

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

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

**[2021] NZEmpC 178
EMPC 260/2020**

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

BETWEEN YINTONG GUAN
 Plaintiff

AND JAY.CO LIMITED
 Defendant

Hearing: 4 October 2021
 (Heard at Rotorua and via Virtual Meeting Room from China)

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

Judgment: 18 October 2021

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Before the Court is a challenge brought by Mr Yintong Guan against JAY.CO Ltd (JAY.CO) following the determination of his employment relationship problem by the Employment Relations Authority.¹

[2] The Authority considered a range of issues which flowed from a short period of employment 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 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 rejected by the Authority. Initially, Mr Guan also claimed he had been unjustifiably dismissed, but as this issue had not been before the Authority, I ruled the Court had no jurisdiction to consider such a claim by way of challenge.

[4] Mr Guan joined the hearing of his challenge via Virtual Meeting Room (VMR) from China. He presented his case and gave evidence in English. Mrs Lisha He, a director of JAY.CO, appeared as agent for it. She presented her case and gave evidence in Mandarin. Mrs Lisha He called three witnesses who were employees of JAY.CO at relevant times. Two of these witnesses gave their evidence in Mandarin. A Mandarin interpreter was present to assist the Court.

[5] The question for the Court is whether the Authority erred either in fact or law concerning each of the three issues outlined above. I will consider these issues on a sequential basis, summarising the conclusions reached by the Authority in each instance and then the evidence placed before the Court in order to determine whether the Authority was wrong in any of its conclusions.

Was Mr Guan employed on 20 and 21 May 2019?

[6] The Authority found that Mr Guan was employed by JAY.CO from 12 July to 18 August 2019.²

[7] It also dealt with an issue as to whether he worked for two days prior to this period, on 20 and 21 May 2019.³

[8] It summarised Mr Guan's evidence that he had received a request from Mrs Lisha He on 19 May 2019 to attend the restaurant the following day at 10.00 am to start work. The Authority referred to a WeChat message⁴ which Mr Guan received on 20 May 2019, containing contact details of food and other suppliers; it also said

² At [11], [13] and [21].

³ At [6]–[12].

⁴ WeChat is a messaging and calling application.

Mr Guan had placed at least one order on behalf of the restaurant. Copies of those messages had been provided in evidence.⁵

[9] The Authority went on to state that one of the messages Mr Guan relied on, to show that he undertook work for JAY.CO, was not a message sent by him. It was instead a message sent to him by Mrs Lisha He as a template to show him how to place orders if he was successful in being employed in the manager's role.⁶

[10] The Authority said that as well as running a restaurant business, Mrs Lisha He ran a motel business, and spent each morning cleaning units. She said she had messaged Mr Guan on 19 May 2019 asking him to be at the restaurant the following morning at 10.00 am but when she realised she would not be there, because she would be cleaning motel units, she rang Mr Guan and asked him to come later in the day. The Authority recorded Mr Guan did not recall whether Mrs Lisha He had called him or not.⁷

[11] The evidence from other employees working for JAY.CO was that they had recalled seeing Mr Guan at the restaurant on the evening of 20 May 2019 but were not able to confirm what time he had arrived.⁸

[12] The Authority preferred the company's evidence, which it said was more plausible. It found that, on the balance of probabilities, it was more likely Mr Guan did not work on 20 or 21 May but rather, attended the restaurant to familiarise himself with its operations. Mrs Lisha He had accommodated him by providing information about suppliers and a suggested template for messages when, and if, he started working at the restaurant. While Mr Guan was introduced to other employees and was invited to join the staff for a meal at the end of the working day, the Authority was not satisfied he himself undertook any work. The application for payment for those two days was therefore declined.⁹

⁵ *Guan*, above n 1, at [7].

⁶ At [8].

⁷ At [9].

⁸ At [10].

⁹ At [11]–[12].

[13] For the purposes of the challenge in this Court, Mr Guan relied on digital images of WeChat messages dated 19 and 20 May 2019.¹⁰ I infer the images were those which had been presented to the Authority.

[14] The first image was a photostock of a message sent by Ms Sophia He, the sister of Mrs Lisha He, on 19 May 2019, asking Mr Guan to attend the restaurant at 10.00 am the next day. The second image was another WeChat message from Ms Sophia He sent the next day at 10.00 am. It contained details of certain external entities from which the restaurant obtained supplies. The third message was sent a short time later, at 10.15 am, under Ms Sophia He's WeChat registration: it included a message apparently sent by Mr Guan to one of the suppliers in which he stated he was "the new Manager of Joy Inn Restaurant Rotorua". He went on to place an order.

[15] Mr Guan said Ms Sophia He had asked him to attend the restaurant to start work. He said he started work on 20 May 2019 and that he was given a contract to commence work. He said he was also asked to place the order which he had sent, as described above.

[16] Finally, he said that his account was supported by another employee, Ms Jing Lu. The Court was told that Ms Jing Lu was a kitchenhand who worked for JAY.CO at the time and until 28 June 2019. She did not give evidence. Mr Guan produced a handwritten statement from her which simply stated that she had "worked" with Mr Guan, apparently on the May dates. She no longer worked for JAY.CO when Mr Guan later commenced working for the company, from 12 July 2019.

[17] The main witness called by JAY.CO on this point was Ms Sophia He. She said that in April 2019, Mr Guan had come to the restaurant stating he was looking for a manager's position. At that time, she told him she could not give him an answer as she was not the employer. She said her sister was the relevant person to give an answer and she was currently in China. She advised him to go to other Chinese restaurants that were looking for a manager.

¹⁰ These were ruled as being admissible in *Guan v JAY.CO Ltd* [2021] NZEmpC 159.

[18] She went on to say that he insisted he wanted to work at JAY.CO. She reiterated he could not apply for a position until Mrs Lisha He returned to New Zealand to interview him.

[19] Ms Sophia He said that she had arranged to meet Mr Guan at 10.00 am on 20 May 2019, but that due to an unexpected situation which arose at the motel which she owned and operated, she was unable to attend at that time. She arranged to meet him in the evening.

[20] Mr Guan had told Ms Sophia He his visa was due to expire in July 2019 and that he badly needed a job to obtain a new work visa so he could remain in New Zealand. He had previously worked as a supervisor for a karaoke company in Auckland, but he had not previously been a restaurant manager and was unfamiliar with this area of work. He asked for advice and information, including which suppliers were available and how to place orders. It appears that this was the context in which she sent the WeChat message to Mr Guan, giving examples of suppliers who provided products to JAY.CO.

[21] She said, on the evening of 20 May 2019, she gave Mr Guan a brief overview of the restaurant's operations and invited him to watch those and dine with the staff after they had finished their work.

[22] On the evening of 21 May 2019, Mr Guan asked for more information about the restaurant and the requirements for the role of manager. While it was operating, Ms Sophia He allowed him to use a computer at the premises to search for information required for his work visa.

[23] Ms Sophia He went on to say that Mrs Lisha He returned to New Zealand in June, and, after she had an interview with Mr Guan, an employment contract was signed.

[24] Mrs Lisha He confirmed that she returned to New Zealand from China on 13 June 2019 and interviewed Mr Guan on 20 June 2019. She said that that was the

first time she had met him. She then confirmed that she offered Mr Guan employment on condition he was first able to secure a valid work visa.

[25] From the documents produced to the Court, it is apparent that an offer of employment was made by Mrs Lisha He to Mr Guan on 26 June 2019; he signed an individual employment agreement (IEA) on 27 June 2019; he was granted an Essential Skills Work Visa approval by New Zealand Immigration authorising him to work as a restaurant manager for JAY.CO on 6 July 2019; and he commenced work on 12 July 2019.

[26] Mr Michael Zhong, a kitchenhand, gave evidence. He said that in May 2019, Ms Sophia He told staff that someone would be coming to the restaurant to observe operations. He said that on the evening of 20 May 2019, Mr Guan had a long conversation with Ms Sophia He. She had invited him to meet staff and observe operations. The restaurant was very busy at the time, so Mr Guan was left alone and not asked to work.

[27] After the restaurant closed, Ms Sophia He invited him to have dinner, and he was then introduced to staff. He said that the next day Mr Guan again called to see Ms Sophia He. Afterwards he had a meal with staff again.

[28] At one stage, he sat at the counter at the front using the computer to work on information he needed for his visa.

[29] I accept the detailed evidence given by Ms Sophia He as to her interactions with Mr Guan. It is supported by the evidence of Mr Zhong, Mrs Lisha He and the documents. On the balance of probabilities, I am satisfied that Mr Guan had immigration issues, that he needed a job before he could obtain a visa after his current visa expired and he was keen to obtain a restaurant manager's position. That is why he attended the JAY.CO restaurant and sought information as to the manager's role. He speaks reasonable English, and it is understandable that he would be regarded as being a potential candidate to manage the restaurant's front-of-house operations.

[30] The director of JAY.CO, Mrs Lisha He, was overseas, and her sister, who ran her own motel business, stood in for her during her absence. It is clear she did not consider it was within her authority to employ Mr Guan as restaurant manager for two days. There is no evidence that Ms Sophia He authorised Mr Guan to send a WeChat message stating that he was the new manager of the restaurant. It would appear he was given access to the restaurant computer in her absence since she was detained elsewhere. He was then able read the message sent to him, and to send a message to a supplier. Its description of his status was incorrect.

[31] It is also clear that no offer of employment was made for 20 and 21 May 2019, despite Mr Guan's assertion that he was given a contract to work on those two dates. It makes little sense that he would be employed for two days as manager and then offered no further work from then until 12 July 2019. It does make sense that JAY.CO was not prepared to employ him until he was interviewed by JAY.CO's director and had obtained a visa; the documents confirm that this is what occurred.

[32] The Authority erred in one respect in that it found that the relevant communications were between Mrs Lisha He and Mr Guan in this period. Ms Sophia He was the person with whom he interacted. The Authority is not to be criticised for this error, since the prevailing language of the witnesses was Mandarin, and aspects of the case would have been difficult to follow.

[33] That said, the substantive finding made by the Authority to the effect that Mr Guan was not employed to work at the restaurant by JAY.CO on 20 and 21 May 2019 is not shown to be incorrect. I accordingly dismiss this aspect of Mr Guan's challenge.

Payment for hours over 40

[34] The Authority recorded that cl 6.1 of the IEA set as 40 the number of hours to be worked each week, on five days of the week. The hours were to be worked by way of split-shifts. The Authority noted that the clause stated the first part of the shift was

to be worked from 11.00 am to 2.30 pm, and the second part of the shift from 5.00 pm to 9.30 pm.¹¹

[35] The Authority recorded that Mr Guan stated that he consistently worked six days each week and claimed payments for the additional pay. This was denied by JAY.CO.¹²

[36] JAY.CO provided time records which contained handwritten entries for hours worked by each of its employees, including Mr Guan, from July to September 2019. During the investigation meeting, Mr Guan acknowledged that some of the entries in the time record book were his. Those entries showed Mr Guan worked five days each week with starting and finishing times consistent with those set out in his IEA.¹³

[37] The Authority concluded that Mr Guan had not established that he worked more than the five days of recorded hours in the time record book. Accordingly, his application for payment for hours worked over 40 each week was declined.¹⁴

[38] Mr Guan's case was that he was in fact expected to work from 10.00 am to 3.00 pm, and 4.30 pm to 9.30 pm for six days per week, a total of 60 hours.

[39] He contended that the time records which had been considered by the Authority and which were before the Court were fake. He said he was forced to complete such a document, apparently because he was not supposed to work more than the 40 hours per week described in his IEA.

[40] Mr Guan also produced copies of images which he said supported the conclusion that the time records were fake. These included photos he had taken on his iPhone of CCTV images recorded at the restaurant on 22, 23 and 24 July 2019. He said that the photos showed either that he was working extended hours or that the restaurant was open at those times. Mr Guan said that other images, also filmed on his iPhone, were recorded as he was proceeding to work; on those images, no date was

¹¹ Guan, above n 1, at [17].

¹² At [18].

¹³ At [19].

¹⁴ At [20].

identified. He said he recorded the CCTV images shortly before his employment was terminated realising he would need such evidence subsequently. He also produced a WeChat audio which he said was an audio of Mrs Lisha He confirming, in effect, the restaurant timesheets were fake.

[41] Mr Guan referred to documents relating to a claim which Ms Jing Lu had brought after her employment ceased. In that claim, she had stated that according to New Zealand labour law employees could not work more than 40 hours a week. She said she had been required to work 60 hours. Attached to her claim was a timesheet which she had apparently prepared. The inference was that her timesheet was real, as opposed to the allegedly fabricated time records which JAY.CO kept.

[42] Mr Guan relied on this evidence to support his claim that the same practice continued when he was employed by JAY.CO.

[43] Mrs Lisha He said Mr Guan did not work 60 hours as claimed. She denied categorically that this had ever occurred. She said that on 28 May 2019, JAY.CO had notified the Rotorua Lakes Council that its business hours were the same as those recorded in Mr Guan's IEA. The email to that effect was produced.

[44] She said that the timesheets were accurate and had been signed by Mr Guan except for the last three days of his employment, when he refused to sign the record after notice of termination of his employment had been given.

[45] The timesheets showed that for much of July and early August the only employees whose time was recorded and signed for were Mr Guan and Mr Benson Wu. However, from 11 August 2019 onwards, time began to be recorded for a person described as "the chef"; and from 16 August 2019, hours worked by Mr Zhong were also recorded.

[46] Mrs Lisha He said that July and early August had been quiet months for the restaurant and that this had impacted on a number of the staff members who were employed.

[47] She also stated that Mr Zhong had suffered a leg injury in July and that, whilst he was in fact a full-time employee, he had been unable to work in that period. Mr Zhong confirmed this evidence.

[48] Mr Wu also gave evidence. He referred to the time record placed before the Court. He confirmed that he had initialled hours he worked on a daily basis. He said the record was accurate.

[49] I accept the evidence of the three witnesses who confirmed the accuracy of the time records produced. There is no reliable evidence to support the suggestion that they were fabricated. The audio reference to a fake timesheet is likely to have been a reference to the time record Ms Jing Lu had prepared which as I will explain shortly, was not authentic.

[50] It was suggested to Mr Guan by Mrs Lisha He when questioning him that he had added in time spent at the restaurant when, with other staff, he ate free meals at the restaurant. Mrs Lisha He said that staff meals were provided each day at 10.30 am, 2.30 pm, 4.30 pm, and 8.30 pm.

[51] I referred earlier to staff eating together after the restaurant closed, on 19 and 20 May 2019, which appear to be examples of this practice.

[52] Mr Guan denied that he had included time for these events, although he did not deny he ate at the restaurant. I find that these arrangements may have lead to some flexibility in working hours and/or opening hours.

[53] The various iPhone and CCTV images produced by Mr Guan are not comprehensive; they are selective and inconclusive. They do not lead to a conclusion that he consistently worked 60 hours each week, as he asserts.

[54] It appears that Mr Guan was influenced by the claim which Ms Jing Lu brought against JAY.CO; his claim was identical. He confirmed that he had met her in May 2019, and that he had subsequently tracked her down, which was the means by which he obtained copies of her documents. Mrs Lisha He explained that although

Ms Jing Lu did bring a claim on the basis of her timesheet it was not accepted as being correct. She was paid for 40 hours per week and not 60.

[55] Mr Guan appears to have relied particularly on Ms Jing Lu's statement that New Zealand employees could not work more than 40 hours per week. That led him to assert that JAY.CO timesheets, which did reflect 40 hours of work per week, were a necessary fabrication.

[56] I note several matters on this topic. First, there is no such legal restriction under New Zealand law.

[57] Second, there was no restriction on hours to be worked in Mr Guan's Essential Work Visa. Accordingly, this document does not suggest Mr Guan was restricted to 40 working hours per week. It would not have been necessary to fabricate timesheets for immigration purposes.

[58] Lastly, I refer to a WeChat communication between Mr Guan and someone at the restaurant on 18 August 2019, the date when Mr Guan's employment ended. Mr Guan said that in the communication Mrs Lisha He referred to a "fake timesheet". He implied that this was the time record he had signed on a daily basis. But those words were used by Mr Guan not by Mrs Lisha He. This self-serving statement does not prove JAY.CO had in fact fabricated its time record.

[59] On the evidence produced to the Court, Mr Guan has not established that he worked 60 hours per week. I conclude that the Authority did not err in reaching that conclusion. This aspect of Mr Guan's challenge is accordingly dismissed.

Premium

[60] The Authority recorded that Mr Guan said he was required to pay JAY.CO a cash sum of \$240 on four separate occasions, totalling \$960. He claimed that these payments were a premium which he was required to pay to JAY.CO to guarantee his employment.¹⁵

¹⁵ At [28].

[61] The payment of any premium is prohibited under s 12A of the Wages Protection Act 1983.

[62] The Authority recorded that Mr Guan had provided a copy of a document which, he said, showed that he made four payments to Mrs Lisha He on 18 and 25 July 2019 and 1 and 8 August 2019. JAY.CO denied such payments.¹⁶

[63] Mr Guan told the Authority that Mrs Lisha He placed her name on the document each week, when he paid her the sum involved.¹⁷

[64] The Authority was not satisfied that the signature on the document was in fact that of Mrs Lisha He. It was set out in Mandarin, with her name being shown in English. The Authority noted that when Mrs Lisha He had signed Mr Guan's IEA she signed in Mandarin. The Authority found it was therefore improbable that Mrs Lisha He would have signed the alleged premiums document in English. The Authority was not persuaded that the document was authentic or that it could be relied on to prove Mr Guan's claim that he had paid premiums. That application was accordingly declined.¹⁸

[65] Mr Guan gave similar evidence to the Court. He produced a photostat of a document, which he said was a receipt for the four alleged payments, acknowledged in each case by Mrs Lisha He by signing "Lisa".

[66] Mrs Lisha He said the document was not authentic. She said that the handwriting on the document was not hers. She also said she did not take any such money from Mr Guan.

[67] Mr Guan also produced an audio recording of a conversation between him and Ms Sophia He which was apparently taken on 1 August 2019. He said that the conversation clearly showed that he was required to pay \$241.86 to Mrs Lisha He on a regular basis.

¹⁶ At [30].

¹⁷ At [31].

¹⁸ At [32].

[68] Ms Sophia He also gave evidence about this conversation. She said that Mr Guan had called her for advice on how to calculate PAYE for different positions and she had advised him to use the IRD calculator, on its website.

[69] At the same time, Mr Guan asked her about the difference in pay between the duty manager and the general manager and how hourly rates should be calculated. She told him that his salary was based on the annual salary figure in his contract and not on the basis of an hourly rate. She was confused by his lack of understanding of these matters.

[70] She said that due to his lack of experience in hospitality, Mr Guan was concerned that he could be dismissed during his probationary period. He asked her that if he was willing to assume a lower position at the restaurant and to return the difference in wages to Mrs Lisha He, he could maintain his employment. It appears he believed that this would avoid potential immigration problems if otherwise he had no job.

[71] She also said that this was not the first time he had raised such an idea. On 28 June 2019, he had asked her if he could work as a helper in the kitchen to get to know the operations of the restaurant. He also made the same request on 4 July 2019. Both these conversations occurred before his work visa were approved. She referred to WeChat exchanges which supported the conclusion that he had held these concerns.

[72] The final piece of evidence which was placed before the Court on this point related to how Mrs Lisha He signed documents. Mr Guan said the receipts were signed by Mrs Lisha He using her left hand. Ms Sophia He confirmed that her sister was right-handed and all her signatures were in Mandarin.

[73] Mrs Lisha He demonstrated to the Court how she would write her name in English, using both her right hand and her left hand. It was obvious that she is right-handed. It is also plain that the correct spelling of her name in English is “Lisha”, whereas on the document produced by Mr Guan the spelling was “Lisa”.

[74] Moreover, there were several documents in the bundle where Mrs Lisha He had signed in Mandarin including Mr Guan's IEA, and the subsequent notice of termination of his employment.

[75] I find that Mr Guan has not proved that the document he relies on is authentic. I accept Mrs Lisha He's evidence that it did not contain either her writing or that she endorsed her name on the document in English.

[76] I also accept Ms Sophia He's explanation as to the content of the audio relied on by Mr Guan. The reference to a payment by Mr Guan to Mrs Lisha He of approximately \$240 was in the context of a discussion as to what would need to occur if he were to work in a lower paying role so as to maintain his employment at the restaurant. The conversation was not one about premium payments.

[77] Again, Mr Guan's evidence was not credible. He has not established that the Authority erred in its findings. This aspect of his challenge is also dismissed.

Result

[78] Each aspect of Mr Guan's challenge is dismissed.

[79] If there are professional costs which JAY.CO has incurred in defending the challenge, although it was not represented by a lawyer or advocate at the hearing, a claim for these may be made within 21 days, supported by relevant invoices, with a response given by Mr Guan within a further period of 21 days.

[80] I express my appreciation to Mrs Tan, who provided assistance to the Court as interpreter.

B A Corkill
Judge

Judgment signed at 4.10 pm on 18 October 2021