/fines/civil-debt-interest-calculator

[59] Payment of all amounts is ordered to be made to the applicants through their representative Karen Keat, within 21 days of the date of this determination.

Costs

[60] Ms Keat has provided a copy of a tax invoice for a total of \$2,116.55 charged to the applicants. Of that amount \$1,950 is her fee for representing the applicants, \$95 photocopying and courier fees, and \$71.55 ERA filing fee. A costs award against DSL is sought in the total amount of the invoice.

[61] DSL will have 14 days from the date of this determination in which to reply to the costs application if it wishes. The Authority will then determine the application.

Alastair Dumbleton

Member of the Employment Relations Authority