

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**[2012] NZEmpC 166  
WRC 7/12**

IN THE MATTER OF      a challenge to a determination of the  
Employment Relations Authority

BETWEEN                FEI LI  
Plaintiff

AND                      WANZHI HUANG  
Defendant

Hearing:                10, 11, 12 and 13 September 2012  
(Heard at Wellington)

Appearances: Graeme Ogilvie, advocate for the plaintiff  
Wanzhi Huang in person

Judgment:            26 September 2012

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**JUDGMENT OF JUDGE A D FORD**

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**Introduction**

[1]     The plaintiff has challenged by way of hearing de novo a determination<sup>1</sup> of the Employment Relations Authority (the Authority) dated 12 April 2012. The Authority concluded that the defendant, Mr Huang, had worked for the plaintiff between 1 June 2011 and 5 December 2011. That had been the central issue in the case. The plaintiff claimed that he had never employed Mr Huang. There was no dispute that Mr Huang did not receive any wages for the period in question. The Authority found that Mr Huang had been employed under an employment agreement dated 16 May 2011 and that he had been unjustifiably dismissed on 5 December 2011. It awarded him approximately \$21,000 for arrears of wages and holiday pay; \$2,419.20 for lost wages from the date of his dismissal and \$2,450 as

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<sup>1</sup> [2012] NZERA Wellington 35.

compensation for emotional distress. The amounts ordered for lost wages and compensation had been reduced by 30 per cent on account of Mr Huang's contribution to the personal grievance in being "evasive and uncommunicative on certain matters". In this Court Mr Huang seeks an increase in his compensation award for non-economic loss and he now claims \$40,000 under that head.

[2] The plaintiff acknowledged signing the employment agreement dated 16 May 2011, along with a job offer dated 10 May 2011, but he contended that the main purpose of the documents in question, which were prepared by Mr Huang, was to enable Mr Huang to make application for a work visa. Mr Li claimed the commencement of the employment relationship was subject to Mr Huang producing a valid work visa and as Mr Huang had never produced a work visa, the proposed employment relationship never commenced. The Authority, however, correctly recorded that Mr Huang had obtained a work visa from Immigration New Zealand (Immigration) on 27 May 2011 although it accepted that Mr and Mrs Li did not know he had a work permit until the position was clarified with Immigration in a telephone conversation on 25 November 2011.

[3] The respective pleadings contain allegations of forgery, fraud and deception. These allegations relate to events involving Immigration that occurred around the time of Mr Huang's alleged unjustified dismissal. Credibility is a critical issue in the case. Where the truth of the fraud and forgery allegations lie has a significant bearing on the outcome. The Authority made the observation that the conflict in the evidence, "particularly on who wrote and signed various documents (including different employment agreements and email letters), have made this matter more difficult and complex." I will need to deal with those issues but before doing so it is necessary to explain more about the background to the alleged employment relationship.

## **Background**

[4] Mr Li arrived in New Zealand in October 2008. For approximately three years he has owned and operated an Internet cafe in Cuba Street, Wellington which trades under the name Eland Internet Cafe and Games (Internet cafe). Mr Li told the Court that he has very limited understanding of the English language. He cannot

read or write in English but he can speak sufficient English to serve his Internet and games customers. He gave all of his evidence through an interpreter. Mr Li usually works between 2.30 pm and 6.00 pm and then between 10.00 pm until closing, around midnight. His wife, Mrs Vicki Li, works at the cafe most days between 9.30 am and 3.00 pm.

[5] Mrs Li appeared to have an excellent command of the English language, both oral and written, and she did not need any assistance from the Court appointed interpreter. She told the Court that she had learned basic English at primary school, high school and university in China and after she came to New Zealand in 2001 she attended language school in Christchurch. In 2005 she obtained employment as office manager with an Asian financial company and after a period of further study she began working with a Chinese restaurant in Wellington. She then acquired a cleaning business which she appears to still operate while assisting her husband at the Internet cafe. She said that her husband also helps her out with cleaning work.

[6] Mr Huang arrived in New Zealand in September 2010. Like Mrs Li, he also has an excellent command of the English language. He did not give evidence about his background apart from stating at one point that Mr and Mrs Li, “should know that I’m not an average Chinese, I’m educated, talented, skilful and ethical.” Although there was a dispute as to who sent the email, Mr Huang did not challenge the contents of a controversial email dated 15 December 2011 which recorded that he had graduated from university in July 2009 and between August 2009 and May 2010 he was employed as an IT specialist at the China branch of Conia Australia Pty Ltd, based in Shenzhen, China. It was further stated in the email that after his arrival in New Zealand, Mr Huang worked as a kitchen hand at a Wellington restaurant and then in November 2010 he obtained full-time employment as a community support worker with the MASH Trust situated at 5 Hobart Street, Miramar, Wellington. He continues to work for that organisation. Mr Huang told the Court that he has “full-time sleepover employment with Mash Trust” working under a roster system for 40 hours per week between 5.00 pm and 8.00 am at \$14.50 per hour. He also made the point in his evidence that the MASH Trust was not able to sponsor his residence application.

[7] In reference to Mr Huang's work at the MASH Trust, the Authority stated in its determination:

[11] On 15 July 2011 Mr Huang made an application to Immigration New Zealand for residence in New Zealand. Also during this time Mr Huang commenced work for an organisation called MASH Trust, a mental health provider in Wellington. He did not tell Mr and Mrs Li and Immigration New Zealand about this work. He worked at MASH at night, involving overnight sleepovers.

[8] The evidence before me was clear that Mr Huang commenced his employment with the MASH Trust on 15 November 2010. I agree with the Authority, however, when it says that he did not tell Mr and Mrs Li about his employment with the Trust. Mr and Mrs Li said in evidence that Mr Huang told them that he had no work and no income and that was why they agreed to help him out. I also agree with the Authority that Mr Huang did not tell Immigration that he was working for the MASH Trust. The Wellington branch manager of Immigration, Mr Rex Hesterman, gave evidence before me and he said that he did not believe that Mr Huang had the legal authority to be working for the Trust. Mr Huang indicated in his cross-examination of Mr Hesterman that he is proposing to challenge the department's opinion on that issue before the Immigration Tribunal.

### **The first employment agreement**

[9] I refer to the employment agreement dated 16 May 2011 as the first agreement for reasons which will become apparent. In November/December 2011, other employment agreements began to appear on the scene. Who drew them up and signed them is one of the matters very much in contention. There is no dispute, however, that the first agreement was signed by each party. The first agreement provided that Mr Huang was appointed to a permanent full-time position as IT Support and Computer Technician with a start date of 1 June 2011. The rate of pay was stated to be \$18 per hour and the hours of work were 9.30 am to 6.30 pm Monday to Friday. The wages were to be paid every Thursday by direct credit to Mr Huang's bank account.

[10] Although the evidence on the matter was not as clear as it could have been, the background to the first agreement appears to be that around the end of April or early May 2011, Mr and Mrs Li made the decision to employ someone in the Internet

cafe. They placed a handwritten advertisement outside the shop. There was no dispute as to the reason for the decision. Mrs Li was nearly 38 years old and she wanted to have a child. Around the same time the couple began to get to know Mr Huang who frequented the cafe. Mrs Li told the Court in evidence which I accept:

3. Huang had started to come into the cafe a lot. We talked about lots of things and he seemed to need somewhere to be a lot of the time. He said he was sleeping in his car so I offered for him to stay at our house for a while, which he did. I trusted him and gave him a key to our house. He was keen to help us with things and in May 2011 we decided we would offer him a job. He put a start date of 1 June 2011 on it but it was made very clear in our discussions that it would only start when he had his work permit and also a police clearance from China. We knew that he was not allowed to work for us without a work permit and the police clearance. He never produced either of these.

[11] Mr Li confirmed that he also had made it very clear to Mr Huang that before he could start work they would have to have a copy of his work permit and his police clearance from China. I accept that through their own experience as Chinese immigrants, both Mr and Mrs Li would have been keenly aware of the need for Mr Huang to be able to produce a work visa before he could commence working for them. Mr Li told the Court:

I knew that I could not employ anyone without seeing their work permit. He never provided these and therefore I never talked to him about starting the employment we had discussed. After that discussion in May I never talked to him again about any employment agreement, about him being an employee, or about paying him any wages. None of these things ever came up with him until the end. I never saw his work visa and I understood he just continued on a friend arrangement where he would come to our work, he would help us out and we helped him by giving him drinks and food vouchers and allowed him to use the Internet for free.

[12] In reference to the same time period, Mrs Li said in her evidence:

4. Between June and December 2011 Huang never once asked us for any wages or asked why he wasn't getting any. I believe he knew quite well that he was not an employee and I see now he was using our letter and the employment agreement just to get what he wanted from Immigration Department.
5. While we were waiting for him to get a work permit he would come into the shop most days for 2 to 3 hours. He would do odd things for us but he was never working as an employee. We trusted him and saw him as a friend who just came to see and help us while he was waiting

for his work permit. In return we would give him free use of the Internet and free drinks.

[13] For his part, Mr Huang said in evidence that he worked full-time for the plaintiff at the Internet cafe from 1 June 2011 until 5 December 2011. He said that Mr and Mrs Li had never asked to see his work permit or police clearance prior to 25 November 2011. He claimed that the plaintiff had “made up stories about so-called friendship arrangement, “free Internet, free food and free drink”, in exchanging of “free help in the Internet café”.” Mr Huang said that his work permit had been issued on 27 May 2011 and the police clearance certificate had been issued on 6 July 2011. He added:

... I always had them available and the plaintiff never asked to see either of them. If he really had asked to see them I had no reasons or motives not to provide them the work permit or the police certificate.

### **The recorded telephone conversation**

[14] On 25 November 2011, Mr Huang and Mrs Li had a telephone conversation with a person who identified herself as “Cherie” at the Immigration New Zealand Contact Centre in Auckland. The phone call was recorded by Cherie which is the normal procedure at the contact centre. The recording was subsequently transcribed and produced at the Authority hearing and before me. The telephone conversation was the focus of considerable attention in the course of the evidence and, as it turns out, it is quite pivotal in determining where the truth of the matter really lies.

[15] The background to the telephone conversation was explained by Mrs Li. She and her husband were unaware that Mr Huang had applied for a resident visa application. She told the Court that a few days before 25 November 2011 Mr Huang told her that he had received a call from his case officer at Immigration saying that he was required to attend an interview around 9.00 am on 25 November 2011. He explained to Mrs Li that he was nervous about the interview because he did not know what they were going to ask him but they had requested him to obtain from her an organisational chart and a financial statement. Mrs Li assumed that the information was required in connection with Mr Huang’s application for a work visa and she told him that if Immigration wanted those two confidential things then she would need to speak to his case officer first. Mrs Li continued in her evidence:

... Then 25<sup>th</sup> November he came back from Immigration, met me at the shop and I asked him, "How's the meeting with your case officer?" He said, "Oh, they told me from today I could start work and working for, and I can work for three months and get the payslip and the IRD tax thinks that I can get my work permit." I said, "Did they ask you financial statement or organisation chart," and he said, "Oh, yes they did but I didn't have them with me." And I said, "Did they tell you, give you, anything in written confirm you get your work permit?" He said, "No, they didn't give me anything, they didn't give me the work permit." I said, "Have you got your case officer's name?" And he said, "No, I don't know her name." And I said, "You were sitting there with her and you just had a meeting how could you [not] know her name?" And he said, "I'm short sighted, I didn't see her name." I know he's short sighted, he said when he's driving he even can't see the speed limit on the big sign, so I just saying, "Okay, then can you just call the 0800 number and ask them which is your officer's number and I can call her, I can talk to her, saying, "Why you need the financial report or why he can start work without any work permit." That's why he made the phone call.

[16] Because of its significance, I set out below the complete transcript of the telephone conversation recorded at the Immigration Contact Centre. It commences with Mr Huang speaking to "Cherie" at the contact centre; then the call is transferred to Mrs Li and towards the end Mrs Li transfers the call back to Mr Huang:

*Welcome to Immigration New Zealand. You're speaking with Cherie.*

This is Wanzhi Huang speaking.

*How can I help today?*

Yeah, how, I wonder ah, can I transfer to the work ah, ah, the ah I want to check my work visa conditions.

*Sure. Can I, do you have your passport number or your client ID for [inaudible] file?*

I have my full name.

*Yes please. Could you spell your last name for me, your family name please?*

Ah it's Huang.

*And what was your date of birth?*

Ah it's 21<sup>st</sup> December 1986.

*Okay. And sorry could you spell your first name for me also?*

It's Wanzhi.

*Perfect. Okay. I'm just bringing up that file. One moment.*

Okay cool thanks.

*Okay and can you also confirm please your home address?*

Ah it's like Hobart Street

*Mm*

Miramar, Wellington.

*Perfect. Okay. So you're wanting to confirm the conditions of your work visa?*

Yeah, yeah, yeah. Because my employer she is beside me and she wants to confirm my working conditions so make sure I can legally work here.

*Sure okay. So we have got you on now what do we have? Ah the Silver Fern Working, ah practical experience visa.*

Yeah.

*And the work conditions, so you are eligible to work as IT support and computer technician for Eland Internet Café in Wellington.*

Oh yeah.

*And that's valid through until 27 March 2013.*

Oh so it is possible that my employer to talk to you to confirm this?

*Yeah, not a problem. You can put them on.*

I just transfer the phone.

*No problem.*

Thank you.

**[Ms Fei Li continues the conversation with Immigration New Zealand]**

Hi its [inaudible] from Eland Internet Café. How are you?

*Fine. I'm good thank you. You're speaking with Cherie at Immigration now.*

Yeah.

*Now, oh sorry how can I help?*

It's the thing about my employee Simon. He [inaudible] the case officer this morning

*Ah, ah.*

And he told me that the case officer said he can start work up here now

*Mm, mm.*



From now on and without a work like a work visa or work permit I don't know such a thing and normally people just working with legal work permit.

*Ah, ah.*

Cause he told me that and I don't have any written notification from the Immigration officer and I don't know if

*Sure*

if he can work here.

*No he certainly can. The conditions of his work visa*

Yeah

*allow him to work as IT support and computer technician for Eland Internet Café in Wellington.*

So he already got his work permit or how, he's, cause I didn't see anything from the Immigration.

*He's, he's held a work visa under the Silver Fern Practical Experience category since the 27<sup>th</sup> of May*

Yeah, but it's already, he told me it's already due that's why he applied for another work permit to work for my internet café but I didn't see the work permit yet and he just came back this morning and saying he can work here now.

*No, yeah, no he certainly can. His current visa, the visa that he currently holds is valid from the 27<sup>th</sup> of May this year until the 27<sup>th</sup> of May 13 so it's a two year work visa.*

Oh until 2013 [inaudible]

*27<sup>th</sup> of May 2013 that's right.*

Oh okay.

*The only other application we have for him is his residency application which is in process but that doesn't affect his work eligibility.*

Oh but he didn't show me his work permit. He said he hasn't got it.

*Unless he's thinking he maybe needs a new one. But he should have a work visa label in his passport*

No. Nothing.

*Interesting.*

That's why I was, I was worry about. Cause he's seen that and I didn't see anything from his passport and I was thinking, oh I start paying now and you work here and one day Immigration [inaudible] come here and they're

saying oh you've got some illegal work person here. I got trouble and he got trouble.

*Sure. Sure. No let me just, I'm just bringing up his, his original approval letter cause he should at least have a copy of the approval letter in his passport*

No he has nothing. He even has no, his application number, such a thing. I ask him and he say oh I got nothing and I don't think I got work permit. I just talk to my case officer and he say I can work now. And I say will you bring me to see the [inaudible]

*No problem. What I'll do is I'll actually ah email through his approval letter*

Yeah

*That he that he would've originally got way, see he would've got this way back in March so possibly he's just lost it in the meantime.*

I think so. I think so cause he, he said oh I haven't got my work permit.

*No, he, he certainly does. So I'll, I'll email this through to his address. It'll go to his email address at simonhuang@hotmail.co.nz.*

I just, I just, I just give the phone to him. You just confirm the email just in case it's lost again.

*No problem. Sure.*

Thank you very much.

*You're welcome.*

Hello?

**[Mr Wanzhi Huang continues the conversation with Immigration New Zealand]**

*Hi there. Um, so I was just, I was just saying to your employer what I can do is email through the original approval letter for your work visa. Cause it is valid for two years under the Silver Fern Practical Experience Programme. So the email address I have on file for you is simonhuang@hotmail.co.nz?*

Yeah. Ah, actually I use another one.

*Sure. So we'll update your email address. What's your new address?*

Its ah, ah, wanjy

*Sorry is that j or*

Wanjy yea. Wangy

*Gy, so g for goat or g for girl?*

yeah, yeah, goat yeah. Dash huang

*Ah huh.*

at hotmail dot com.

*hotmail dot com.*

Yeah.

*Okay. So I've just updated that email address. I'll resend through your original confirmation letter and you'll be able to show that to your, to your employer. Um you should also have a, there should be a visa label in your passport*

Oh

*From back, it will be from way back in May but that will be the visa label for your work visa.*

Oh yeah.

*But in the meantime I'll send this email through to you as well and you'll be able to, your employer will then be able to have that on file.*

Oh okay cool thank you.

*Okay so that's all been done for you.*

Oh that's wonderful that just solve my employer's concern.

*No problems.*

Cool thank you.

*Thank you for your call. You have a good day.*

Okay you have a good day too.

*Bye.*

Bye bye.

[17] Mrs Li told the Court that she had been made to “feel like a fool” asking the person from Immigration about Mr Huang’s work permit after she found out in the course of the telephone conversation that he had had a work visa since May 2011. She said that she asked Mr Huang why he had not told her that he had a work permit and he said, “... he didn’t know, he hadn’t got it”. She pointed out to him that the Immigration person said that the sticker was inside his passport and she asked him to bring his passport to let her see it and he replied, “I haven’t got passport from Immigration.” Mrs Li said that at that point Mr Huang told her that he would go to

“the mental house” at Hobart Street in Miramar which he used as a postal address to check if his passport was there. Mrs Li said that she asked him why he was going to that address and then for the first time he told her that he had a full-time job working at the Hobart Street address. Mrs Li said that she asked Mr Huang to text her that night once he had obtained his passport but he did not text her that day (which was a Friday) and on the Monday when she asked him if he had his passport, Mr Huang replied, “No, the person who got some mail left Friday night.” She told the Court that she did not see his work permit until the Authority hearing and she has never seen his passport.

[18] In his extensive examination-in-chief and submissions, Mr Huang said surprisingly little about the recorded telephone conversation on 25 November 2011. Initially he said:

... Vicky on the 25<sup>th</sup> November 2011 started to be somehow interested in my work permit and wanted to see my work permit. Since my passport was not on me on that day we then rang the Immigration call centre to confirm the conditions on my work visa.

Later he expanded on that statement:

... this was the first time that Vicky asked me to see my work permit and she never did this before that. I had been working full-time there since the 1<sup>st</sup> of June 2011 and suddenly she came up with the idea to see my work permit. Since my passport was not on me we called Immigration to confirm my work condition. Vicky also found out that I applied for the residency. This was my personal business and I did not think she would be interested in knowing anything about my residency application. She and the other plaintiff then promised me to back pay me very soon and I was deceived to let them handle my residency application but later the plaintiff and Vicky threatened me that I needed to give up the pay of six months wages so that they could sponsor my residency application. I turned them down and that is why, now, we’re having this employment case.

[19] Mr Huang was cross-examined at some length about the contents of the telephone conversation on 25 November 2011. It was put to him that “about three times” in the course of the conversation Mrs Li had told Immigration that she had never seen his work permit but he had not challenged that statement even though he had been standing alongside her. Mr Huang appeared to have difficulty understanding the question and when it was clarified, he answered: “That was her words and I think it’s very contradictory. I don’t think it makes any sense.”

[20] Mr Huang was asked by the Court if Mrs Li had wanted to see his work visa why did he not show her his passport. He replied:

Because I was working in the shop and my passport is in my car. My car is, was parked on Mount Victoria, it's too far away to go and Immigration is like two blocks away and that is a 800 phone number, ah 0800 to call and can verify it, the conditions on the work visa. It's more handy than going to get the passport.

[21] A short time after giving that answer, Mr Huang was asked by Mr Ogilvie, advocate for the plaintiff, about the approval letter Immigration had said they would email to him. Mr Huang replied that he never received the email "and later, later I went to the counter of the Immigration office, which is on Willis Street and I got the visa, visa label, this page, document H, for Vicky." Document H was the work visa. The obvious question which was unanswered on the evidence is why it was necessary for Mr Huang to allegedly go to the Immigration office to obtain the visa if, as he told the Court, the work visa all along was in his passport which was in his car.

### **The end of the relationship**

[22] It was clear from the evidence that Mrs Li became quite disillusioned after the telephone conversation with Immigration on 25 November 2011 and Mr Huang's ongoing failure to produce his passport or his work visa. She told the Court:

We had another discussion on Friday 2 December. I asked him about hiding things from us. He said he had lied to me about the Immigration Office asking for our financial statements. I asked whether it was true he had an interview on 25 November with Immigration. He said he had. I asked if he really did not know the work permit was already issued (on 27 May). He said he did not know and he did not have his passport. I asked him about applying for permanent residency. He agreed he had done this but had not told us. I asked him why he had not told us and he said he thought he could do it by himself.

[23] Mrs Li confirmed that when Mr Huang told her that he needed financial details from the shop and an organisation chart, she understood that it was for his work permit application but in the telephone conversation of 25 November 2011 she had learned that it was for his permanent residence application. She said that she was "shocked" to find out that Mr Huang had applied for residency. She explained her reasons:

‘Cos, um, at that time I didn’t know he got work visa but he already applied for his permanent residence and he didn’t tell us. We see him as a friend. We trust him. That’s why we went to him, move to live with us, and work for us, ‘cos we trust him. I don’t, I don’t know, if people think about trust, I trust, I trust a person before I do anything.

And a little later:

‘Cos he didn’t tell us, ‘cos, you know, as I, as my own experience, you normally talk to your employer before you apply for residence ‘cos employer needed to, um, sponsor you and give you some, like a contract, like a payslip, like IRD, um, record, and the Immigration normally will come talk your employer to confirm you actually worked there. So I think it’s really related to, to the, um, you know, when he worked there, when he applied for the work visa connected with us then when he applied for permanent residence Immigration will contact us so - but he didn’t tell us.

[24] Following Mrs Li’s discussion with Mr Huang on Friday, 2 December 2011, she and her husband had further discussions about Mr Huang and they decided to tell Mr Huang that they did not want him to come back to the shop. On Monday, 5 December 2011, they both went in and opened the shop and later, while Mr Li looked after the business, his wife talked to Mr Huang and told him not to come back. Mrs Li said in evidence:

I talked to Huang on 5 December and told him we did not want to support him with the Immigration Office anymore. He was not happy about this. I asked him not to come into the shop anymore. I told him I will be telling Immigration that we are not supporting him anymore with any application. ...

[25] Mrs Li said that later the same day they received three text messages from Mr Huang and she went to the police about them but as they were in the Chinese language she had to get a certified translation. She said that a policeman phoned Mr Huang and warned him not to do anything suggested in the text or he would be arrested. The translated text messages timed at 6.13 pm, 6.14 pm and 6.24 pm respectively read as follows:

**Message One:**

My friends in New Zealand all wanted to smash your cars, house and shop for me. I told them not doing these now and it’s illegal. If my visa has been [cancelled], I have to send the recorded videos to the related departments, which shows seventy or eighty kids playing games. I do not care about how serious the result is because I am going back to China anyway. But I won’t do these if I could stay in New Zealand. People leave home for making money and nobody wants to hurt the others. You are the only one can let me

stay here or going back to China. You should think about it. I have already made the complaints to the Department of Labour this afternoon about the wages for the half the year, \$18 per hour. I know the landlord of the building, employees working around, the customers and I have their phone numbers, so I won't [lose] in the Court. Regarding the resign letter, please read it few times because once I start the work, it will be nothing legal. My Work Visa was issued since June and the probationary period ended on September. You must pay me the whole year salary if you take unilateral decision to dismiss me. Both the violent actions and legal process would hurt you and me. I would like come back to work and settle the whole thing personally if you could continually sponsor my application for Residence and pay me.

**Message Two:**

I still believe people are good but just want to protect myself for some reasons.

**Message Three:**

I feel sorry in my heart for setting you up so many ways, even haven't done anything bad and hope for your forgiveness. I promise not starting fight from my side and mess up everything. I prefer negotiation whatever what have happened.

[26] Mr and Mrs Li told the Court that the request for wages in Message One was the first request Mr Huang had ever made for wages.

[27] On 6 December 2011, Mrs Li sent another letter signed by both her and her husband to Immigration withdrawing their sponsorship of a work permit for Mr Huang. The letter commenced:

1. Wanzhi Huang was granted and issued a two-year Work Permit on 27/05/2011, BUT he has hidden this very important information from me until I knew it by ringing the immigration call centre up on 25/11/11. Before that, I have asked him many times about his Work Permit and he said he has not got it. It is completely unacceptable for hiding critical information from us, Wanzhi Huang's sponsoring employer.

[28] Further on in her letter, Mrs Li said:

4. During the period of June to 25/11/11, Wanzhi Huang came to our shop almost every day because he told us he has no money and nowhere to go and he currently lives in a backpacker [close] to our shop and sharing a room with ten people. So we let him stay in our shop as long as he likes, for using Internet, learning the managing systems of my shop and helping us a lot. I am really appreciated and see him as an honest, reliable and valuable employee in the future. But gradually we found and really upset about his telling everyone he was working at my shop, because I haven't see any legal proof from

immigration saying he could work legally until 25/11/11. Also immigration and I have asked his police clearance for China since June and he always made excuses fail to provide it.

...

6. After discuss with my husband, Fei Li, the owner of Eland Internet Café, we were really disappointed about Wanzhi Huang's dishonest behaviours through the application of his Work Permit. We can not let such a person who is trying to fool and play us from the very beginning of his application. Even at this stage, he has not provided us with his police clearance for China, copy of his passport, copy of his Work Permit and his IRD number. Wanzhi Huang is not genuinely working towards work and job but for the Permanent Residence. We strongly doubt he could be a good employee bringing benefits to our business.
7. On 5<sup>th</sup> December, we have told Wanzhi Huang that we did not want him to start working for us because his dishonest and cheating behaviour makes us really disappointed. We [cannot] accept such an employee full of lies and he will put us in trouble one day as we believed. Wanzhi Huang was extremely furious and saying nasty words to us before he left the Internet café.

...

## **Visit from Immigration**

[29] At approximately 10.30 am on Wednesday, 14 December 2011, in response to Mr and Mrs Li's letter, two Immigration officers, Ms Anna Castelle and Ms Louisa Jacques, made an unannounced visit to the Internet cafe. They met with Mrs Li. A full report of the site visit interview on Immigration New Zealand letterhead signed by both Immigration officers was produced in evidence. At the outset the officers showed Mrs Li an email which appeared to have been sent by Mr Li to Immigration on 5 December 2011 at 9.42 am supporting Mr Huang's residence application. The email was sent from the address: elandinternetcafe@gmail.com and was addressed to "Anna Castelle". It quoted Mr Huang's residence application number, 10565830. The email commenced:

Dear Anna Castelle,

I am Fei Li, the employer of Wanzhi Huang from Eland Internet Cafe.

I am writing to support Wanzhi Huang's residence application 10565830. Eland Internet Cafe is a family business [run] by me and my wife Hongyu Li. We reached an employment agreement with Wanzhi Huang at the end of May this year. His main duties are to deal with all the IT related tasks in our



business. But due to his Asian travelling plan, we lately decided to start the employment from 1st-Dec-2011 after his trips.

...

[30] The site visit report recorded that Mrs Li informed the Immigration officers that the email had definitely not been sent by her husband whose “English is not good enough to have written the email.” She also informed the officers that the email address was unknown to her because the business email address was elandgame@gmail.com. The evidence before me was that as at 5 December 2011, Mr and Mrs Li did not know Mr Huang’s residence application number. Nor did they know Ms Castelle.

[31] The site visit report stated that the Immigration officers then proceeded to produce other documentation which Mrs Li had never seen before. First, there was a second offer of employment and employment agreement dated the same dates as the original offer and employment agreement but the hours of work had been changed from “9:30 a.m. to 6:30 p.m.” to “9:30 a.m. to 3:30 p.m.” Mrs Li told the officers that the second set of documents did not contain her husband’s signature because he signs his name in Chinese characters whereas his signature on the second set of documents was printed in English. Mrs Li was also shown a job description which she confirmed she had never prepared. The officers then produced a third offer of employment and employment agreement which were dated “27/11/2011” and “30/11/2011” respectively. The significant change in the third set of documents was that the date of the commencement of employment had been changed from 1 June 2011 to 1 December 2011. Again, Mrs Li told the officers that the documents had not been issued by them or signed by her husband. Mr Li’s purported signature was again printed in English. Finally, the officers showed Mrs Li a letter from Mr Huang informing Immigration that his employment start date had been delayed until 1 December 2011 because he planned to travel around Asia. His letter stated that this had been discussed with his employer who had agreed to the change of start date. Mrs Li told the officers that she knew nothing about that and it had not been discussed.

## **Resident visa application**

[32] On 15 December 2011, Ms Castelle from Immigration wrote to Mr Huang in relation to his resident visa application. The letter stated that he appeared to have submitted false and misleading information to Immigration in support of his application for a resident visa and he was invited to provide Immigration with comments or further information by 4 January [2012]. Ms Castelle noted in her letter that the email she had received on 5 December 2011 (see [29] above) in support of Mr Huang's application, which appeared to be signed by Mr Li, was sent on the same date that he was informed by Mr and Mrs Li that they were withdrawing their offer of employment. She also pointed out that Mr Li's English language skills were not good enough to have written the email and the sender's email address was not the correct address for the Internet cafe.

[33] On 20 December 2011, Mr Huang responded to Ms Castelle's letter. He did not specifically deal with the queries Ms Castelle had raised in relation to the email of 5 December 2011 but he accused Mr and Mrs Li of providing Immigration with "false and misleading information" without his consent. He also stated:

My employer has taken my email account, which is [simonhuang@hotmail.co.nz](mailto:simonhuang@hotmail.co.nz) since from 22-Nov-2011. He changed the password of my email account and has been using that to communicate with you. Now I have to use [simon20101221@hotmail.com](mailto:simon20101221@hotmail.com) to contact with you.

The date with a dash between the day, month and year in this letter which Mr Huang admitted sending to Immigration is virtually identical to the method used in the email of 5 December ([29] above) which Mr Huang claimed that Mr Li had sent to Immigration. Either it was sent by the same computer with the date set at that default or it was sent by the same person.

[34] Mr Huang made further allegations about Mr and Mrs Li in his email to Ms Castelle of 20 December 2011 including the following statement:

I started to work from 1-June-2011 as stated on our employment contract. But, they have not paid me since the first day I started to work by using various excuses and threatening to cancel my employment sponsorship.

On 22-Nov-2011 you emailed me asking for pay slips. I then immediately raised the issue to my boss. He then deceived me that he would back-pay

me soon and he could help me deal with this because he knows some immigration advisors. He deceived me to give him all my original documents and the password of my email account. If you had not sent me this letter I would never find out that they have been providing you so much false information by making up unbelievable stories and changing the password of my email account.

[35] On 23 December 2011, Ms Castelle wrote again to Mr Huang acknowledging receipt of his response by email but confirming that his “application for residence under the Skilled Migrant category” had been declined. Mr Huang was advised of his rights of appeal.

### **Letter of 30 November 2011**

[36] One of the controversial documents produced in evidence before the Authority and at the hearing before me was a letter dated 30 November 2011 to Ms Castelle at Immigration which appeared to have been sent by Mr Huang. The letter in question reads as follows:

Dear Anna Castelle,

Thanks for your time on my case.

According to your last email, I am now providing all the original documents.

Please note that:

My employment starting date has changed from 1-June-2011 to 1-Dec-2011 as I have agreed with my employer. This is the reason why all my income documents, such as pay slips, bank statement and IRD record are not provided this time. I have asked my employer to contact you to confirm this change. I hope they may reach to you just within a few days.

I was planning to travel around Asia. I actually applied the visas and booked the flights to Malaysia, Singapore and Indonesia. My employer discussed and agreed with me that we changed my employment starting date. But lately I found out I'd better stay in NZ for preparing documents for my residence application. Besides I believed there might be much more going on in NZ due to the Rugby World Cup.

Instead of my income documents, I am providing:

Visas and flights to Malaysia, Singapore and Indonesia

Please just email me any more information that I need to supply or just come to my work place if you like to see me in person since we are only 100 meters away.

Mary (sic) Christmas and have a good day.

Yours sincerely,

(signature)

Wanzhi Huang  
30-Nov-2011

[37] The signature on the letter appears to be that of Mr Huang's and the method of recording the date (noted in [33] above) is the same as that used by Mr Huang but when the document was put to Mr Huang during cross-examination, he told the Court:

I didn't produce this document. It was Vicki who produced and forged my name and they supplied this document to Immigration, so I had no idea about the details of this. I had no intention, I had no motives to deny my backpay. This letter does not benefit me at all. It only benefit the plaintiff.

[38] Mrs Li denied that either she or her husband had written the letter. She said that they did not know Anna Castelle at that stage. Mrs Li explained that the letter was in the bundle of documents which Immigration had shown her during their subsequent unannounced site visit on 14 December 2011. The letter contained visas and flight tickets for Mr Huang which he alleged he had given to Mr and Mrs Li between 25 November and 5 December 2011. When it was put to Mr Huang by the Court that the signature on the letter looked very much like his own signature, he responded:

It's quite similar because before I mentioned that after the 25<sup>th</sup> of November they asked me to sign some documents and I didn't pay attention to what the documents were and this could be that one but if they asked me to examine this letter carefully and asked me to sign that I would never sign this one, that's what -

I must say that that explanation strained all credibility.

### **Defendant's case**

[39] I have already dealt with much of Mr Huang's evidence. The thrust of his case was that after signing the first employment agreement he obtained his work visa and then he worked continuously on a full-time basis between 1 June 2011 and 5 December 2011. He claimed that he asked Mr Li for his pay at the end of the first

week and on other occasions but he was never paid. When asked in cross-examination why he was prepared to work for six months without pay, he replied:

Because I was frightened that they would cancel my visa and I had to go home. I believed that but [nowadays] I know that it wasn't true. They had no such power. And I was able to live on because I have a second employment in Mash.

[40] The second aspect to his case was his claim that in November 2011 when Mr and Mrs Li learned that he had applied for a resident visa, they offered to support him with his application and he provided them with the visas and flight tickets referred to in the letter of 30 November 2011 (paragraph [36] above) and other relevant information but they deceived him. The deception was variously described by Mr Huang in his evidence as a "perfect plan", a "clever business plan" a "fraud" and a "clever arrangement" whereby they threatened to withdraw their alleged resident sponsorship unless he agreed to change the start date of his employment agreement from 1 June 2011 to 1 December 2011 and abandon his claim for back pay.

[41] In support of his claim that he worked full-time at the cafe between 1 June 2011 and 5 December 2011, Mr Huang produced a variety of documents and made extensive submissions. Although he did not call any of them as witnesses, he produced a number of one-sentence statements from customers of the cafe confirming that Mr Huang had been "working" at the cafe but no indication was given of the hours he was seen at the premises. The statements followed a similar format and appeared to have been typed by either the same person or on the same computer. The plaintiff and his wife did not dispute that Mr Huang spent a lot of time at the cafe using the Internet for his own purposes and helping out but they strongly denied that he had ever been an employee. Evidence was given by a Korean friend of Mr Huang's who also frequented the cafe and had shared a backpackers' room with Mr Huang for a period. He said that Mr Huang was working at the cafe "a solid six, seven hours a day." I say at once, however, that I did not find that evidence convincing or credible.

[42] There was also evidence about an alleged burglary which occurred at the Internet cafe between 10.00 am and 11.00 am on 24 August 2011. Mr Huang made

an official complaint to the police about the incident and the police constable who attended the scene gave evidence and said that he was the only “staff member” present. In cross-examination the officer admitted that she had just made an assumption when she described him as a “staff member”.

[43] Mr Huang produced a bank statement showing account transactions in his Kiwibank account between 10 July 2011 and 8 December 2011. He said that the statement was produced for two purposes. First, to show that he had breakfast in Burger King, 20 metres away from his work between 8.30 am and 9.30 am “almost every morning before I worked.” The other purpose was said to be because it showed numerous amounts, “all odd numbers, like \$2.50, \$5.40, \$4.50” which he claimed he had to pay to the cafe to “cover up when customers fled away without pay.” I did not find that evidence particularly credible or helpful. There were Burger King entries for various times of the day but they were equally consistent with Mr and Mrs Li’s evidence that Mr Huang helped them out in the cafe in exchange for free Internet use. In relation to the alleged cover-up payments, Mrs Li said, in evidence which I accept, that he was never at the cafe when the till was balanced and he never had to make any payments to cover a shortage in the till.

[44] Mr Huang also produced seven short notes which he said had been left for him on the table in the cafe by either Mr or Mrs Li with instructions such as confirmation that a customer had left a book for him and paid the money she owed and advice that “some Maori Lady left her cell phone here”. Again, these notes were consistent with the plaintiff’s evidence that Mr Huang did help them out in the shop, but he was not an employee. In one note which I accept was written on 25 November 2011, Mr Huang said that Mr Li had informed him “to swap my shift this weekend from Saturday to Sunday”. The Court invited the interpreter to provide a translation of that particular part of the note and the translation read: “Simon, You have Saturday off this week. Both of us have something on this Sunday. You look after the shop. If you think it is suitable for you, you can take Saturday off from now on. Thanks.” In reference to this particular note, Mr Li explained that Mr Huang had been coming into the cafe on Saturdays to “use the Internet or to talk” even though they did not need him and had never asked him to come in but, on that particular occasion, as he and his wife wanted to go somewhere on Sunday,

27 November 2011 they asked Mr Huang if he could help out on the Sunday but they were also making it clear that they did not need any future help on Saturdays.

## **Discussion**

[45] At the outset of this judgment, I indicated that credibility was a critical issue in the case. There is simply no way of reconciling the different version of events. In this regard, I say at once that I was impressed with the evidence given by Mrs Li. I found her to be a totally credible witness. Unfortunately, I cannot say the same for Mr Huang. Although his grasp of the English language and the skill in which he presented his case were impressive, I simply do not believe most of what he told the Court about the events in question. For the record, wherever there is a conflict in the evidence between Mr Huang and Mrs Li, and there were conflicts in abundance, I have no hesitation in preferring the evidence of Mrs Li.

[46] The employment agreement both parties admitted signing dated 16 May 2011 was submitted to Immigration by Mr Huang on 23 May 2011 in support of his application for a work visa. A letter to Mr Huang from Immigration dated 27 May 2011 was produced approving his application for a New Zealand work visa and enclosing his passport “with work visa enclosed”. The plaintiff and his wife were keenly aware that it would be unlawful for them to employ Mr Huang unless he had obtained a work visa. In my view, there is nothing in the Employment Relations Act 2000 (the Act) which would preclude an employment agreement being drawn up and signed by the parties for the purpose of enabling the employee to obtain a work visa. The agreement would be conditional on the issuance of a work visa. It can be assumed that the parties to an employment relationship will seek to comply with the requirements of the law including relevant Immigration legislation. In this case the work visa was processed and issued to Mr Huang within an impressive timescale and on the face of it the employment relationship should have commenced as anticipated on 1 June 2011.

[47] Relevantly, an “employment relationship” under s 4(2) of the Act is that between “an employer and an employee employed by the employer”. The meaning of “employee” is set out at some length in s 6 of the Act. Most commonly the meaning is referred to in the context of cases involving the issue of whether a

particular person is an employee or an independent contractor but the defined meaning is not restricted to that scenario and has relevance to any situation where an issue arises as to whether the parties have entered into an employment relationship. Section 6, so far as is relevant provides:

**6 Meaning of employee**

- (1) In this Act, unless the context otherwise requires, employee—
  - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
  - ...
- (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.
  - ...

[48] As McGrath J stated in *Three Food Six Ltd v Bryson*:<sup>2</sup>

- [21] The Act thus requires an assessment of all matters relevant to the real nature of the arrangement. The parties' intentions concerning the status of the person engaged are expressly included among those relevant matters. ...
- [22] The contract will not, however, necessarily provide a complete picture of the real nature of the relationship under s 6(2). Evidence of the way that an engagement operated in practice may significantly contribute to it. It may do so for example by indicating that the reality of the relationship is not what the contractual label or other terms reveal.

[49] Each case must depend on its own facts but a party ought not to be able to take advantage of a situation by claiming the existence of an employment relationship they never intended. I am satisfied that in the present case Mr Huang never had any intention to enter into an employment relationship with the plaintiff. I say that for several reasons not least of all because at no stage did he tell either Mr or Mrs Li that he had obtained a work visa. He never showed them his passport containing the visa which Immigration had sent to him under cover of the letter of

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<sup>2</sup> [2004] 2 ERNZ 526 (CA).



27 May 2011. Nor did he tell his prospective employer that he had another full-time job. These matters, of course, also go to the issue of good faith which is the requirement in s 4 of the Act underpinning all employment relationships.

[50] There is another reason for my conclusions regarding Mr Huang's intentions. One of the documents produced in evidence was a resignation letter signed by Mr Huang. It is undated but reads as follows:

Dear Fe Li,

I am writing to resign from my current IT specialist & computer technician position. The reason for this is that my girl friend decides to break up with me and I feel that I no longer want to stay in New Zealand.

I can not focus on work and plan to travel for several months instead. Thanks very much for offering me this position and I hope I may work for you sometime in the future if possible.

Yours

(signature)

Wanzhi Huang

[51] Mr Huang freely admitted to writing the resignation letter. He was cross-examined about it at some length and was rather vague in many of his answers. He did agree, however, that he had written the letter between the date of the employment agreement (16 May 2011) and 1 June 2011. He agreed that he resigned but he claimed that his resignation had no effect after he started work. For his part, Mr Li's recollection was that he never saw the resignation letter until August or September 2011. I accept, however, that it was written prior to 1 June 2011. In the final sentence Mr Huang is thanking Mr Li, not for having worked for him, but for "offering" him the position. I consider it most likely that Mr Huang wrote the letter immediately after he received confirmation from Immigration that he had been issued with his work visa but he never submitted it to Mr Li because he worked out that it would be more advantageous to him not to disclose the fact that he had obtained a work visa. In that way he would be able to carry on in his full-time position with the MASH Trust. At the same time he could continue in colloquial terms, "to hang-out" at the Internet cafe as he pleased and provide assistance to Mr and Mrs Li in exchange for having free use of the Internet. That was a lifestyle scenario that suited him at the time. Later in the year he sought to take further

advantage of his association with the Internet cafe by relying on his work visa in support of his residence application. But Mr and Mrs Li had no knowledge of those developments.

[52] It is always difficult to try and rationalise the actions of a person intent on distorting the true facts, but I consider the developments I have just described to be the most likely scenario covering the relationship between the parties after the issuance of Mr Huang's work visa. Although Mr and Mrs Li would have preferred to know that Mr Huang had already been issued with his work visa so that they could start a family, they were content within reason to wait until the outcome of his application was known. The interim arrangement seemed to suit everybody. It was based on friendship and trust. Towards the end of her evidence, in answer to a question about the help Mr Huang had given them, Mrs Li summed up the position in these terms:

Um, 'cos he always come to help us, like sometimes two, one or two, three hours, and the - that's why we offer him to stay with us free for living like four or five weeks and give, always give him some food, sometimes if I cooked, sometimes just a voucher and a cookhouse, and sometimes we gave him like a - Fei give him his coat, beanies and medicines when he was sick. I think it's like based on the friendship and I - I learn it when I was a volunteer of Life Flight Centre and the Sustainable Trust 'cos, I came there a lot for one year volunteer and they give me like free tea, coffee, and some tickets for a bus, so I think it's the same thing.

[53] I have dealt with the events that subsequently unfolded in November/December 2011 and I see no need to revisit them. Suffice it to say that I have been left in no doubt that the two further employment agreements I have referred to in [31] above were forwarded to Immigration by Mr Huang and it was he who had printed Mr Li's signature on the signature page of each. The change in working hours in the second agreement was no doubt made by Mr Huang to reflect the fact that his work at the MASH Trust commenced at 5.00 pm. The change in the start date of his employment from 1 June 2011 to 1 December 2011 recorded in the third employment agreement would have been made by Mr Huang after Immigration had requested his wage records for the period from 1 June 2011. Mr Huang would have known immediately that he could not comply with that request because he was not employed from 1 June 2011. He, therefore, falsely represented to Immigration that the commencement of his employment had been deferred by agreement between

the parties until 1 December 2011. Apart from the two employment agreements I have just referred to I am equally satisfied that the other contentious emails and correspondence held on the Immigration New Zealand file, were all produced and signed by Mr Huang. I found the propositions Mr Huang was inviting the Court to accept alleging deception, fraud and forgery on the part of Mr and Mrs Li to be completely fanciful and I reject them.

## **Conclusion**

[54] The plaintiff, therefore, succeeds in his challenge and this decision now stands in place of the Authority's determination. The plaintiff is entitled to costs. I do not anticipate that it will be possible to reach agreement on this issue. Mr Ogilvie is, therefore, invited to file his submissions on costs within 21 days and Mr Huang will then have a further 21 days in which to file his submissions in response.

A D Ford  
Judge

Judgment signed at 2.30 pm on 26 September 2012