IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 65
ARC 45/13

IN THE MATTER OF	a challenge to the determination of the Employment Relations Authority
BETWEEN	WILLIAM TAN Plaintiff
AND	FENGQIN YANG AND JINFU ZHANG Defendants

Hearing:	7 and 8 April 2014 (Heard at Auckland)
Appearances:	T Delamere and C Fredric, advocates for plaintiff F Joychild QC, counsel and L Wong, advocate for defendants
Judgment:	9 May 2014

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] Migrant and would-be migrant workers are vulnerable to exploitation. There has been a discernible upswing in cases involving a failure to comply with minimum employment standards in relation to such workers.[1] Ms Joychild QC, counsel for the defendants, submits that this is one such case. It is alleged that William Tan received a substantial payment from Fengqin Yang and Jinfu Zhang in exchange for an offer of employment for their daughter, who they desperately wanted to bring to New Zealand from China.

[2] The facts have now been traversed in three different fora – the Disputes Tribunal, the Employment Relations Authority and this Court. While this is a de

[1] See for example *Mehta v Elliot* [2003] 1 ERNZ 451 (EmpC), *Labour Inspector v Civic City Ltd* [2013] NZERA Auckland 385, *Lin v Zhou* [2012] NZERA Auckland 43, *Tian v South Pacific Ltd* [2012] NZERA Auckland 367, *Zhou v Harbit International Ltd* [2012] NZERA Auckland 404 and *Damacharla v Southern Rocks Pacific Ltd* WA181/10, 8 November 2010 (ERA).

novo challenge, and I have heard and considered the evidence afresh, I find myself in agreement with the factual conclusions that have previously been reached.

Background

[3] Mrs Yang and her husband Mr Zhang are elderly Chinese migrants who came to New Zealand in December 2002 to be with their son, Bin Zhang, who had migrated four years previously. They were both factory workers in China and are now in their mid 70s. They speak very little English and have had difficulties integrating into the community here. They spend much of their time looking after their grandson and tending their vegetable garden.

[4] Mrs Yang and Mr Zhang's adult daughter, Li Zhang, still lives in China. They wanted her to come to New Zealand so that the family could be reunited. Mrs Yang talked to a friend whose son, Jimmy Li, subsequently introduced her to Mr Tan, the plaintiff. Mr Tan owns two restaurants in Auckland. Mrs Yang says that Mr Tan told her that he could assist in supporting Li Zhang's application for residency in New Zealand by extending an offer of employment to her in one of his restaurants. Mrs Yang says that the offer was conditional on payment of $14,000. Her evidence was that she told Mr Tan that she could not afford to pay him this amount in a lump sum and that it was agreed that he would be paid $7,000 with the remainder to be paid at some later date.

[5] On 8 May 2012 Mr Zhang and Mrs Yang met with Mr Tan at his restaurant. Mrs Yang says that Mr Zhang handed Mr Tan $7,000 in cash and Mrs Yang asked for a receipt, which he printed and signed in front of them.

[6] On 10 May 2012 Mrs Yang heard news that the government would shortly be closing the Sibling and Adult Child Category of its residence policy. She became very concerned that this would have implications for her daughter's application and contacted Mr Tan to see if they could meet to ensure that the documentation was completed before the looming deadline. It was at this stage that Mrs Yang told her son about the agreement with Mr Tan. He was concerned about it and advised his parents not to pay any further money to Mr Tan until Li Zhang was in the country.

On 12 May 2012 Mr Zhang and Mrs Yang went to Mr Tan's restaurant and he completed some documentation, scanned it and emailed it to Li Zhang. The documentation included confirmation that he had offered Li Zhang employment in his restaurant as a kitchen hand. It was common ground that this meeting took around two to three hours. Li Zhang subsequently filed her application with Immigration New Zealand.

[7] A few days later Mr Tan started making demands for payment of the remaining $7,000. Mrs Yang asked Bin Zhang for the money to enable her to pay Mr Tan but her son declined. Bin Zhang then entered into communications with Mr Tan, advising that no further money would be given to Mr Tan until his sister was in the country and, if Mr Tan was unhappy with such an arrangement, they would withdraw reliance on the job offer and in return seek repayment of the $7,000 already paid.

[8] On 21 May 2012 Li Zhang withdrew Mr Tan's job offer from her application and Mr Tan was again asked to return the money that had been paid to him. A meeting eventually occurred on 12 June 2012. The defendants told Mr Tan he could keep $1,000 if he returned the remaining $6,000. Mr Zhang and Bin Zhang say that Mr Tan demanded proof that the job offer had been withdrawn from Li Zhang's application. Confirmation was sought, and obtained, from the Immigration Service on 14 June 2012 and forwarded to Mr Tan. He did not respond and a claim was pursued by the defendants in the Disputes Tribunal.

[9] The Tribunal found that $7,000 had been paid to Mr Tan in return for an offer of employment but held that the payment comprised a deposit which was forfeited when the agreement was cancelled. The Tribunal noted that it had no jurisdiction in relation to employment matters and, in particular, whether there had been a breach of the Wages Protection Act 1983 (WPA).

[10] The defendants subsequently lodged a statement of problem in the Authority. On 23 May 2013 the Authority determined that Mr Tan had made an offer of employment in exchange for a promise to pay $14,000, had received $7,000 in part

payment and that his actions amounted to a breach of s 12A of the WPA.[2] It ordered Mr Tan to repay the sum of $7,000 and a penalty of $3,500 pursuant to s 13 of the WPA.

[11] Mr Tan gave evidence that there had been no agreement to offer Li Zhang a job in exchange for a sum of money. Instead, he said that there had been an agreement for the payment of $14,000 but that this had been for other purposes. He also denied receiving $7,000 in part payment and that he had issued a receipt to the defendants. Mr Tan alleged that the receipt that was before the Court, and which had previously been before the Disputes Tribunal and the Authority, had been forged. Mr Tan relied on evidence given by Mr Maran, who expressed the opinion that it was "highly probable" that the receipt had not been signed by Mr Tan.

Expert evidence

[12] It is convenient to deal with issues relating to the expert evidence at this point. Mr Maran is a certified graphologist, which involves the study of handwriting to analyse the writer's personality. While his report states that he is a certified handwriting and document examiner he confirmed in evidence that he is "not certified as such". Rather, he gained certification in handwriting and document examination in 2012 via a 26 lesson course conducted over the internet. By comparison, the expert witness called by the defendants, Ms Morrell, has extensive qualifications and experience in the subject matter that is relevant to these proceedings.

[13] Further, and as Mr Maran readily accepted, there were limitations with the assessment he carried out, although he declined the invitation to revisit or otherwise qualify the strongly expressed conclusion he had reached. Notably, the specimen signature pool that he had referred to in undertaking his analysis was limited to four comparative documents. In cross examination the following interchange took place:

> Q. But [Ms Morrell] is being very cautious [in expressing her opinion] because she only had eight [sample signatures].

[2] *Yang v Tan* [2013] NZERA Auckland 208.

A. Yeah

Q. Here you are with four or five because you did say in evidence that you also saw the job offer signature and you are making a really strong statement about something being false.

A. Yeah well I mean I've made that statement on what is submitted to me. I mean I know I would have preferred more known signatures for comparison purposes but with the actual – I can only work with what I've got available to me.

Q. Yes. So wouldn't a real expert have said I cannot say it's highly probable because I've only got four it looks to me on what I have seen as though it is. Wouldn't a real expert have qualified their opinion?

A. He probably would.

Q. Yep. Would you like to qualify it now?

A. No I am not going to change anything at this last minute.

[14] In addition one of the comparative documents contained initials at the foot of the page which, as Ms Morrell explained, were analytically useful. Mr Maran did not consider the initials but accepted that it could have been helpful to have done so. The greater pool of specimen signatures that Ms Morrell was able to access put into question some of the conclusions that Mr Maran had reached, including as to the placement of the "dash" on the receipt signature, the "terminal stroke" and the "full stop".

[15] Self evidently, an expert can only give evidence on matters on which he or she is an expert. I am not satisfied, on the basis of the material before the Court, that Mr Maran had the requisite knowledge and skill to give the evidence he gave or that his evidence was within his area of competence or expertise. Further, the limitations relating to the sample size, which he accepted in cross-examination, were not identified in his report and his conclusion was unqualified in this regard. While Ms Morrell had additional samples available to her (namely eight), she was not able to express anything more than a weak positive opinion that the receipt signature was Mr Tan's. The conclusions she might otherwise have been able to reach were adversely affected by the paucity of specimen signature documents that were provided.

[16] In the final analysis I did not find the evidence relating to the authenticity of the signature on the receipt of any real assistance.

The agreement

[17] I preferred Mrs Yang's evidence as to what unfolded and the agreement she reached with Mr Tan, namely that he offered to provide a job offer to support her daughter's application in exchange for a payment of $14,000. I also accept her evidence that Mr Tan told her that he would gratuitously sort out some of the documentation. I preferred Mrs Yang and Mr Zhang's evidence as to the meeting in Mr Tan's office where the $7,000 was paid over and Mr Tan printed and signed a receipt. While they have a limited understanding of English they clearly understood that they were receiving a receipt for the money they had paid to obtain a job offer from Mr Tan. The receipt states: "Here received a deposit $7000 from Jinfu Zhang, re family reunion immigration sponsorship job offer."

[18] It was not put to either of the defendants that they had forged the receipt and the signature, and it is implausible that they would have been in a position to do so given their limited grasp of the English language. And when the proposition was put to Bin Zhang by counsel for the defendants he unequivocally denied it. As Mr Crichton, the Authority Member, pointed out such a scenario would have involved an elaborate rouse that would have made little sense.

[19] I do not accept Mr Delamere's submission that text messages between Mr Tan and Bin Zhang provided no support for the defendants' case. On 19 May 2012 the following exchange took place:

> Mr Tan: Ill get copy of confirmation of her application being declined.
>
> Mr Tan: Then Ill come bring u the money and the copy of the document.
>
> Bin Zhang: Feel free to withdraw your offer. My sister's application has nothing to do with the offer. After u withdraw just return our money. Thanks.
>
> Mr Tan: … Ill guarantee You this: my offer withdrawn and your application declined! Wait for me to prove to you.

> Bin Zhang: Well, we appreciate your effort, and we still want you to continue, otherwise my mum won't pay you that 7000. We just want to pay you the rest 7000 once the application is successful. I believe it is very reasonable … but our bottom line is we cannot pay you the rest now, if you cannot accept this, then withdraw your offer and return the money.

[20] On 21 May 2012 Bin Zhang texted Mr Tan advising that:

> …we have withdrawn the job offer you provided from the application. [N]ow you can give the offer to other people. Thank you for your help anyway. When can you return the money to my mum?

[21] Mr Tan failed to respond to this request and Bin Zhang texted him again on 24 May 2012 saying:

> We are open for negotiation to solve our problem, but if you close the door by yourself, NZ immigration service will know you are selling a job offer.

[22] Notably, at no time during the extensive exchange of text messages did Mr Tan seek to correct or clarify what Bin Zhang had to say about the job offer being separate from the application for residence, and nor did he respond to the suggestion that the job offer was related to the money that had been paid and which Bin Zhang was seeking reimbursement of. It is clear that what the two men were discussing was a $7,000 payment that had been made and a residual equivalent payment that had not yet been made. At one point Mr Tan responded by confirming that he would return the money. He suggested in cross-examination that he was joking, but I do not accept his evidence that this was so. The text exchanges tend to support the defendants' version of events.

[23] The withdrawal of Mr Tan's job offer and associated request for repayment of the $7,000 is also consistent with the defendants' version of events. As the correspondence reflects, confirmation was sought and obtained from Immigration New Zealand that Mr Tan's job offer had been withdrawn from Li Zhang's application, and was forwarded to Mr Tan on 14 June 2012 together with a further request for repayment. Mr Tan did not respond and a claim was then pursued by the defendants in the Disputes Tribunal.

[24] Mr Tan gave evidence that he had never received $7,000 from the defendants. As Mr Delamere pointed out, there were no bank statements presented on behalf of the defendants to indicate that a withdrawal of $7,000 had been made. Mr Delamere submitted that Mrs Yang's evidence as to how she and her husband accumulated that amount of money, by withdrawing a certain amount each week and setting aside any residual cash, was inherently unlikely. This overlooks the fact that Mrs Yang and Mr Zhang were used to living in a cash orientated society, and did not use banks in the same way that others may do. I accept Mrs Yang's evidence and I also accept her evidence that the $7,000 that she paid to Mr Tan represented their life's savings. The text messages clearly refer to a payment of $7,000 and a request for repayment of that amount. Mr Tan's evidence to the contrary is plainly incorrect. Mr Li gave evidence that he never saw any money change hands between the parties, but it is also clear that he was not present during each of their meetings and nor did he have a clear recall of events.

[25] I am satisfied that Mr Tan received $7,000 from the defendants.

[26] I was not drawn to Mr Tan's evidence that the offer that he made to Mrs Yang related to other services, rather than prospective employment. His evidence was inconsistent, both internally and having regard to the contemporaneous documentation. In evidence-in-chief he said that the work he agreed to undertake for Mrs Yang was advice and support in relation to her daughter's application, consistently with Mr Li's recollection of a conversation with Mr Tan prior to a meeting with the defendants. He said that Mr Tan told him that the defendants owed him money for providing immigration advice and services. However Mr Tan's evidence became somewhat equivocal, later suggesting that the assistance he provided was more in the nature of secretarial work, filling in and printing relevant documents. In evidence-in-chief he asserted that he had filed Li Zhang's application with the relevant immigration authorities but that is not so. Li Zhang did that herself, together with a sponsorship form filled in by her brother, Bin Zhang.

[27] Mr Tan suggested that a request for payment of $14,000 for services of the kind he says he provided was reasonable having regard to charges being made at the relevant time by others, of around $20,000. However it is apparent that the

comparison was being drawn with immigration advisers. I say nothing about the reasonableness of such charges. As Ms Joychild pointed out, while Mrs Yang may have been naïve in her dealings with Mr Tan she is not unintelligent. $14,000 for two to three hours of secretarial work is so far out of the ballpark that it defies belief that she would agree to such a deal.

Analysis

[28] Section 12A(1) of the WPA was inserted as from 1 April 1993 by s 62(2) of the Health and Safety in Employment Act 1992. It provides that:

> No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[29] In *Sears v Attorney-General* it was held that "[i]n the normal understanding of the term a premium imports some consideration paid or demanded as a price of a contract."[3]

[30] Although Mr Tan has denied that the request for $14,000 was payment for the job offer he could provide Li Zhang and has also denied that he ever received $7,000 as part payment, I have preferred the evidence for the defendants. Accordingly I find that Mr Tan's request for $14,000 and receipt of $7,000 in exchange for a job offer plainly amounts to an employment premium in breach of s 12A(1) of the WPA.

[31] I turn now to consider whether this is an appropriate case to award a penalty pursuant to s 13 of the WPA, and if so, what the quantum of it should be. The Court is given a broad discretion to decide on the amount of the penalty that should be awarded as there are no guidelines set out in the Act. It is however generally accepted that a penalty should only be imposed for the purpose of punishment and should not be used as an alternative route for increasing compensation.[4]

[32] The following non-exhaustive list of factors may usefully be considered:

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[3] *Sears v Attorney-General* [1994] 2 ERNZ 39 (EmpC) at 61.
[4] *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC).

- the seriousness of the breach;
- whether the breach is one-off or repeated;
- the impact, if any, on the employee/prospective employee;
- the vulnerability of the employee/prospective employee;
- the need for deterrence;
- remorse shown by the party in breach; and
- the range of penalties imposed in other comparable cases.

[33] I take into account that Mr Tan does not appear to have come before the Authority or Court previously in relation to a breach of s 12A. He has, however, taken no responsibility for his actions. Rather he has made serious allegations relating to the authenticity of the receipt, and the defendants have been put to the trouble of pursuing a claim against him for the recovery of the money they paid. The text message exchanges reveal thinly veiled threats in relation to Li Zhang's immigration application if they did not meet his demands. Mr Tan effectively stripped the defendants of their life's savings. Mrs Yang and Mr Zhang trusted Mr Tan because he spoke Chinese, and they were keen to see their daughter come to New Zealand. They did not know that it was unlawful for someone to ask for money for a job offer in this country.

[34] It was submitted on behalf of the plaintiff that the circumstances of this case were distinguishable from cases involving vulnerable employees on work visas who face the spectre of having their visa revoked if they do not remain in employment. I agree that such employees are in a particularly tenuous position. However, Mrs Yang and Mr Zhang were also in a vulnerable position and Mr Tan took advantage of that. The impact on the defendants, and the family, has been significant. The Court must send an unequivocal message that this sort of conduct is wholly unacceptable.

[35] Ms Joychild submitted that, as the defendants are legally aided, any penalty imposed should be set at the maximum level as they will be required to make a contribution to their legal costs. While that may be so, I do not consider it appropriate to address any perceived inadequacies or shortfalls in the legal aid

regime by inflating the quantum of penalty that I would otherwise impose. To do so would have a distorting effect. The purpose of a penalty is not to compensate a party for a breach. Rather it is to punish and deter others from engaging in such conduct.

[36] This is a case that clearly warrants the imposition of a penalty. The Authority imposed a penalty of $3,500. Ms Joychild submitted that a substantially greater amount was warranted in the circumstances. I agree. There is a need to send a clear deterrent message in cases such as this. The maximum penalty of $10,000 in the case of an individual must be reserved for the most serious cases. The cases referenced at [1] of this judgment reveal a broad range of penalties from $7,000 to $15,000 in the case of a company, for which the maximum penalty is $20,000. Much depends on the individual facts of each case. Having regard to the factors identified above, including the aggravating features of this case, I am satisfied that a penalty of $6,000 ought to be imposed.

Conclusion

[37] The challenge is dismissed. This judgment now stands in the place of the Authority's determination which is set aside by virtue of s 183(2) of the Employment Relations Act 2000.

[38] Mr Tan is ordered to repay the defendants the sum of $7,000 pursuant to s 12A(2) of the WPA. No interest was sought on this amount and none is accordingly awarded.[5]

[39] In addition Mr Tan is ordered to pay a penalty of $6,000 under s 13 of the WPA. I agree with the Authority that, in the circumstances, it is appropriate that the penalty be paid to the defendants. I make an order accordingly.

[40] That means that Mr Tan must pay the defendants the sum of $13,000.

[41] At the request of the parties costs are reserved. If they cannot otherwise be agreed they may be the subject of an exchange of memoranda, with the defendants

[5] See *Ora Ltd v Kirkley* [2010] NZEmpC 6 at [27]-[29].

filing and serving a memorandum and any supporting material within 21 days of the date of this judgment and the plaintiff filing and serving any response within a further 14 days. The parties are reminded of the usual approach to costs in this Court.[6]

Christina Inglis
Judge

Judgment signed at 10 am on 9 May 2014

[6] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA), *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).