

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 785  
3328840

BETWEEN	YATONG ZHANG Applicant
AND	NEW CONCEPT CONSULTING COMPANY LIMITED First Respondent
AND	YUNE ZHANG Second Respondent
AND	ZHANGRUIYI LIU Third Respondent

Member of Authority:	Helen van Druten
Representatives:	David Kim, advocate for the Applicant Lion Yang, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	Up to 4 September 2025 from the Applicant Up to 2 December 2025 from the Respondent
Determination:	4 December 2025

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In October 2023, Ms Yatong (Monica) Zhang applied for a tutor position with New Concept Consulting Company Limited (NCCC) to commence on 2 November 2023. She was not given any contract documentation and was required to submit an invoice for payment of hours worked.

[2] Ms Zhang claims that for the period from 2 November 2023 to 19 August 2024, she was an employee and is therefore entitled to payment for all hours worked including

tutor preparation time and relevant leave entitlements. Ms Zhang raises personal grievance claims for unjustified dismissal and unjustified disadvantage. She further claims that she was required to pay an unlawful premium for her employment. She seeks penalties for this breach of s 12 of the Wages Protection Act 1983 (WPA) and for breach of s 65 of the Employment Relations Act 2000 (the Act) for NCCC's failure to provide her with a written employment agreement.

[3] NCCC says that Ms Zhang was a contractor tutor and was the same as other contractor tutors in the company.

### **The Authority's investigation**

[4] In a case management conference held with the parties' representatives on 15 August 2025, the parties agreed that the preliminary matter could be determined on the papers. Dates for receipt of all relevant information for consideration of the preliminary matter were timetabled.

[5] During that call, the parties discussed the amended statement of problem received on 13 August 2025, including Ms Liu as Third Respondent. Following further information received, the Authority confirmed that the Second and Third Respondents remained as parties and an amended statement in reply was lodged.

[6] On 6 November 2025 a minute issued by the Authority sought feedback from the parties for the unlawful premium claim to be considered at the same time as the agreed preliminary matter. The parties were directed to the relevant attachments already provided to the Authority and invited to a further case management conference or timetabling for submissions. All parties responded and agreed the matter could be determined on the papers and at the same time as the initial preliminary matter. No further information was received from the parties until 2 December 2025.

[7] On 12 November 2025, the Authority identified material information that was not copied to the other party. Consequently, timeframes for additional submissions were extended so this material could be considered and any response provided. A supplementary witness statement from Ms Zhangruiyi Liu was received on 2 December 2025 specifically in response to Ms Zhang's evidence relating to the telephone call of 21 August 2024.

[8] For the Authority's investigation written witness statements were lodged from Ms Yatong Zhang (as applicant), Mr Haiguang Zhang (Ms Zhang's father), Ms Yune Zhang (director), Ms Zhangruiyi Liu (director) and Grace An, Huayizi (Emily) Chen, and Yiyun Yan (all contractors with NCCC). The representatives were given an opportunity to provide written submissions.

[9] As permitted by s 174E of 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.

### **The preliminary issues**

[10] The first preliminary issue requiring investigation and determination is whether Ms Zhang was an employee or a contractor for the 2 November 2023 to 19 August 2024 period or any portion of that period.

[11] The second preliminary issue relates to the claim by Ms Zhang that Ms Yune Zhang sought and received payment from her for work visa application costs in breach of s 12A of the WPA.

### **Relevant law**

#### *Employment status*

[12] The meaning of an employee is defined in s 6 of the Act and the common law tests in this area have been firmly in place since the decision of the Supreme Court in *Bryson v Three Foot Six Limited*.<sup>1</sup> In that decision the Court set down clear factors to consider in determining the status of an employment relationship:

The written and oral terms of the contract between the parties ... any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice ... the way in which the parties have actually behaved in implementing their contract ... features of control and integration and ... whether the contracted person has been effectively working on his or her own account.

[13] Section 6 of the Act emphasises the importance of the real nature of the relationship and how that relationship operates in practice. If a contractor is treated like an employee, with significant control over their work, integration into the business and

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<sup>1</sup> *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] NZLR 721.

limited ability to work elsewhere, the contractor will likely ‘in law’ be an employee, even if their contract labels them a contractor.

[14] Whether a person is engaged as an independent contractor or employed as an employee therefore requires an objective look rather than a subjective one. *Rasier Operations BV* emphasises the importance of the protections provided by the Act and that a party cannot contract out of the Act by applying inaccurate labels to describe the relationship.<sup>2</sup>

#### *Premium payments*

[15] The WPA provides that no premium is to be charged for employment.<sup>3</sup> The section applies “whether the premium is received from the person employed or proposed to be employed or from any other person”.

[16] In *Labour Inspector v Tech 5 Recruitment Limited* the Court discussed the definition of “premium” and potentially extended application to an employer’s recruitment costs:<sup>4</sup>

Used in the context of s 12A we consider “premium” naturally captures paying to acquire a job (that is, consideration over and above the wage paid for the work performed in the wage/work bargain) as described in *Sears* and illustrated in *Tan*; specifically where a price is paid either by an employee, or potential employee, or is paid on that person’s behalf to secure employment. However, we consider “premium” extends beyond those situations to apply to an employer recouping, or attempting to recoup, recruitment-related costs or other expenses that would ordinarily be borne by an employer. Given the ingenuity with which agreements can be drafted each case will be fact-specific.

[17] Applying the principles outlined in the *Tech 5 Recruitment* decision, though distinguishing the facts in that case, *Holman v CTC Aviation Training (NZ) Ltd* established two fundamental tests for determining if a payment is a premium for employment:

- a. The payment is a condition for the obtaining of employment. The employment will not be obtained without making the prior payment.
- b. The payment does not benefit the employee in any way other than obtaining employment.<sup>5</sup>

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<sup>2</sup> *Rasier Operations BV v E Tu Inc* [2024] NZCA 403 at 112.

<sup>3</sup> Wages Protection Act 1983, s 12A.

<sup>4</sup> *Labour Inspector v Tech 5 Recruitment Limited* [2016] NZEmpC 167 at 54.

<sup>5</sup> As outlined in *Holman v CTC Aviation Training (NZ) Ltd* [2017] NZEmpC 60 at 20.

## **Background Information**

[18] The tutor role at NCCC was advertised on Skykiwi.com on 20 October 2023. Written in Mandarin, the posting sought an art design assistant teacher for part time weekend work.

[19] Ms Zhang met with Ms Liu and was offered the position to start on 2 November 2023. In response to Ms Zhang providing her personal details, Ms Liu sent Ms Zhang an invoice template on 3 November 2023 with instructions to complete her personal details on the template and return it. Ms Zhang did so.

[20] No employment agreement was offered by NCCC. Ms Zhang was concerned that she was not paid for the time she spent preparing for the tutoring and reviewing student work. She did not say anything to Ms Liu and said that she presumed this was usual in New Zealand.

[21] Ms Zhang continued to tutor for NCCC and invoice for her tutoring hours. There is no dispute regarding payment for those hours invoiced.

[22] In January 2024, Ms Zhang and Ms Liu discussed the possibility of NCCC supporting a work visa application for Ms Zhang. The parties dispute who initiated and drove the visa application process. Regardless, Ms Zhang initiated her visa application on the basis of their conversation and Ms Liu initiated the employer part of the visa application process.

[23] In the work visa application process for an accredited employer work visa application (AEWV), the employer is responsible for the employer accreditation process, advertising and a job check application to Immigration New Zealand. Once approved, a job token is issued and sent to the applicant, linking them to that job check application for their visa application process.

[24] For the purposes of the work visa application, Ms Zhang received an employment agreement from Ms Liu signed by both parties on 17 and 26 July 2024 respectively. The agreement was conditional upon a valid work visa.

[25] In August 2024, NCCC decided not to continue with the work visa application process for Ms Zhang and, for different reasons, also ended the working relationship. Ms Zhang was aggrieved that she had spent money on the visa application process, was led to believe that it was progressing and with her visa due to run out in September 2024, she then had no time to seek another employer to support a work visa.

### **Was Ms Zhang an employee or a contractor?**

[26] Ms Zhang's claims relating to s 65 of the Act, her personal grievance claim and wage and payment claims rely on the Authority finding that Ms Zhang was an employee during the period she worked at NCCC. If not, then the claims are outside the jurisdiction of the Authority.

#### *Documentation*

[27] The Authority was provided with a non-certified translation of the advertisement. Based on that translation, the advertisement is generic. The position was advertised as an art design assistant teacher with a WeChat address containing "consultant" in its address. It does not provide any reference to the nature of the relationship between the parties, refers generally to pay as "higher than minimum pay" and the teaching duties are equally applicable to a contractor or an employee.

[28] As evident from their respective witness statements, Ms Zhang and Ms Liu had different understandings of the nature of the employment from their first meeting. After one meeting and the offer to work, Ms Zhang understood that she now had a "long-term stable job". Ms Liu said that she did not intend it to be an employment relationship. For her, Ms Zhang was another contractor tutor for NCCC. Neither party discussed whether the role was casual employment, part-time employment or a contract for service in their communications.

[29] There was no documentation either as a contractor or an employee provided at any stage. Ms Liu said that she has never needed signed contracts as the company operates on a trust model and long-term cooperation with professionals, and it worked well. Ms Zhang said that she asked initially about paperwork to get paid, sent her IRD number and personal details and received an invoice template with an explanation of how to complete it. Intermittently from then on, she asked for an agreement but never received one.

[30] On balance, I conclude that both parties went into the first meeting with their own expectations and heard what they wanted to hear. Neither thought to clarify the status of the relationship with the other. Both parties entered the working relationship with different understandings of the nature of that relationship.

*Other factors*

[31] As there was no initial agreement between the parties on employment status, I have weighed other indicators and looked at the real nature of the relationship as required by the Act.<sup>6</sup>

[32] There are strong factors supporting Ms Zhang being a contractor:

- a. The payment process aligned with a contractor relationship. No leave entitlements were made or accrued and Ms Zhang was paid for hours worked and invoiced. One of Ms Zhang's concerns is that she was not paid for preparation hours but this is not unusual for a contractor. All three contractor tutors who gave evidence stated they did not bill for lesson preparation, only teaching hours.
- b. Ms Zhang completed, issued and was paid for 21 invoices between 3 November 2023 and 19 August 2024. If Ms Zhang had concerns about the nature of her employment, I would expect that there would be WeChat messages, conversations or queries asking about her employment agreement. None were provided in evidence.
- c. Evidence from the three contractor tutors, based in London, China and Auckland all emphasise the independent, flexible nature of their work with NCCC and key features of their work aligned to a contractor relationship. All witnesses stated they work with NCCC as a contractor tutor. I did not have the opportunity to question the witnesses directly, but the variances in their statements support Ms Liu's explanation of the business - that NCCC have a variety of tutors to match with student need. Of the three witnesses, one is full time working with tutoring on the side,

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<sup>6</sup> Employment Relations Act 2000, s 6(2).

another has variable tutoring hours and the third is a student and fits tutoring in around her study and exams. Two witnesses started at approximately the same time as Ms Zhang and remain contractors at NCCC.

- d. There was no indication that NCCC controlled Ms Zhang's work or limited her work elsewhere. On the contrary, Ms An gave evidence that she first met Ms Zhang at a studio where Ms Zhang was working in February or March 2024 and realised she was also at NCCC. Based on Ms Zhang's evidence, she was given the hours students were booked for tutoring and given the freedom to design and deliver the required lessons without input from NCCC.
- e. Ms Zhang did not have regular hours at NCCC. Reviewing all hours worked, she worked 37 out of 41 weeks. Of the weeks worked, hours per week ranged between two hours and 43 hours with an average of approximately 11.5 hours per week. No regular work pattern was evident. There was no evidence that Ms Zhang applied for leave and other tutors stated that "I inform [Ms Liu] in advance" and are "free to negotiate my teaching schedule".<sup>7</sup>

[33] Based on these factors alone, Ms Zhang was a contractor from 2 November 2023 until the termination of her contract on 19 August 2024. However, the certified transcript (and part transcript) of a conversation on 21 August 2024 between Ms Liu, Ms Zhang and her father must also be considered. Both parties gave evidence on this conversation.

#### *Intent of the parties*

[34] Based on the transcripts of the recorded conversation between Ms Zhang and Ms Liu on 21 August 2024, ultimately Ms Zhang wanted to extend her New Zealand work visa expiring in September 2024. By her own account, she approached Ms Liu in January 2024 and asked whether she could apply for a work visa through NCCC and if they could support her work visa application. Both parties agree that they discussed the Immigration New Zealand visa requirements and sponsoring a visa application. The

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<sup>7</sup> From the witness statements of Ms An and Yiyun Yan respectively.

parties talked to a licensed immigration adviser and for her part, Ms Zhang began the visa process including paying the application fee, engaging an immigration adviser, and medical examinations.

[35] When NCCC decided not to pursue the AEWV visa for financial and eligibility reasons Ms Zhang was caught by surprise and understandably upset. NCCC's August 2024 decision not to progress the application meant that Ms Zhang did not have an opportunity to seek other work visa sponsorship opportunities with other employers and she left New Zealand in September 2024.

[36] Accepting the recorded conversation as robust evidence, much of the conversation focuses on the family's disappointment that Ms Zhang was not advised earlier that NCCC was stopping the visa application process for Ms Zhang. They understood the visa process was almost complete. However, in the recording, Ms Liu says that:

“However, from the start, we told her that due to our course structure and business model, we simply cannot support hiring an offline teacher with long working hours and hourly wages sufficient to sponsor an immigration status. I made it clear from the beginning...”

[37] There are several references in the transcript to employer and employee, part time work and references to wages payments, some highlighted by Ms Zhang as evidence of her employment status. I considered these carefully. Taken in context, looking at the full conversation and balanced against other evidence, I do not consider there is sufficiently compelling evidence that NCCC ever intended Ms Zhang was engaged as an employee. Ms Liu did not know she was being recorded, and the conversation was also interspersed with references that support NCCC's position. Receipt of Ms Liu's recent supplementary statement reinforced that conclusion.

[38] I accept that in January 2024, NCCC intended to make Ms Zhang an employee by supporting her work visa application. At the point that NCCC decided not to continue the application; it should have told Ms Zhang. Unfortunately for Ms Zhang, NCCC is entitled to decide if it wishes to pursue a visa application for an individual. At that point, Ms Zhang was not an employee.

[39] The employment agreement given to Ms Zhang on 17 July 2024 was an offer conditional on a work visa being obtained as part of the AEWV work visa application process and can only be relied upon as an intent to create an employment relationship as part of that work visa application. Ms Zhang's acceptance of that employment agreement was conditional upon a valid work visa and she was unable to obtain this for reasons outside her control.

[40] Regrettably for Ms Zhang, the promises given by NCCC were not what she expected and she says that her trust and ignorance of the law was used by NCCC and her health is now impacted. Ms Zhang said that she did not know what a contractor was and the company took advantage of that. Certainly, NCCC benefitted from Ms Zhang's failure to question and lack of knowledge on employment matters.

#### *Possibility of casual employment*

[41] I also considered whether Ms Zhang was a casual employee rather than a contractor. For the same reasons as above, I concluded that she was not a casual employee.

#### **Conclusion on employment status**

[42] As well as applying the common law tests to the detail of Ms Zhang's work arrangement, I must review the whole relationship objectively. It cannot be an employment relationship only because one party wanted it to be, if an objective look would lead an outsider to think otherwise.

[43] Given all the evidence before me, this was a contractor relationship between the parties. Ms Zhang has not established to the Authority's satisfaction that she falls within the definition of "employee" in s 6(1)(a) of the Act, so the Authority does not have jurisdiction to investigate her employment claims.

[44] Ms Zhang's claims against NCCC as an employee are unsuccessful and are declined.

#### **Payment of a premium**

[45] As it is determined that Ms Zhang was not an employee, the second issue relates to payment of the costs of the visa application process and whether these are considered

payment of an unlawful premium as defined in s 12A of the WPA. Despite being a contractor at the time of her visa application, the scope of that section includes premiums received from those “proposed to be employed or from any other person”. On that basis, the amounts paid by Ms Zhang are capable of falling within the s 12A definition of a premium.

[46] It is not disputed that payments were made by the Zhang family for Ms Zhang’s visa application. Based on transaction evidence provided by Ms Zhang, her family made two payments for RMB8,694 on 11 March 2024 and RMB6,300 on 17 April 2024 for the immigration fees and job advertisement. Both amounts were paid into a bank account in the name of Yune Zhang. This equates to approximately \$3,385 NZD based on the exchange rates at the time.

[47] NCCC says that as the arrangement was for Ms Zhang’s sole benefit, Ms Zhang’s family had offered to cover NCCC for the costs of the “sponsorship fee”. From NCCC’s perspective, they did not benefit financially from the arrangement and were not responsible for giving Ms Zhang immigration advice therefore any suggestion they were taking unlawful premiums was misleading and unfair.

[48] Having considered the 21 August 2024 conversation and the evidence from Ms Zhang and Ms Liu, I am satisfied that the application for an AEWV visa was initiated by Ms Zhang. NCCC agreed to proceed with the application on the basis that there was no cost to them and, in discussions on 21 August 2024 with Ms Zhang’s father, said that it “hoped that [Ms Zhang] could gradually take on more work and responsibilities, and that the company’s performance would improve...but clearly that hasn’t happened”.

*Were Ms Zhang’s payments a premium?*

[49] The question then remains whether the payments made by Ms Zhang fall within the definition of a “premium” as defined by the Act.

[50] I considered the definition of premium discussed in *Labour Inspector v Tech 5 Recruitment Limited*<sup>8</sup> where the full Court considered that a premium could extend to

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<sup>8</sup> Above at n 4.

an employer recouping or attempting to recoup expenses normally borne by the employer.

[51] For AEWV applications, Immigration New Zealand specifically provides that the employer is not permitted to pass on any recruitment costs to applicants including advertising costs, adviser fees or accreditation and job check application fees.<sup>9</sup>

[52] Based on the Immigration New Zealand website, those fees currently sit at \$775 for a standard AEWV employer accreditation and \$735 for a job check. Messages between the parties relating to this transaction shows the job advertisement cost \$180.55, equating to a total cost of \$1,690.55 NZD. A significant portion was also paid to the licensed immigration adviser.

[53] Written evidence from both parties confirms that the payments made by Ms Zhang's family were for employer accreditation, the job check and the job advertisement listing. In her evidence, Ms Liu stated that the first payment was for the employer accreditation and the second payment for the job check and job advertisement. Based on presentation of an invoice from the licensed immigration adviser and other evidence presented, I accept that NCCC did not profit financially from the money paid to it by Ms Zhang.

[54] Given then that the payments made by Ms Zhang may fall within the definition of a premium, I apply the two legal requirements outlined by the Court in *Holman*<sup>10</sup>.

[55] *Prima facie*, the first requirement in *Holman* is met. Ms Zhang was required to pay the employer's visa application costs in return for the employer progressing the work visa application. If Ms Zhang did not cover the costs, the application would not be progressed.

[56] However, the Court in *Holman* noted the need for a clear distinction as to the purpose of the payment. Ms Zhang had offered and agreed to cover the costs of the visa application on the basis that NCCC progressed the visa application. NCCC would not have made the visa application but for Ms Zhang's assurance that her family would

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<sup>9</sup> Immigration New Zealand Operational Manual ref. WA2.10.10 (m).

<sup>10</sup> Above at n 5.

cover the costs. This was a mutual (albeit verbal) agreement to progress a visa application for Ms Zhang's benefit using NCCC as a vehicle to do so.

[57] In addition, Ms Zhang was not seeking employment. According to Ms Zhang's evidence, in January 2024, Ms Zhang believed she was already an employee. Even if that belief was mistaken, it follows that for Ms Zheng, the visa application and associated costs were not payment required to secure employment as required by s12A of the WPA, they were payments to enable Ms Zhang to acquire a work visa to stay in New Zealand. For Ms Zhang personally, payment of the visa application costs was not a condition for the obtaining of employment.

[58] Both the *Tech 5 Recruitment* decision and *Holman* demonstrate that each case must be determined on its own facts. For both parties, the payment was not intended to be a payment required by NCCC. The payment was offered by Ms Zhang and therefore did not meet the requirements to be considered payment of a premium in accordance with s 12A of the WPA.

[59] It still remains that NCCC made a verbal agreement to support Ms Zhang's visa application. It ought reasonably to have known in January 2024 that Ms Zhang was not working enough hours to likely meet AEWV requirements and the company's performance would not improve to the extent that it would be able to offer Ms Zhang the hours required. Ultimately NCCC misled Ms Zhang, caused her to unnecessarily incur immigration costs and its decision to withdraw its support of her application was a breach of the verbal agreement between them.

[60] As a breach of the verbal agreement in these circumstances was outside the jurisdiction of the Act,<sup>11</sup> any remedies sought are correspondingly outside the jurisdiction of the Authority but can best be applied for in the Disputes Tribunal.

### **Conclusion on payment of a premium**

[61] I do not consider that this was payment of a premium for the reasons I have already outlined. As there is no breach of s 12A of the WPA no award for any penalty is made.

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<sup>11</sup> Employment Relations Act 2000, s 161.

## Costs

[62] Costs are reserved.

[63] The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, the successful party may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, the other party then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[64] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>12</sup>

Helen van Druten  
Member of the Employment Relations Authority

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<sup>12</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).