

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 716
3052453

BETWEEN JINGJING LI
 Applicant

AND GRAND TREASURE
 INVESTMENT LIMITED t/a
 GRAND TREASURE
 First Respondent

AND YUAN GAO
 Second Respondent

Member of Authority: Nicola Craig

Representatives: May Moncur for the Applicant
 Yuan (Anson) Gao for the Respondents

Investigation Meeting: 29 August 2019

Submissions and Further At the investigation meeting from both parties
Information Received: 19 September and 2 December 2019 from the Applicant
 11 September 2019 from the Respondents

Date of Determination: 17 December 2019

DETERMINATION OF THE AUTHORITY

- A. Grand Treasure Investment Limited is ordered to pay Jingjing Li the following sums within 28 days of the date of this determination:**
- (i) \$9,240.00 net as arrears of wages;**
 - (ii) \$748.80 net as holiday pay; and**
 - (iii) \$593.34 for reimbursement of expenditure.**
- B. Grand Treasure is ordered to pay Ms Li the sum of \$2,500.00 as a contribution to her costs and \$71.56 for the Authority's filing fee.**

Employment Relationship Problem

[1] Jingjing Li became acquainted with Yuan Gao (also known as Anson Gao) from using his services as a mortgage broker. At that point in early 2017 Mr Gao was contracting his services to a mortgage broking firm.

[2] Mr Gao is the sole director of Grand Treasure Investment Limited trading as Grand Treasure. Ms Li undertook work tasks as arranged by Mr Gao. She describes herself as his personal assistant.

[3] Ms Li claims that she was employed by Grand Treasure or Mr Gao. She says that she worked for Mr Gao for around six months but that he only paid her one wage payment. She claims that she owed wages.

[4] Mr Gao had some involvement in this proceeding, although neither he nor Grand Treasure filed a statement in reply. At a case management conference, Mr Gao said that there was no employment relationship. He accepted that Ms Li undertook a couple of afternoons' work for him, which he paid her for, but nothing else. Mr Gao failed to file a witness statement and additional documents before the investigation meeting, despite being directed and agreeing to do so.

[5] On 29 August 2019 I held an investigation meeting and heard evidence from Ms Li and Mr Gao. During the meeting Ms Li's representative objected to Mr Gao turning up without having provided a statement or documents. However, she rejected the possibility of an adjournment. Further information and comments were provided by both parties after the investigation meeting.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded everything received from the parties but have stated findings, expressed conclusions and specified resulting orders.

Issues

[7] The issues for investigation are:

- (a) Was Ms Li in an employment relationship?
- (b) If so, was it with Grand Treasure or Mr Gao personally?
- (c) If Ms Li was an employee, is she owed any arrears of wages and holiday pay?
- (d) Is Grand Treasure and/or Mr Gao liable to any penalties?

Mr Li and Mr Gao's meeting

[8] Ms Li undertook university training in New Zealand in IT and Finance. She had run her own small business before and had some interest in the property market. Ms Li met Mr Gao in a WeChat¹ group in March 2017. He introduced himself as an experienced and successful mortgage broker. As far as Ms Li was aware Mr Gao was contracting his services to a loan broker and a financial advisory business.

[9] In June 2017 Mr Gao arranged a mortgage for Ms Li. She admired his financial ability and was keen to learn from him.

Initial arrangement

[10] It appears that Mr Gao was a successful broker who, during the property market boom of a few years ago, was undertaking a lot of business. As a result, he was looking to recruit a personal assistant.

[11] Both parties agree that Mr Gao offered Ms Li at least a small amount of work. She describes the initial period as a trial period to assess her suitability for the personal assistant role. She says she was then offered that role.

[12] Mr Gao accepts that Ms Li had done a couple of afternoons of paperwork for him and that was paid for. He does not describe it as a trial although he accepts he was potentially interested in a full time person when he received enough income, but he was not at that point yet.

[13] A somewhat different perspective also referred to by Mr Gao in his evidence, was that he offered to do some instruction or training with Ms Li, whereby he would not charge for his training but he would not pay for her time. This may have been additional to her work time.

Payment

[14] The parties agreed that Ms Li would be paid \$18.00 per hours net, with Mr Gao to work out what was the grossed up figure.

[15] I found Mr Gao's evidence about when and how many payments were made confusing. He says that Ms Li filled in a timesheet regarding the "first payment", suggesting there was more than one payment and that work was carried out in distinctly separate periods.

¹ Chinese social media platform

Elsewhere in his evidence he describes several days' work which appeared to be in a row. He also referred to there being two payments but then said he was unsure whether there were one or two payments.

[16] Both parties agree that there was some payment for a small amount of work but disagree on the payment method. Ms Li says she was paid \$120 in cash. Mr Gao appeared initially to accept \$120 as the amount paid. However, when asked about the fact that the payment of \$120 could not readily be divided by \$18.00², he said that it was not exactly \$120.

[17] Mr Gao insists that he had paid through online banking, saying that he never paid for things with cash. He was given an opportunity to provide a record of that after the investigation meeting. He advised that there were transactions with presumably inaccessible "hidden details" but identified one transaction which he thought might relate to Ms Li. It was dated 19 November 2017 and was for \$345.00. However, Ms Li advises that that is not her bank account. For the sake of completeness I note that the hourly rate of \$18.00 net does not divide readily into that figure either.

Further work

[18] Ms Li says she started working on 27 July 2017 at the loan brokers' office where Mr Gao contracted his services. Mr Gao introduced her as his personal assistant to other members of the team. Ms Li says the arrangement was that she would be the back office person doing the paperwork and Mr Gao would deal with the clients.

[19] Ms Li claims the agreement was that she would work three days per week, Monday, Wednesday and Friday from 9am to 5pm, totalling 24 hours a week. In addition, she would occasionally have to work extra hours, as required by Mr Gao.

[20] Mr Gao says he had made up a spread sheet and Ms Li would fill it out. He called her or texted her to let her know when there was work. No evidence of text messages was provided. However, he also mentioned a seemingly different arrangement, closer to Ms Li's description, of standing time in the office two or three days, from 1 or 2pm until 5pm.

[21] Although not accepting that Ms Li was working that regularly, Mr Gao gave evidence of getting to the point where there was no kind of job alignment (presumably between Ms Li and the role), so things finished in September. I found this evidence difficult to follow. Mr

² 6.666

Gao says the payments referred to above were made by the end of September for work done from about the end of July to the end of September. He estimated that the time in total was less than 20 hours in total, then saying under 15 hours.

[22] Mr Gao speculates that he and Ms Li may have had different understandings of what was involved. He suggests she may have thought she was being paid to be on stand-by and has to be paid for that. In response Ms Li said that she would not describe it as stand-by or on-call work.

[23] Even after the lack of alignment around the end of September, Mr Gao's evidence suggested that Ms Li still did some work. He referred to her doing "some days", before the "last payment".

Ms Li's evidence regarding seeking an employment agreement and further payment

[24] Ms Li was not provided with an employment agreement, although she says Mr Gao had referred to one in their discussions in July 2017. About a month into her employment, she reminded Mr Gao that she had already worked for a month and was waiting for an employment contract. Mr Gao said that he had been busy as he was following a commercial project but promised to get the agreement signed as soon as he could manage.

[25] Ms Li was disappointed by the lack of an agreement and the fact that no wages had been paid however she describes it as being difficult for her to ask for payment because the money issue is a sensitive topic in Chinese culture. She did not want to embarrass Mr Gao by mentioning it. Ms Li says that the payment she did receive gave her confidence that payment for her further work would eventually be forthcoming.

[26] She decided to wait and give Mr Gao a little more time. A couple of days later when she was having lunch with him in a café next to the office she mentioned the non-payment of wages. She told Mr Gao that it would not be a problem if he decided to pay her monthly and confirmed her bank account number with him again.

Conference

[27] Mr Gao asked Ms Li to attend the annual conference of loan company which Mr Gao and Grand Treasure were contracted to. Ms Li says this supports her being an employee.

[28] However, Mr Gao says that he had bought a ticket for his ex-girlfriend but she could not make it so he offered it to Ms Li. She denied having heard about that explanation before,

which Mr Gao accepted. Mr Gao said he offered Ms Li a ticket as a family member although as she pointed out, Ms Li was not Mr Gao's family member.

[29] Ms Li arranged the accommodation although Mr Gao said he would pay her back later. He never did that. He or Grand Treasure paid for the flights and any conference costs,

Working from home

[30] Ms Li gave evidence that in October 2017 Mr Gao asked her to come in to a shared office building on the North Shore where she met Mr Gao's new boss and business partner. Mr Gao told her that he was trying to build up a new business with this man and asked Ms Li to keep working her normal hours at the other office. He also asked her not to tell anyone at the office about the arrangement with the new business partner.

[31] Ms Li took the opportunity to discuss the issue about her wages and Mr Gao apologised. He explained that he had been too busy as was evident from the number of new clients coming in. She felt uncomfortable but did not push him too hard. She was aware that Mr Gao had a lot of loan settlements and would receive a significant amount of commission so imagined it was only a matter of time before she got paid. Ms Li appreciated that he was busy.

[32] Towards the end of October Mr Gao asked Ms Li if she had a printer and scanner at home and she confirmed that she had. He then asked her to work from home. She had no difficulty with this arrangement as they had already been using an email Dropbox for sharing documents. It also avoided her having to commute.

[33] From 1 November 2017 Ms Li says she worked for Grand Treasure and Mr Gao from home. She later reminded Mr Gao about her wage arrears and felt that he tried to avoid the topic. Later Ms Li suggested that he pay her \$5,000.00 first and work out the calculation of the balance during the Christmas break and pay her the rest before Chinese New Year in late January. She says Mr Gao agreed to do so.

[34] However, after that conversation Mr Gao did not contact Ms Li again nor update any file in the Dropbox for about a week. Ms Li remained on standby ready to work as required.

[35] On 4 January 2018, after her return from an end of year break, Ms Li could not open her work email and the Dropbox. On contacting Mr Gao, he implied that he was doing a system upgrade and asked her to wait until further notice. He never contacted her again.

Documentary evidence of work

[36] Ms Li filed documents showing work she had been involved with for Mr Gao:

- (a) a bank loan confirmation signed by Mr Gao as mortgage adviser in June 2017;
- (b) a completed loan application document from the mortgage business which Mr Gao contracted to, from July 2017; and
- (c) client financial records with entries covering some months, finishing in September 2017.

[37] There is also a 22 September 2017 email from Mr Geo to a client which copies Ms Li in at her Grand Treasure email address. The email is also sent to Ms Li at what appears from the reply email to be a hotmail address. Significantly, in email Mr Gal tells the client that:

Jingjing is my personal assistant who will fill out the loan structure form.³

[38] Mr Gao notes at the end of the email:

@ Jingjing Li Please help me write the loan structure form when you are available? Many thanks.

[39] Ms Li filed a photograph which she says show her, Mr Gao and other staff who worked at the loan business at the annual conference in Australia. She provides the hotel reservation confirmation for two rooms for herself and Mr Gao in Australia.

[40] Ms Li also filed phone records of calls between herself and Mr Gao. The calls begin in March 2017 and run through to December 2017.

[41] This shows Ms Li calling Mr Gao over 20 times in September 2017, although some of these were noted as being for zero minutes. There are over 60 calls from Ms Li to Mr Gao in October and over 20 calls in November. There were also over 20 calls in July 2017.

[42] Mr Gao suggested that these calls could have been in relation to the loan Mr Gao arranged for Ms Li. However, I find this unlikely to be the sole explanation on the basis of an agreement for sale and purchase filed. This showed that the settlement date for the property which Ms Li bought was 26 October 2017. This would not explain a large number of calls continuing into November 2017.

³ Emphasis added.

[43] Mr Gao was asked about the 13 answered calls in November 2017. He struggled to recall but thought it was all personal stuff with Ms Li wanting help with a job.

[44] I accept Mr Gao's point about he and Ms Li being in another relationship, as in broker and client, but it seems unlikely that that could explain that volume of phone calls, especially a number which were at short succession.

[45] There was surprisingly little email or social media documentation filed. Neither party provided any WeChat messages, despite that being how the two met. Ms Li says that she cleared her old WeChat messages so cannot find the ones between herself and Mr Gao. There was also a suggestion in submissions that old WeChat entries cannot be accessed.

[46] Ms Li explained that because of the confidential nature of the documents Mr Geo and she were handling, the drop box was used rather than emailing documents between the two of them.

Additional oral evidence

[47] Ms Li said that when she started work she gave Mr Gao her bank account and IRD details on a piece of paper which he took without comment. She was given a Grand Treasure email address.

[48] Ms Li says she thought that her employer would record her hours so she did not. She worked her standard hours each week, unless Mr Gao asked her to do something else.

[49] There was no system in place for monitoring or recording her work hours. Even when Ms Li was working from the office, she says that Mr Gao was often not present as he was visiting clients. From October 2017 Ms Li worked from home so Mr Gao could not observe her working hours.

[50] Mr Gao relied on there being no work done by Ms Li after the last payment although he was unable to identify when the last payment was.

[51] Mr Gao said that there was around two to three hours of paperwork per loan deal. He says that he only achieved 37 deals in the whole year, whereas if Ms Li did say a generous five hours of paperwork on average for each deal, her claim to 560 hours equates to 110 deals in less than six months. While some potential deals may have needed paperwork but were then unsuccessful, he estimated that around 70 to 80 % of deal were successful. No documents were filed in support of this evidence.

Conclusion

[52] I had difficulties with both parties' cases.

[53] Although I appreciate it can be difficult to ask for money, including from a cultural perspective, I still found it surprising that Mr Li continued to work for months without more than a very modest payment. Also she took a considerable time after the work finished to seek payment or representation.

[54] Ms Li had a few documents which supported her having been involved in Mr Gao and/or Grand Treasure's work. Even the few documents she provided were from different time periods and suggest that her work was for more than the short period suggested by Mr Gao. The phone records also support Ms Li working for the business. The invitation from Mr Gao to the mortgage business's annual conference does as well.

[55] Mr Gao accepted some work was done but at some points in his evidence minimised it to what seemed like a surprisingly small total to have been done over an extended period. His evidence about when the work and payments occurred was confusing. Mr Gao was able to file few documents in support of his evidence.

[56] Standing back and looking at the evidence, by a fine margin, I prefer Ms Li's evidence.

[57] I find that Ms Li was employed to work and that the employer was Grand Treasure, rather than Mr Gao personally. There were a number of features linking Ms Li's work to the company. The evidence was that Mr Gao's broking work was undertaken through Grand Treasure. Ms Li had a Grand Treasure email address. Mr Gao's evidence was that the payments to Ms Li were from Grand Treasure.

[58] I reject Mr Gao's suggestion that Ms Li was a contractor. Even for the small amount of work Mr Gao accepts occurred, there was a timesheet. No invoices were filed by Ms Li. Although towards the end of the arrangement Ms Li worked from home, her earlier work was at Mr Gao's office. There was Ms Li's Grand Treasure email account. She undertook specific tasks as directed by Mr Gao and there appears to have been no potential for her to make more money out of the work by undertaking it more efficiently. The real nature of the relationship was one of employer and employee.

Arrears and holiday pay

[59] Having accepted that Ms Li was an employee of Grand Treasure I turn to look at her arrears claim. I am not satisfied that Ms Li is entitled to payment for all the hours she claimed. She was employed to work 24 hours a week. She has claimed 32 hours for some weeks, initially six in a row, then a gaps of two back to 24 hours, then two more of 32 hours. She did not contemporaneously record the hours she did at the time. The list of her claimed hours was prepared many months, possibly over a year, after she worked for Grand Treasure. She has only a few records to refer to, to assist to prompt her memory.

[60] Given the nature of the work I can see no reason why additional work above the agreed 24 hours, would always have to have been 32, rather than say 28 or 33, let alone not quarter or half hours. I cannot be satisfied that the hours claimed above 24 hours are valid.

[61] I therefore base the arrears claim on one week of 16 hours (the first week) and 21 weeks of 24 hours at \$18.00 net per hour. This totals 520 hours which is \$9,360, less the payment made, which I find to be \$120. I have been unable to determine what the appropriate gross pay rate is.

[62] I order Grand Treasure Investment Ltd to pay Ms Li the sum of \$9,240.00 net as arrears within 28 days of the date of this determination.

[63] From total earnings of \$9,360 net, I calculate Ms Li's holiday pay entitlement as 8% of that figure. I order Grand Treasure Investment Ltd to pay Ms Li the sum of \$748.80 net as holiday pay.

Reimbursement

[64] Ms Li also claims reimbursement for the costs of two rooms which she paid for her and Mr Gao's accommodation to attend the conference. I accept that this is a work related expense which Grand Treasure should pay for. Grand Treasure Investment Ltd is ordered to pay Ms Li the sum of \$593.34 within 28 days of the date of this determination.

Penalties

[65] Claims were made that there were breaches as follows for which one or both of the respondents should be penalised:

- (a) failure to pay holiday pay on termination of employment as required by the Holidays Act;
- (b) failure to keep and/or provide time and wage records contrary to s 130 of the Employment Relations Act 2000 (the Act); and
- (c) failure to provide an employment agreement in breach of s 63A of the Act.

[66] A limitation difficulty was raised at the case management conference. Under s 135(5) of the Act actions for the recovery of a penalty must be commenced within 12 months of the date when the cause of action first became known to the person bringing the action or when they should reasonably have known about it.

[67] This claim was lodged in the authority on 25 January 2019. I am satisfied that Ms Li became aware in the second half of 2017 that she had not been provided with an employment agreement and no record was being kept of her hours being worked. She had asked for an employment agreement but was not provided one. She was frequently working away from Mr Gao's supervision and was not recording or reporting any hours to him. There was evidence that she had awareness of record keeping requirements from her previous business experience. The claim for a penalty in that regard is therefore outside the time in s 135(5) of the Act and cannot be pursued.

[68] As regards holiday pay Ms Li became aware when she returned to work after a break on 4 January 2018, that she could not access her work email and the Dropbox. She spoke to Mr Gao who replied that he was doing a system upgrade and asked her to wait until further notice. Mr Gao did not contact her after that.

[69] Ms Li was aware shortly after 4 January 2018 that she had not received any holiday pay. Her claim for a penalty must fail as she did not commence her action within 12 months.

Costs

[70] Ms Li seeks costs for her representation. Mr Gao mentioned fees he had incurred for getting legal advice but he did not provide any invoices from that. Ms Li was successful in establishing that she was owed money by Grand Treasure and therefore she is entitled to a contribution to her costs.

[71] The Authority's daily tariff for a one day investigation meeting is \$4,500.00. This hearing took a little over half a day. An uplift was claimed for the mediation which the parties were directed to. However, this was the first mediation so I make no uplift for this.

[72] I order Mr Gao to pay Ms Li the sum of \$2,500.00 as a contribution towards her costs, along with the \$71.56 filing fee, within 28 days of the date of this determination.

Nicola Craig
Member of the Employment Relations Authority