

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 204
3030554

BETWEEN ZHANG CHAO
 Applicant

AND LJ CATERING LIMITED
 TRADING AS THE ORIENT
 CAFÉ AND RESTAURANT
 Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant in person
 Ryan Cao for the Respondent

Investigation Meeting: 17 December 2018

Submissions and further At the investigation meeting and 18 December 2018 and
information received: 24 January 2019 from the Applicant
 7 January 2019 from the Respondent

Date of determination: 5 April 2019

DETERMINATION OF THE AUTHORITY

- A. LJ Catering Limited is ordered to pay Zhang Chao, within 21 days of the date of this determination, the sum of \$8,710.00 gross as wage arrears and \$71.56 for the Authority's filing fee.**

What is the employment relationship problem?

[1] Zhang Chao (Mr Zhang) was a chef for L J Catering Limited (LJ or the company) trading as The Orient Café and Restaurant in Penrose, Auckland. Mr Zhang worked at The Orient from 22 January to 21 May 2018.

[2] Mr Zhang claims that he was underpaid, as he was paid for considerably lesser hours than he actually worked. LJ's says that Mr Zhang was paid for all hours in accordance with the employment agreement.

[3] I held an investigation meeting on 17 December 2018. Mr Zhang gave evidence by Skype as he is now working some distance from Auckland. Mr Zhang's friend also gave evidence by Skype. Ryan Cao (also known as Haiwei Cao), one of LJ's directors, represented the company and gave evidence. I also heard evidence by telephone from Nancy Liu (also known as Yanan Liu), manager of The Orient. I was assisted by an interpreter of the Mandarin language. Subsequent to the investigation meeting both parties filed further documents.

[4] 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 on issues necessary to dispose of the matter, and specified orders made.

What are the issues?

[5] The issues for investigation and determination are whether Mr Zhang is owed wages by LJ Catering Ltd and, if so, of what amount. No penalties are sought.

[6] Mr Zhang's statement of problem refers to overtime, however what he is seeking is payment at his standard hourly rate for all the hours he worked above those LJ paid for.

What does the employment agreement say?

[7] The letter of appointment offers Mr Zhang the position of Executive Chef. The employment agreement says that he is employed as a Chinese Chef.

[8] The agreement refers to Mr Zhang working 39 hours per week from Tuesday to Sunday, between 3pm and 9.30pm. The reference to Sunday is surprising as the parties agree that The Orient was not open on Sunday and Mr Zhang did not work then. The agreement sets his pay rate at \$20 gross per hour.

What hours does Mr Zhang say he worked?

[9] The parties agree that Mr Zhang worked six days a week. Mr Zhang says that for the first two weeks he worked from 7am on weekdays and 8am on Saturdays, usually finishing at around 4 or 4.30pm.

[10] After the first couple of weeks Mr Zhang's work pattern changed. He says he worked on Monday to Friday starting at 7am and finishing after 9pm, with a break from 3pm and 5pm. On Saturdays Mr Zhang started at 8am and although the café closed for guests at 9pm, there was online ordering available until 9.30, so he did not finish work until 10pm or later. Therefore he was working over 12 hours a day. Mr Zhang reports not getting a lunch break, other than the two hour break later in the afternoon.

[11] Once Mr Zhang gave LJ his letter of resignation which mentioned fatigue, the manager said to only start work from 9am. This amounted to a 10 hour work day, as he was still getting the two hour afternoon break.

[12] Mr Zhang's friend was in contact with Mr Zhang two or three times a week, and says this was usually after 9 or 10pm. He says that Mr Zhang's discussion of his work hours at the time was consistent with the evidence above. The friend understood Mr Zhang was on a salary arrangement. However, the employment agreement refers to an hourly pay rate and set hours.

What hours does LJ say Mr Zhang worked?

[13] Mr Cao says that the arrangements with Mr Zhang were undertaken by the manager Ms Liu but Mr Cao's understanding was that Mr Zhang worked according to his employment agreement. Mr Cao thought that after a couple of months Mr Zhang changed his working times.

[14] Mr Cao reports that as Mr Zhang was a cook of Chinese food he would not have been needed in the mornings because in early 2018 The Orient only provided

an English-style breakfast. No menus were produced. Mr Cao knew that Mr Zhang had experience with Western food but said he was employed to cook Chinese food.

[15] The manager Ms Liu reported that Mr Zhang worked Monday to Saturday from 12 noon to 3 pm, then from 5 to 9 pm.

What other documents were produced?

[16] Mr Zhang provided a photo of The Orient's opening hours, which refers to Monday to Friday 7am to 9pm and Saturday 8am to 9pm. Included in the photo was the café's on-license application which was affixed to the front door. It refers to alcohol being able to be served from 7am to 9pm on Monday to Sunday.

[17] Mr Zhang's resignation letter of 2 May 2018 refers to him being dissatisfied and working six days a week 7am until later than 9.30pm, with the two hour break. He refers to unbearable fatigue.

[18] Mr Zhang also provided pages from a calendar where he says he noted his actual start and finish times on each day. He says he wanted to be able to show his family overseas the hours he was doing.

[19] At the investigation meeting Mr Cao made mention of payslips and produced one. I directed that any other payslips be filed. After the meeting LJ filed weekly payslips for Mr Zhang's period of employment. Mr Zhang denied ever having been given payslips during his employment. Ms Liu said she gave Mr Zhang the payslips. Mr Cao accepted that on occasions the slips were not given out, including because Ms Liu sometimes forgot.

[20] The payslips were in a format which is familiar to the Authority. However, I have concerns about those records. For no apparent reason, the monetary entries were in different fonts. For example, in the line indicating the pay period and payment date, the total earnings figure was in a different font to the net pay figure next to it. Also, the leave record lines were not used at all with Mr Zhang appearing to accrue no annual leave, despite taking no leave. Ms Liu's evidence was that LJ's accountant had filled out the payslips.

[21] The pay rate on the payslips was \$21.625. This is an unusual figure, going to three decimal places. It is also not the same pay rate specified in the employment

agreement. Mr Cao did not know why that rate was on the pay slip. He did not believe Mr Zhang had received a pay rise in the short time he worked at The Orient. Mr Cao reiterated that Mr Zhang was paid in accordance with his employment agreement.

[22] The vast majority of the payslips show Mr Zhang working and being paid for a total of 40 hours each week, except when there are public holidays. The total hours are not broken down. Forty hours a week is not consistent with the employment agreement which refers to 39 hours a week. The payslips show the weekly gross payment as \$865. At the rate of \$20 per hour, that equates to 43.25 hours' work per week. While not impossible, that is unusual. The figure of 43.25 hours when divided by Mr Zhang's working week of six days does not provide an easy figure.¹ This adds to the questions about the authenticity of the payslip information.

[23] The slip for payment on 1 June 2018 showed Mr Zhang's hours of work as 47.0691. Mr Zhang is not sure why a different number of hours would be recorded for that week. The final slip showed payment of holiday pay on 8 June 2018.

[24] The payslips do match with two IRD employer monthly schedules provided by LJ, as well as with Mr Zhang's bank records showing net payments received.

[25] LJ filed no wage and time records other than what is in the payslips. Mr Cao understands there was a roster or schedule of work but none was filed. He accepts that the Authority has nothing from LJ to show the hours actually worked. Ms Liu says there was a timetable of staff work hours, although this did not change as people worked the same hours each week. The timetable was sought but not provided.

[26] Ms Liu says that Mr Zhang worked seven hours a day, six days a week. This totals 42 hours. However, the gross pay of \$865 on the payslips would amount to 42 hours at \$20.60 per hour, higher than the employment agreement rate of \$20 but lower than the \$21.625 on the payslips. Ms Liu says the accountant had told her what to pay. She suggests a bit extra was added to allow for some cleaning time. She accepts some overtime was done by Mr Zhang but that was already

¹ For a six day week this would be 7.2083333 hours a day.

allowed for. Ms Liu is unable to explain why the pay slip referred to an hourly rate of \$21.625.

[27] I found Ms Liu's evidence inconsistent. She said there was no need to have a changing roster as staff did the same hours each week. Later she said that she got staff to write down their hours each week if they had worked any overtime, although no written evidence of these recordings was produced. However, Ms Lieu also referred to adding on a bit when setting Mr Zhang's standard weekly pay to cover overtime worked. Mr Zhang says that other staff were also paid a set weekly amount.

What hours were worked?

[28] The inconsistencies between the employment agreement and the payslips regarding both hours worked and pay rate, along with the other issues outlined above, lead me to conclude that the pay slips are not an accurate record of Mr Zhang's hours of work. I found Mr Zhang's evidence regarding his hours of work more credible than that of LJ's witnesses. I accept Mr Zhang's evidence that he worked a substantial number of hours which he was not paid for.

What did LJ pay Mr Zhang?

[29] LJ paid Mr Zhang the net sum of \$713.60 into his bank account each week. This did not change when his hours were reduced after he handed in his notice of resignation in May 2018. Both Mr Cao and Ms Liu gave evidence of Mr Zhang's hours changing during his employment. However, this did not affect his payment.

What is Mr Zhang owed?

[30] Mr Zhang claims that he worked 435.5 hours which were not paid by LJ. In order to calculate this figure he used the information on hours from the calendar pages to create a spreadsheet. The spreadsheet compares his actual work hours and his agreement work hours. The hours on the spreadsheet were consistent with Mr Zhang's evidence of working shorter hours for the first couple of weeks, as well as the last three weeks of work. At the employment agreement's rate of \$20.00 per hour, 425.5 hours amounts to outstanding pay of \$8,710.00 gross.

[31] LJ Catering Ltd is ordered to pay Zhang Chao the sum of \$8,710.00 gross within 21 days of the date of this determination.

[32] Although Mr Zhang did not seek holiday pay on that figure I considered whether to order payment for it. However, the amount of holiday pay which Mr Zhang was paid on resignation was considerably more than what he would have been entitled to on the basis of the earnings specified in the pay slips. No explanation was offered for this. I therefore cannot be satisfied that there is any holiday pay outstanding and make no order in that regard.

Was a premium for employment paid?

[33] Although not evident from the statement of problem, during the investigation meeting Mr Zhang mentioned having made payments of a deposit, to LJ. The company did not acknowledge receiving any such payments. From Mr Zhang's evidence the payments were seemingly in the nature of a premium for employment. The Authority informed the parties that it was considering copying the determination to the Labour Inspectorate of the Ministry of Business and Innovation and Employment (MBIE) and gave an opportunity to comment. Nothing was received.

[34] After the investigation meeting, Mr Zhang filed documents which appear to show three payments of RMB 50,000² each. LJ challenged this evidence as being We Chat³ screen shots which may be forged. It filed an example of a forged screen shot created by an unidentified IT friend of Mr Cao.

[35] Mr Zhang's evidence showed total payments of about NZ \$33,000. There are references in the comments section to "Chao Zhang First Payment of security deposit for New Zealand working time" and "second payment of New Zealand work visa fee". Payments were made in May and December 2017, as well as January 2018. I am unable to determine whether these payments amounted to a premium for employment. Also, the money may have been paid into an overseas bank account, which presents difficulties under s 12A of the Wages Protection Act 1983.⁴

² RMB is Chinese Yuan Renminbi currency

³ Chinese social media platform

⁴ *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451 EC

[36] I direct that a copy of this determination be provided to MBIE's Labour Inspectorate.

Costs

[37] Mr Zhang represented himself, incurring no legal costs. I order LJ Catering Ltd to pay Zhang Chao \$71.56 for the Authority's filing fee within 21 days of the date of this determination.

Nicola Craig
Member of the Employment Relations Authority