

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

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

**[2021] NZEmpC 159
EMPC 260/2020**

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

AND IN THE MATTER of an application for leave to produce digital
 evidence

BETWEEN YINTONG GUAN
 Plaintiff

AND JAY.CO LIMITED
 Defendant

Hearing: (on the papers)

Appearances: Y Guan, in person
 L He, agent for JAY.CO Ltd

Judgment: 20 September 2021

**INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Admissibility ruling)**

[1] Before the Court is a challenge brought by Mr Yintong Guan against JAY.CO Ltd, following the determination of an employment relationship problem by the Employment Relations Authority about several issues.¹

[2] The Authority considered a range of issues which flowed from the period when Mr Guan worked for JAY.CO as its restaurant manager in 2019.

¹ *Guan v Jay.Co Ltd* [2020] NZERA 297 (Member Campbell).

[3] Mr Guan's non-de novo challenge is now restricted to three issues. Did he work on two days in May 2019; did he work for more than 40 hours in any week; and did he pay JAY.CO approximately \$240 each week, as a premium? Each of these claims were dismissed by the Authority.

[4] Mr Guan also raised a fourth claim that he was unjustifiably dismissed, but because no such claim was before the Authority, I ruled Mr Guan cannot bring a challenge on this point.

[5] On 26 March 2021, I convened a directions conference with Mr Guan, who resides in China, and with Mrs He, agent for JAY.CO, who resides in Rotorua. I directed that a fixture was to be scheduled for the matter. The Court will be convened in Rotorua on Monday, 4 October 2021. Mr Guan will participate from China via Virtual Meeting Room (VMR) technology.

[6] In the various other directions I made for the hearing, I provided a timetable for the filing and serving of evidence by each party and allowed for the possibility of objections as to admissibility.

[7] For the purposes of his evidence, Mr Guan subsequently submitted a USB flash drive containing various photoshots and videos.

[8] The content may be briefly summarised as follows:

- a) Document 1: Video of a WeChat exchange between Mr Guan and an acting manager of the restaurant, as to an alleged obligation to pay a premium said to have occurred during working hours; and a related photoshot of the relevant WeChat exchange.
- b) Document 2: Photoshot alleged taken at the workplace showing various dates and timestamps, said by Mr Guan to confirm he was working on the contested dates of his employment.
- c) Document 3: Photoshot of statement, allegedly from a chef who worked at the subject restaurant, as to typical opening hours.

- d) Document 4: Series of photoshots of WeChat communications allegedly with Mrs He's sister as to hours worked by Mr Guan; with the acting manager as to contact details for food and other suppliers; and, with the chef, as to the limit on payable hours worked each week.
- e) Document 5: Photoshot of document allegedly signed by Mrs He and said to be an acknowledgment of payment by Mr Guan of a premium.

[9] Mrs He, representing her own interests and those of JAY.CO, filed an objection to the admissibility of this material on the USB flash drive. Essentially, Mrs He submits that the material on the USB flash drive is unreliable and that some of it could have been fabricated; she also submitted that some of the material is not relevant and that the Authority reached the correct conclusions as to the issues of the challenge.

[10] Mr Guan responded. He submitted that the materials are reliable and genuine.²

[11] The key question for the Court is whether the wide-ranging material is potentially relevant to the several issues which the Court will have to resolve at the hearing of the challenge.

[12] At this stage, the Court cannot reach a clear conclusion one way or the other as to whether the material is in fact genuine and/or reliable. Mr Guan says it is; Mrs He says it is not. These are bald assertions which will have to be tested at the hearing of the challenge.

[13] On the face of it, the various images are relevant to each of the questions which Mr Guan has placed before the Court for determination.

[14] The question of weight to be attributed to this material, however, is an entirely separate question. I will need to consider all the evidence relating to the events which occurred over the several weeks of Mr Guan's employment before reaching a conclusion as to whether the evidence he proposes to tender is in fact reliable. If issues

² Attached to Mr Guan's reply were two videos. They were not in a form which could be usefully viewed. I have therefore not considered this material.

are to be raised as to whether the images are genuine, it may be necessary for forensic evidence to be provided on this topic.

[15] Accordingly, I dismiss the objection and rule that Mr Guan may produce the evidence at the hearing.

[16] There is no issue as to costs.

B A Corkill

Judge

Judgment signed at 4.30 pm on 20 September 2021