

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU**

**[2022] NZEmpC 227
EMPC 319/2021**

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

BETWEEN RAN CHEN
 Plaintiff

AND WNY GROUP LIMITED
 First Defendant

AND LI WU
 Second Defendant

Hearing: 3 May and 14–15 June 2022
 (Heard at Auckland)

Appearances: Plaintiff in person
 J Wickes, counsel for defendants

Judgment: 8 December 2022

JUDGMENT OF JUDGE KATHRYN BECK

Introduction

[1] Ran Chen is challenging a determination of the Employment Relations Authority which found that he was not an employee of WNY Group Limited (WNY).¹

[2] He says that he was employed in a sales role in May 2019, that he worked for two weeks, but that he then could not do any more until he received documentation that he had requested but was never forthcoming. He received \$3,206.08 (net of PAYE) per month, which was then immediately repaid to Mr Wu, a director of the

¹ *Chen v WNY Group Ltd* [2021] NZERA 369 (Member Urlich).

company, until October 2019 when the payments stopped. He says he did not realise his employment was terminated until April the next year when he inquired about receiving the COVID-19 wage subsidy. He claims he was unjustifiably dismissed.

[3] WNY says Mr Chen was never employed; instead, it says it reached an arrangement with him to enable him to obtain the benefit of the Government KiwiSaver subsidy. It entered into this arrangement at the request of a trusted advisor, Mr Chen's partner at the time.

[4] There are a number of issues arising from Mr Chen's claim that he was unjustifiably dismissed.

[5] The inquiry starts with the nature of the relationship. There was clearly an arrangement here, but was it one of employment?

Issues

[6] The issues to be determined by the Court are:

- (a) Were the plaintiff and the first defendant in an employment relationship?
- (b) If they were, did Mr Chen raise a personal grievance within the 90-day time period?
- (c) If not, do grounds exist for granting leave to raise a grievance out of time?
- (d) If a personal grievance was raised in time or leave is granted, was Mr Chen unjustifiably dismissed?
- (e) If so, what remedies are available?

[7] During the hearing Mr Chen also raised the issue of breaches of the Wages Protection Act 1983. This was not pleaded. While the basis of the claim was not

entirely clear, it appeared to relate to the payment of money by Mr Chen to Mr Wu and his wife, Renmin Yu. The claim would therefore seem to be that such payments amounted to an unlawful premium.

[8] While noting that it was not pleaded, Ms Wickes did not object to the inclusion of a wages protection claim. In any case, given the equity and good conscience jurisdiction of this Court, if I decide there has been a breach of minimum code legislation, I consider I can deal with it.

[9] In any event, as with the other issues in this proceeding, it will not become an issue unless I determine that there was an employment relationship between the parties.

Was there an employment relationship?

Agreed facts

[10] It is helpful to first deal with the matters that are not in dispute.

[11] WNY is a company registered in New Zealand from 21 November 2018. It currently has one director, Mr Wu. The sole shareholder is Ms Yu. Meizi Xu is a chartered accountant who worked for the accountancy firm Norrie and Daughters Ltd which previously provided accountancy services to WNY.

[12] Ms Xu and Mr Chen were friends and, for a period from some time in 2018 through to July/August 2019, they were in an intimate personal relationship.

[13] Ms Xu introduced Mr Chen to Mr Wu and Ms Yu and they socialised together.

[14] In May 2019 Mr Chen was set up as an employee in WNY's payroll system. He was paid the sum of \$4,000 gross per month from May 2019 to October 2019. PAYE was deducted and paid to the Inland Revenue Department (IRD). KiwiSaver was also deducted and an employer contribution of \$120 per month paid. At the end of each month, WNY paid the net amount of \$3,206.08 into Mr Chen's bank account.

On each occasion, Mr Chen paid the same amount (rounded up to the nearest dollar) into Mr Wu's and Ms Yu's personal bank account.

[15] There are no employment documents such as letters of offer or an employment agreement. The only documents appear to be PAYE returns filed with the IRD.

[16] WNY did not pay Mr Chen after October 2019. There was no correspondence or contact between Mr Chen and Mr Wu from 30 May 2019 until Mr Chen messaged Mr Wu the following year on 10 April 2020 asking whether WNY was applying for the COVID-19 wage subsidy for him.

[17] Mr Wu responded that the relationship had been terminated "... for a few months already. Didn't Jennifer [Ms Xu] tell you?"

[18] At this point Mr Chen raised various issues about his employment. He lodged a claim in the Employment Relations Authority for unjustified dismissal, seeking remedies of reinstatement, wage arrears and compensatory damages on 21 May 2020.

[19] The key areas of factual dispute are the genesis of the relationship – how it came about – and how and when it ended.

The plaintiff's case

[20] Mr Chen says that Ms Xu, his girlfriend at the time, told him that Mr Wu was looking for a salesperson and that she had recommended him. He says he spoke with Mr Wu. They agreed that he would work for WNY as a salesperson. He commenced work on 1 May 2019 and says he "began to work to learn and research and think about work-related matters." He became concerned about whether the company was related to an organisation in China which he said had issues in respect of a large amount of money. However, the nature of the alleged issues was unclear, and he did not detail them in his evidence or submissions.

[21] He met with Mr Wu to request copies of documentation that he says the company needed to be able to operate legally as a lender. He says he never received

that information/documentation and so could not perform any further work from that point but remained an employee.

[22] He says the amounts he paid into Mr Wu and Ms Yu's bank account were a loan.

[23] Mr Chen says that in November 2019 Ms Xu told him that, for family reasons, Mr Wu needed to suspend the salary payments to him. He then heard nothing further but says he was waiting for Mr Wu to get back in touch with him when his family circumstances changed.

[24] In April 2020, he wrote to the company asking if it was applying for the wage subsidy for him and Mr Wu's response was the first he knew of the relationship being terminated.

The defendants' case

[25] Mr Wu says that Ms Xu approached him in May 2019 and asked him to register Mr Chen as an employee so that Mr Chen could obtain the New Zealand Government KiwiSaver subsidy. The arrangement was that Mr Chen would then pay back any money paid to him directly to Mr Wu and Ms Yu so that there was no cost to them. He says Ms Xu was a trusted adviser and that if she thought this was acceptable, then he was agreeable.

[26] He says Ms Xu made all the arrangements, set up Mr Chen in the payroll system and obtained Mr Wu and Ms Yu's personal bank account details.

[27] His evidence was that there was no employment relationship and that none was ever intended. He had no need for a salesperson; the company only had one loan. He never met with Mr Chen to discuss the job and Mr Chen never sought any information from him about financial compliance.

[28] There was no further discussion about the arrangement until October 2019 when Ms Xu advised him that she and Mr Chen had separated and that WNY could

stop paying him. Mr Wu says he trusted Ms Xu to stop the payments and relied on her to tell Mr Chen that the arrangement was now terminated.

[29] He heard nothing from Mr Chen at that time or at all until April 2020 when Mr Chen sent him a (WeChat or text) message asking whether he was applying for the wage subsidy for him (Mr Chen). He was surprised by this as Mr Chen was not an employee, and the arrangement they did have had ended in October the year before.

[30] Mr Wu also says that the business did not perform any work other than making one loan; he was responsible for any day-to-day matters after a former director, Mr Yi, left in September 2019. There were no other employees.

[31] I note that as the hearing evolved, it was apparent that there was one other person on the books of the company as an employee, Judong Cao, Mr Yi's wife. Mr Wu's evidence was that she had a similar arrangement to Mr Chen.

[32] The Court was provided with documentation that showed large sums moving in and out of the account of WNY. That appeared inconsistent with the company only having one loan. In answer to the Court's question, Mr Wu's explanation for this was unclear, but in any case he maintained that there was no work for Mr Chen to undertake.

[33] There are difficulties with both parties' accounts, and I have formed the view that neither has been entirely forthcoming with the Court.

The law

[34] An employment relationship means any of the employment relationships specified in s 4(2) of the Employment Relations Act 2000 (the Act). Section 4(2) sets out that employment relationships are those between "an employer and an employee employed by the employer".²

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

[35] An employer means “a person employing any employee or employees”,³ and an employee is defined in s 6.

[36] Section 6 sets out the meaning of an employee. For the purposes of this case, an employee means “any person of any age employed by an employer to do any work for hire or reward under a contract of service”.⁴ When deciding whether a person is employed by another person under a contract of service, the Court must determine “the real nature of the relationship”.⁵ This requires consideration of all relevant matters, including anything that indicates the intention of the parties but not treating as determinative any statement by them that describes the nature of their relationship.⁶

[37] This is not a case where the Court is required to determine whether the commercial relationship between Mr Chen and WNY was one of a contract of service (employment) or a contract for services (independent contractor). This case is about whether there was a genuine commercial (employment) relationship at all.

[38] It is necessary to look to the wording of s 6(1)(a) itself. The key questions here then are whether Mr Chen was in fact employed to perform any work in exchange for hire or reward and whether there was a shared intention to enter a contract of service.

[39] The inquiry into these elements is fact specific.⁷ The Court is concerned with the conduct of the parties in context.⁸

[40] I deal with each element in turn.

³ Section 5.

⁴ Section 6(1)(a).

⁵ Section 6(2).

⁶ Section 6(3).

⁷ *Fleming v Attorney-General* [2021] NZEmpC 77, [2021] ERNZ 279 at [39].

⁸ *Courage v Attorney-General* [2022] NZEmpC 77 at [142].

Analysis

Was Mr Chen employed by WNY to undertake any work?

[41] As set out above, the first defendant says that at no point did it ask or require Mr Chen to do any work and, further, that Mr Chen did not in fact undertake any work for it.

[42] Mr Chen, on the other hand, says that he did undertake some work for up to two weeks at the beginning of the relationship. He then requested documentation from Mr Wu that would enable him to undertake his duties, but this was not forthcoming and so, while he was ready and willing to do so, he was not able to undertake any further work from that point and did not do so.

[43] Mr Chen's evidence was that he was employed in sales for WNY. He says his work was arranged and instructed by Mr Wu. After joining WNY, he says he did "study and consideration of work-related matters". In cross-examination Mr Chen stated that he did work for WNY through his "study and research and thinking about the work related matters". This is a phrase that he repeated in answer to questions from the Court also.

[44] When questioned further as to what was involved in studying, researching and thinking about work-related matters, Mr Chen's evidence was that he was studying about sales and loans and how to get customers. He said he was researching all the materials that related to the company, during which time he came across some information that concerned him. In terms of the other work-related matters, he said one of them was how to start the job as a salesperson and another one was how to find customers, as well as some information about the loan. He says he also needed to research what sort of customers or clients related to him in his field.

[45] Mr Chen also said he prepared for meetings. When questioned further, he advised that he only had one meeting, which was with Mr Wu. He says that was the only meeting he prepared for and then after that things went "south".

[46] He says he worked from home as WNY did not have a physical address.

[47] There were no visa issues as he had permanent residence.

[48] Mr Chen says the financial documentation he requested from Mr Wu in the meeting in May 2019 was required in order to enable him to work legally. It became apparent that, by “legally”, Mr Chen was referring to the company being a financial service provider and needing to have appropriate qualifications and certificates to undertake those duties. Mr Chen did not refer to any particular legal requirements or regulatory regime. I have inferred that he was referring to the requirements of the financial services regulatory framework.

[49] Mr Chen’s father passed away in China around the same time as the meeting he says he had with Mr Wu. After the meeting, he then left for China and did not return until 12 June 2019. He says he did no further work after that as he was unable to do so without the necessary documentation. However, he did not follow up with Mr Wu about the documentation at all.

[50] As noted above, Mr Wu says that at no point was Mr Chen asked to undertake any work for the company. He denies that any meeting took place between them in May. His evidence is that other than the social activities undertaken earlier in the year with Mr Chen and Ms Xu, he did not meet with Mr Chen at all.

[51] Mr Chen did not provide any evidence of the study or research he says he undertook. No research materials, work papers, notes or diary entries were provided to the Court; there was no correspondence such as email or other WeChat exchanges between Mr Wu and Mr Chen in relation to work, or between Mr Chen and any other party in relation to work.

[52] In the absence of any corroborating evidence, combined with Mr Chen’s inability to provide any real detail around the duties he says he undertook or the documentation he says he had requested and his failure to follow up at all with Mr Wu or WNY for a period of five months after making the alleged request (before payments

stopped), I do not find his evidence in relation to the work he says he did for WNY, to be persuasive.

[53] I find that Mr Chen did not carry out any work for WNY.

[54] Given this finding, it is not necessary to undertake an analysis of the nature of the work. I accept that had I found Mr Chen to have genuinely undertaken the tasks he claims to have undertaken, they would amount to work.

[55] The finding that Mr Chen did not in fact undertake any work for WNY is not the final answer to whether or not there is an employment relationship. The other elements still need to be considered.

Was there hire or reward?

[56] It is common ground that Mr Chen was paid the sum of \$4,000 (gross) per month from May 2019 to October 2019.

[57] PAYE was deducted and paid to the IRD. KiwiSaver contributions were also deducted and paid. The first defendant paid the net amount of \$3,206.08 into Mr Chen's bank account on a monthly basis for that period.

[58] The next day, however, Mr Chen paid the same net amount (rounded up to the nearest dollar) back to Mr Wu and Ms Yu's personal bank account.

[59] PAYE returns were filed with the IRD.

[60] Mr Chen says that these are payments of salary for work, consistent with the employment relationship he claims with WNY.

[61] Mr Wu says this was an arrangement constructed purely to enable Mr Chen to obtain the Government subsidy in relation to KiwiSaver which he (Mr Wu) mistakenly understood would result in no cost to the company.

[62] It was accepted by all parties that the arrangement did have a net cost to the company in terms of both a PAYE deduction and an employer KiwiSaver contribution. Mr Wu says this was something he was unaware of at the time and that he relied on the advice of Ms Xu, who he trusted.

[63] Mr Wu also gave evidence that WNY changed its accountants in 2020, at which time it was advised that the arrangement was not appropriate and, as a result, new accounts had to be prepared which did not have Mr Chen and another person, with whom there was a similar arrangement,⁹ as employees. This altered the outcome for the financial year. As a result, a further amount had to be paid by way of tax.

[64] In the absence of the defendants' accountants giving evidence, it was not entirely clear what steps WNY had taken with regard to the IRD. It appeared, however, that on the basis of the information provided by Mr Wu to his new accountants, transactions relating to Mr Chen and Ms Cao were reversed out of the accounts.

[65] This is consistent with Mr Wu's evidence that in fact there was no employment relationship between WNY and Mr Chen.

[66] Mr Chen questions the motives for this. He says this only took place after he had made his claim in the Authority. He suggests that this was a step taken to rebut his claims.

[67] Mr Wu, in his evidence, accepted that the timing was similar, but he said that they were not related. He says that new accountants were brought in to review the accounts. He explained the arrangements to them (in the same terms as he has done to this Court) and then followed their advice that such arrangements were not sustainable and needed to be reversed. That resulted in further cost to the company.

[68] Mr Wu says that there was never an intention for the company to pay Mr Chen anything – hence the repayment by him of the funds he received the following day.

⁹ See above at [31].

[69] In relation to the repayment of the funds, Mr Chen's evidence was that this was a loan to Mr Wu and Ms Yu. He also said that the loan was at the request of Mr Wu, and he felt that he had no choice but to agree to lend the money or he would lose his job.

[70] There are several difficulties with Mr Chen's explanation for the repayment of the funds. There is nothing in the WeChat messages that refer to a loan or anything similar.¹⁰ Mr Chen has at no point taken any steps to recover the alleged loan from Mr Wu and Ms Yu. When Ms Xu sought and obtained the bank account details from Mr Wu to enable Mr Chen to pay the amount to him, there is no mention of a loan.

[71] Nor did Ms Xu, in her evidence, refer to a loan. When she was asked why she asked Mr Wu for his bank account number, she said that she was asked to obtain the bank account details so "after [Mr Chen] got the salary and then transfer it back to Mr Wu". She refers to "[transferring] it back", not lending or advancing it.

[72] I consider it more likely than not that the payment by Mr Chen to Mr Wu and Ms Yu of \$3,207 was a repayment of the net amount that had been paid to him.

[73] Such a repayment is consistent with the arrangement Mr Wu says existed between them.

[74] Mr Chen says it is not credible for an experienced businessman, like Mr Wu, to say he did not realise there would be a cost to the company of such an arrangement. I agree. However, for whatever reason, that appears to have been the arrangement reached.

[75] It is not necessary for the Court to speculate on the motivation of the company or Mr Wu and Ms Yu, who personally received the funds, to agree to the arrangement.

¹⁰ An exchange on 30 May 2019 between Mr Chen and Mr Wu and an earlier exchange between Mr Wu and Ms Xu on 21 May 2019.

[76] For Mr Chen's part, he obtained a benefit in the amount of \$648 by way of employer contributions to KiwiSaver. Whether that is sufficient to drive him to enter into such an arrangement is not a question the Court is required to answer.

[77] I do not consider that the Court has the full picture of the financial arrangements set out above. However, I am clear that the payments made to Mr Chen and then repaid by him to Mr Wu and Ms Yu were not for hire or reward for any work undertaken or intended to be undertaken by Mr Chen.

Was there a contract of service?

[78] As already mentioned above, there is no employment documentation other than the IRD returns. I do not find these to be of any particular weight. They merely record part of the financial transaction between the parties. Payment of PAYE does not in itself render a person an employee or, on its own, indicate a shared intention to form an employment relationship.

[79] There was no employment agreement, letter of appointment or indeed any correspondence between the parties that would indicate an employment relationship. It is not uncommon for parties to fail to record relationships properly, and such failures are not fatal to the finding of an employment relationship. However, it is most unusual for there to be a complete absence of correspondence, including text or WeChat messages, between the parties discussing either the setup or operation of the employment relationship between them or indeed any reference to work or employment at all.

[80] While there are WeChat messages between Mr Chen and Mr Wu, there is nothing in those exchanges to support or indicate an employment relationship. Those messages are all about the arrangements for Mr Chen repaying the money.

[81] There is nothing to indicate shared intention to form an employment relationship.

[82] Further, all parties agree that the payments stopped at the end of October 2019. It is disputed as to whose responsibility it was to advise Mr Chen of the stopping of

payments and/or the reasons for those payments stopping. Both Mr Chen and Mr Wu agree that they did not speak to each other and there was no formal communication in relation to that stoppage. They both agree that there was no contact at all between them from the end of May 2019 until April 2020.

[83] I consider the fact that Mr Chen did not initiate contact for a further five months after October 2019 (until April 2020) even though payments had stopped, is consistent with there not being an employment relationship.

[84] Taking into account those factors, together with my findings above, I find that there was no contract of service entered into between Mr Chen and WNY.

[85] I cannot comment as to the value or the benefit to each party of this arrangement. They must have thought that it was sufficient to enter into it. As noted above, I do not consider that the Court has the full picture of the situation, but nor did I need it. There is sufficient evidence to be clear that the arrangement was not one of employment.

[86] Having made that finding, it is not necessary to consider and determine the balance of Mr Chen's claim.

Outcome

[87] Mr Chen's challenge is unsuccessful.

[88] I direct the Registrar to provide a copy of this judgment to the Department of Internal Affairs.

[89] The parties agreed that this matter is appropriately allocated category 2B for costs purposes under the Practice Directions Guideline Scale.¹¹ Those costs ought to be able to be agreed. If that does not prove possible, the defendants may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. The plaintiff is to respond by memorandum filed and served within 14 days

¹¹ "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

thereafter with any reply from the defendants filed and served within a further seven days. Costs will then be determined on the papers.

Kathryn Beck
Judge

Judgment signed at 10 am on 8 December 2022