IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 66
EMPC 315/2014

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	XING (WENDY) SU Plaintiff
AND	IGOLF LIMITED First Defendant
AND	XIAOMING ZHANG Second Defendant

Hearing:	30 March 2015 (Heard at Auckland)
Appearances:	M Dillon, counsel for plaintiff No appearance for either first or second defendant
Judgment:	15 May 2015

JUDGMENT OF JUDGE M E PERKINS

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[1] This case involves unusual circumstances relating to the relationship between the plaintiff and the defendants. The plaintiff, Ms Su, claimed she was an employee of iGolf Ltd (iGolf). The proceedings involve a challenge to a determination of the Employment Relations Authority dated 3 November 2014.[1]

[2] Following an investigation meeting and written submissions from the parties, the Authority Member, in his determination, found that Ms Su was never in an employment relationship with iGolf.[2] Accordingly, her claim for lost wages and other financial claims failed.

[1] *Su v iGolf Limited and Zhang* [2014] NZERA Auckland 450.
[2] At [44].

[3] The Authority's determination records that neither iGolf nor Mr Xiaoming Zhang, the second defendant in these proceedings, engaged in the Authority's process until the investigation meeting. On that date Mr Zhang attended at the appointed time. This behaviour on the part of the defendants is similar to their inaction in the present proceedings before the Court.

[4] The defendants have taken no steps in the present proceedings. The challenge to the Authority's determination was filed with the Court on 1 December 2014. On 5 December 2014, service of a copy of the statement of claim and the determination was effected on both defendants. This was confirmed in an affidavit as to service dated 4 February 2015. Annexed to this affidavit are documents from New Zealand Post's courier service confirming delivery to Mr Zhang, both in his personal capacity and as a director of the first defendant. The documents were delivered to Mr Zhang at the registered office of the first defendant. A confirmation of receipt is endorsed on the courier service tracking document and this is signed by Mr Zhang. I am satisfied that both defendants received the documents and were aware of the requirements upon them if they wished to take steps in the proceedings. These requirements are prescribed in a notice to defendant, which is contained at the end of the statement of claim.[3]

[5] When no steps were taken by the defendants within the time prescribed, a directions conference was held with the plaintiff's legal counsel. This took place on 2 March 2015 and dealt with timetabling matters to enable a hearing of the plaintiff's challenge to take place by way of formal proof. That formal proof hearing took place on 30 March 2015. Ms Su gave evidence through a formally sworn interpreter.

[6] Even though the defendants had taken no steps in the proceedings and would not have been entitled to defend the challenge without leave, the Registrar took the precautionary step of attempting to notify them of the hearing date by sending them a notice of hearing and a copy of the Judge's minute relating to the directions conference previously held on 2 March 2015. Every effort was therefore made to try and ensure that the defendants were aware of the procedure to be taken. NZ Post's

[3] Employment Court Regulations 2000, Sch 1, Form 1.

courier service was unable to effect service of the notice and 2 March 2015 minute and they were returned to the Court.

Factual outline

[7] Ms Su and Mr Zhang formed a personal relationship following Ms Su's arrival in New Zealand. This came to an end, but both Ms Su and Mr Zhang remained living in a house owned by Mr Zhang's mother. Mr Zhang was the sole director and shareholder of the first defendant company. After their personal relationship ended but while Ms Su was still residing in the mother's house, Ms Su accepted a position with iGolf as a Media and Communications Manager. This occurred on or about 12 March 2012. A formal employment agreement was executed. A copy of the individual employment agreement, dated 20 March 2012, was produced as an exhibit at the formal proof hearing. The document is stated to be valid for a fixed term from 15 April 2012, until 15 April 2014, although the agreement produced does not contain any provision as required by s 66 of the Employment Relations Act 2000 (the Act). It would therefore be regarded as open-ended.

[8] On or about 6 April 2012 there was a physical altercation between Ms Su and Mr Zhang. Following Police involvement, Mr Zhang was charged and prosecuted on an assault charge but subsequently discharged without conviction. It appears Ms Su and Mr Zhang worked out the differences between them but lived apart from each other from that time. The Authority in its determination considered this altercation was one of the factors which made Ms Su's assertion of the subsequent employment relationship unlikely. The Authority Member relied upon Mr Zhang's oral evidence in making this finding. However, the contemporary documents now produced by Ms Su make the determination inconsistent with what was clearly a continuing employment relationship between Ms Su and iGolf.

[9] In her evidence given at the hearing, Ms Su described her role with iGolf as being involved with promoting the business by arranging advertisements, writing newsletters and designing and maintaining an internet page. She also arranged golf tours, marketed and arranged golf "experience days" or training days for overseas

secondary school students and carried out some administrative tasks such as liaising with the company's accountant and Inland Revenue about tax matters. These duties were also confirmed in the job description annexed to the employment agreement.

[10] Ms Su stated in her evidence that the majority of iGolf's business was providing golfing tours for and training Chinese tourists. Her plans for the golf tours would normally involve organising the days when, and courses where, the customers would play. She had to arrange flights, accommodation and other activities for the customers such as visiting Rotorua or taking a trip to the Hobbiton movie set attraction near Matamata. She would also calculate and advise the costs associated with what would really become a golfing holiday package. In addition Ms Su would prepare a newsletter about iGolf and the tour packages it provided each month. She would also arrange for promotional cards to be sent out to customers and potential customers for Chinese New Year. Ms Su stated that she designed an entire web-page for iGolf with the "skykiwi.com" website, which is a website for Chinese businesses in New Zealand. The webpage was never made publicly available though, because Ms Su states that Mr Zhang never gave approval for that to occur.

[11] In documents produced at the hearing, substantial corroboration is provided to Ms Su's assertions as to the duties she performed. These documents consist of promotional work which she has clearly prepared for iGolf. There is correspondence between her and clients. There is correspondence between her and Mr Zhang. All of these documents corroborate her assertions as to her employment between March 2012 and September 2013. The documentation is substantial and clearly contemporary with the period Ms Su alleges she was employed. Not only has Ms Su produced in her bundle of documents those created during the course of her employment with iGolf, but in her prepared statement of evidence she has set out lengthy schedules itemising these documents. The primary reason for this was that although the documents in some instances contained translations from the Mandarin language into English, many of the documents are in fact written totally in Mandarin and the schedules in her evidence provide descriptions of these documents in English.

[12] Ms Su's immigration status during the period of her employment was not entirely clear. However, she was in the course of applying for a work visa and there is evidence that this was supported by iGolf and Mr Zhang. She did not in the end obtain a work visa and I perceive that this may have been because she did not provide sufficient documentary evidence to satisfy Immigration New Zealand as to the nature and extent of the employment she was undertaking. Following termination of her employment with iGolf in September 2013, she had potential employment with another company, but that did not eventuate. She informed me that she is now present in New Zealand on a student's visa. While some mention was made of the immigration issue in the determination of the Authority, and it was clearly a relevant issue to the Authority Member at the time, in view of the further evidence now presented to the Court, Ms Su's immigration status assumes less relevance to the findings the Court needs to make.

[13] Throughout the period when Ms Su was employed by iGolf she was meant to have been paid an annual salary of $37,000. In her evidence Ms Su said that she was not paid the salary and Mr Zhang, when confronted with the issue on more than one occasion, stated that iGolf was a new business and yet to become profitable and that he would ensure that she was paid when that occurred. These conversations are corroborated to some extent in the documents. She had some reluctance to take action for payment in view of the fact that she was relying upon the employment in support of her application for a work visa at the time. She did not wish to do anything that would prejudice that application or her ability to live and work in New Zealand. She did get an assurance from Mr Zhang that while she was not receiving her salary, the company would, in the meantime, make payment of PAYE deductions to Inland Revenue. It turned out that that did not happen either. She also discovered that Mr Zhang was withdrawing company funds from cashiers at the SkyCity Casino and these were clearly being used for gambling purposes. The reason that she became aware of this was that parts of her duties were involved in the financial management of the company and she had access to the company's bank accounts. In the end Ms Su terminated the employment out of frustration at not receiving payment for the substantial amount of work she was performing.

[14] Plainly there is an oddity in the situation where Ms Su continued her business relationship with Mr Zhang following the breakup of their relationship and the altercation, which resulted in him being prosecuted for assault on her. The Authority Member placed considerable store on this in expressing scepticism of Ms Su's assertions. Nevertheless, as already indicated, the substantial documentation, including written evidence of communications between Ms Su and Mr Zhang, confirms that despite these personal relationship difficulties, the employment relationship did indeed continue until it was terminated.

[15] The Authority Member took the view that in the context of the deterioration in the personal relationships, he was not prepared to accept that there was a genuine employment relationship between Ms Su and iGolf. It may well be that upon the basis of the evidence provided to him at the investigation meeting, including evidence given to him orally by Mr Zhang, who had arrived at the investigation meeting at the last minute without notice, he formed an adverse view on Ms Su's evidence as a whole in reaching his determination. Ms Su indicated that Mr Zhang's appearance at the investigation meeting and presentation of evidence there was a matter of some surprise and she conceded that she was unable in the circumstances to fully present evidence to rebut what Mr Zhang had stated. Correspondence shows that an attempt was made after the conclusion of the investigation meeting to provide the Authority Member with further documentary evidence. It is difficult to ascertain the extent to which that might have been taken into account. Ideally Ms Su, and the counsel representing her at the investigation meeting, should have sought an adjournment to enable a proper reply to be presented. Certainly, it is now clear that substantially more evidence has been presented to the Court than was available to the Authority.

[16] It is significant that Mr Zhang and iGolf have chosen to take no part in defending the challenge to the determination, which Ms Su has made in this Court. It is not possible to reach any conclusion from the contemporary documents, which have now been produced, other than that Ms Su was employed by iGolf. Ms Su carried out substantial duties for iGolf in the period that she specifies, and those duties were carried out in performance of the employment agreement she had entered into with iGolf. Appreciative letters written to her by customers of iGolf confirm her

contact with them on behalf of the company and the substantial arrangements she made with them in performance of the duties previously specified.

Remedies sought

[17] Apart from asking the Court to find that the employment relationship continued after the altercation on 6 April 2012, Ms Su seeks financial awards. Through her counsel, Mr Dillon, she filed a memorandum setting out the calculation of income not paid, interest and costs. She would be liable for income tax on any amount recovered for wages. For the period of her employment she seeks the sum of $52,653.96 including tax. This is based on the annual salary of $37,000 provided for in the employment agreement. The claim to interest is $3,352.44 and is calculated from the date of termination of employment. The costs incurred in respect of the Authority's investigation and the challenge filed in the Court total $7,985 including disbursements.

[18] Ms Su is also entitled to holiday pay on the unpaid salary at the time of termination of her employment. This is not included in the memorandum filed and a retrospective calculation will be required if Ms Su wishes to pursue this entitlement.

[19] In addition, penalties are sought from both iGolf and Mr Zhang for the egregious breach of Ms Su's employment agreement. A penalty is also sought against either or both of them for inciting, instigating, aiding or abetting such breach.[4] It is problematic that a penalty for aiding and abetting is sought against the employer iGolf. The claim against Mr Zhang for such behaviour would be possible.

Disposition

[20] In view of those matters already discussed, I find that Ms Su was clearly in an employment relationship with iGolf from the time when the written employment agreement was commenced until she terminated the employment in September 2013. It is significant that neither iGolf nor Mr Zhang has chosen to take steps in the challenge to the determination. This needs to be considered also in the context

[4] Employment Relations Act 2000, s 134(2).

where Ms Su in presenting the evidence at the hearing has had the opportunity to now respond more fully to those matters which took her by surprise when Mr Zhang appeared unannounced at the investigation meeting before the Authority. The documentary evidence is significant. It clearly shows Mr Zhang acting in a position of control on behalf of iGolf over Ms Su in the performance of her duties. While the Authority Member inferred that the documentation presented by Ms Su at the investigation may have been created retrospectively, the extent of the documentation now produced at this Court's hearing could not possibly be created for nefarious purposes as may have been suggested in the determination. I accept that because Ms Su was then taken by surprise at Mr Zhang's last minute appearance before the Authority, she was unable to fully respond. The documentation, which has now been placed before the Court, was clearly not available to the Authority.

[21] Ms Su was not paid during the course of her employment with iGolf in accordance with legal requirements and the obligations imposed under the employment agreement. While it is not specifically stated in the determination, it is inferred that in view of the fact that Mr Zhang denied the employment relationship existed, he accepted that no payments had been made to Ms Su. The calculations of salary, interest and costs set out in Mr Dillon's memorandum would appear to be correct. The costs claim is particularly modest. If Ms Su wishes to claim holiday pay to which she is also clearly entitled, then leave is reserved for a further memorandum to be filed setting out details as to how such holiday pay is to be calculated.

[22] In addition to my finding that Ms Su was an employee of iGolf, she is entitled to judgment for $52,653.96 in unpaid salary. That is the gross figure and accordingly tax is included. The company is to pay the gross amount to Ms Su, thereby leaving her to deal directly with Inland Revenue as to the appropriate amount to be paid by way of income tax. This is particularly important in view of the fact that Ms Su remained unemployed for a substantial period following the termination of her employment with iGolf, and this will have an effect on the rate of income tax which she is now liable to pay.

[23] In addition to the salary payment there is also judgment for the sum of $3,352.44 being interest from 30 September 2013 until 30 March 2015. The company is ordered also to pay interest from 30 March 2015 until this judgment for salary is satisfied.

[24] Leave is reserved to Ms Su to provide evidence as to her holiday pay entitlement and quantum and if that information is provided an ancillary judgment will be issued.

[25] Insofar as the claim for penalty is concerned, iGolf retaining Ms Su in employment for such a substantial period without making any payment to her, amounts to the egregious and deliberate behaviour for which a penalty should apply.[5] In *Xu v McIntosh*, Chief Judge Goddard stated:[6]

> A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?
>
> The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate?

[26] These principles enunciated in *Xu* were applied in *Bracewell v Richmond Services Ltd*,[7] and in *Tan v Yang* Judge Inglis pointed out that:[8]

> 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.

[27] The factors set out in that decision to be taken into account are:[9]

a) the seriousness of the breach;
b) whether the breach is one-off or repeated;
c) the impact, if any, on the employee/prospective employee;

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[5] Employment Relations Act 2000, s 134(1).
[6] *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC) at [47]-[48].
[7] *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111 at [122]-[126].
[8] *Tan v Yang* [2014] NZEmpC 65 at [31].
[9] At [32].

d) the vulnerability of the employee/prospective employee;
e) the need for deterrence;
f) remorse shown by the party in breach; and
g) the range of penalties imposed in other comparable cases.

[28] In the present case, the breach occasioned by the failure to pay salary over a substantial period of time is serious. The company and Mr Zhang were in a position of power over Ms Su in view of the precarious nature of her immigration status. She performed substantial duties for the company without pay. The correspondence and documents show the high quality of her performance of duties and that she built up good-will for the company with its customers.

[29] The maximum penalty which can be imposed on a company is $20,000.[10] In this case Ms Su has not claimed any compensation even though she may have been so entitled. Accordingly, there can be no suggestion that she is seeking a penalty simply to increase any compensation, which might otherwise have been awarded to her. She seeks to have iGolf and Mr Zhang punished for their actions. The circumstances leading to the termination of her employment probably amount to a constructive dismissal. However, that is not before the Court as it has not been pleaded in that way. Nevertheless, as a reasonably substantial penalty against iGolf is appropriate, the penalty of $5,000 is imposed against it. The entire amount of that penalty is awarded to Ms Su. It is not appropriate to award a separate penalty against Mr Zhang personally, as he was simply acting on behalf of the company employer throughout.

[30] Insofar as the alternative penalty sought for aiding and abetting is concerned, there may well be some jurisdictional difficulties in the Court (as opposed to the Authority) now considering such a penalty, in view of the wording of s 134(2) of the Act. However, I form no concluded view on that issue. Quite apart from that, it must only be Mr Zhang rather than iGolf against whom a penalty for aiding and abetting could be contemplated. In view of the fact that at all times he would have been acting as the director of iGolf, questions of double jeopardy also arise if he too is ordered to make payment of a penalty for the same breach. Finally, there is simply

[10] Employment Relations Act 2000, s 135(2)(b).

insufficient evidence as to the manner in which he might have aided and abetted the company in breaching the employment agreement. That application by Ms Su is not granted.

[31] I will reserve the issue of costs. Ms Su is claiming a total amount of $7,985, presumably on an indemnity basis. Further costs may be incurred in dealing with the issue of holiday pay. In addition to that it is appropriate for Ms Su's counsel to file a further memorandum as to costs dealing with the issue as to whether indemnity costs should be awarded if that is indeed the application being made. Any memorandum dealing with holiday pay and the further issues on costs is to be filed within 14 days of the date of this judgment.

M E Perkins
Judge

Judgment signed at 9 am on Friday 15 May 2015