

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 388
3034337

BETWEEN FEE WENG (FRANK) YEE
Applicant

AND NZ NATURAL BEEF AND
LAMB LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Jennifer Wickes, counsel for the Applicant
Shelley Eden and Dasha Kovalenko, counsel for the
Respondent

Investigation Meeting: 27 March 2019 at Auckland

Submissions Received: 28 March 2019 from the Respondent
1 April 2019 from the Applicant
2 April 2019 from the Respondent

Date of Determination: 01 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Yee made a number of employment related claims against NZ Natural Beef and Lamb Limited (NZNBL). However NZNBL claimed that the Authority did not have jurisdiction to investigate Mr Yee's claims because the parties were never in an employment relationship.

[2] NZNBL said this was a situation in which two experienced businessmen, who were also good friends and former work colleagues, agreed to establish a new business venture in New Zealand.

[3] Mr Wang said that Mr Yee was a trusted business partner, who took on the risk of creating the NZNBL business and making it profitable, in order to obtain the potential reward of partial ownership of an Chinese company that Mr Wang owned and operated in China.

[4] This determination addresses the preliminary jurisdictional issue of whether or not the parties were in an employment relationship.

Relevant law

[5] The Authority only has jurisdiction over the employment relationships that are defined in s 4(2) of the Act. That means the Authority cannot investigate Mr Yee's claims unless it determines that he was employed by NZNBL.

[6] Mr Yee bears the onus of establishing on the balance of probabilities that he was an employee as defined by 6 of the Employment Relations Act (the Act).

[7] Section 6(1) of the Act defines an employee as a person employed for hire or reward under a contract of service. It includes a homemaker or person intending to work but excludes a volunteer who does not expect to be rewarded, and is not rewarded, for their services.

[8] Section 6(2) of the Act requires the Authority to determine the real nature of the relationship between the parties. In doing so, s 6(3) of the Act requires the Authority to consider all relevant matters, including the intention of the parties, but statements by the parties about their status are not to be treated as determinative of the nature of their relationship.

[9] When determining the real nature of the relationship, the Authority must not take a rigid or strict contractual approach to the contractual formation elements of offer/acceptance/consideration because it is not to focus on form over substance.¹

[10] Determining whether the parties were in an employment relationship involves an intensely factual inquiry into the particular facts of this case. An employment relationship may also be inferred from the conduct of the parties, despite the parties not having put that label on it.

¹ *Prasad v Tulai* [2017] NZEmpC 150 at [18]-[20].

Material background

[11] Mr Jinxiong (Peter) Wang resides in China. He is the sole director and shareholder of the Chinese company Shenzhen Zhixing United Investment Consulting Company Limited (Shenzhen), which holds 80.1% of the shares in NZ Natural Beef and Lamb Limited (NZNBL).

[12] Shenzhen is a China based entity and its core business is to provide immigration consultancy services to Chinese nationals in China.

[13] Mr Frank Yee is a Dutch national with 20 years' experience in importing commodities into China. Mr Wang and Mr Yee were "*good friends*" who had also previously worked together for a former employer that provided immigration services.

[14] Mr Wang said he asked Mr Yee to help him manage the China based Shenzhen business that had been established on 24 November 2014 and that he (Mr Wang) designated Mr Yee as a director of that Chinese based company.

[15] At that time Immigration New Zealand (INZ) had an entrepreneur work visa for people who wanted to work in their own New Zealand based business that waived capital investment requirements if the New Zealand based business showed export potential.

[16] Towards the end of 2014 Mr Wang and Mr Yee discussed setting up a new business exporting beef and lamb to China from New Zealand. This proposed new business was intended to serve as a New Zealand based franchisor exporting business that would allow Shenzhen's immigration clients to obtain entrepreneur work visas in New Zealand, as franchisees.

[17] Mr Wang had the money to invest in a new New Zealand based business but he did not have the time available to be able to set up a new business in New Zealand as his business interests were in China. Mr Yee had the time and business skills to be able to set up the proposed new business in New Zealand, but he did not have any money to invest in a new business.

They agreed that Mr Wang and his entities would fund a proposed new New Zealand based business from China, while Mr Yee would set up and run the proposed new business from New Zealand.

Mr Yee's involvement with NZBNL

[18] Mr Yee worked on the proposed new NZ based business before NZNBL was established. Mr Yee did some work on it at the end of 2014, when he was still in China. Mr Yee then moved to New Zealand in January 2015 and continued working on the proposed new business.

[19] Before NZNBL had been established Mr Yee set up a project for livestock breeding that would be related to the proposed new business. Mr Yee also identified and recruited people with the necessary skills to help make (the yet to be created) NZNBL successful, in particular:

- (a) David Mason – immigration advisor;
- (b) Hong Heng (Arthur) Lim – accounts and immigration franchisee matters;
- (c) Grant Dixon – responsible for cattle;
- (d) Dr Anwar Ghani – procurement.

[20] Mr Ghani was engaged by Mr Yee on a contract only basis. All of the other people Mr Yee recruited were offered directorships and shares in NZNBL in lieu of charging for their services. None of the people Mr Yee recruited were engaged as employees.

[21] The people Mr Yee recruited to work on the proposed new business invested their time and labour with the expectation they would receive a share of the profits when NZNBL became profitable. These people were reimbursed by Mr Wang on behalf of Shenzhen/NZNBL for any business expenses they incurred as a result of the work they were doing, but they were not separately remunerated.

[22] That arrangement changed in August 2015, after the people Mr Yee had recruited had invested around three months of their time and services into NZNBL. The directors of NZNBL, who up until then had been providing their 'sweat equity' for free, decided they could not continue to commit 100% of their time into the NZNBL business without financial compensation while the business was growing.

[23] Agreement was then reached that although the directors would not receive remuneration for their time, they would instead receive advances against their shareholding, which they would have to pay back to NZNBL either once it became profitable or by selling their shares back to NZNBL.

[24] In May 2016 Mr Yee asked for advances like the other directors. The difference was that the other directors were all shareholders in NZNBL (so they could repay their advances by selling NZNBL's shares back to it) while Mr Yee was not. These director advances are discussed in more detail later in this determination.

[25] After NZNBL had been established, Mr Yee managed the business as its CEO. He mainly managed the franchisees side of the business, looking for potential beef and lamb buyers, and solving business or day to day problems of franchisees.

Timeline of key dates

[26] NZNBL currently has 2001 shares, of which Shenzhen holds 1601 shares, Mr Arthur Lim has 200 shares and Mr Ahmad Zainudin has 200 shares.

[27] In October/November 2014 Mr Wang discussed setting up a new business with Mr Yee that would be based in New Zealand and that would use their China contacts. This new business would later become NZNBL.

[28] On 24 November 2014 Mr Wang set up Shenzhen in China, with its core business being to provide New Zealand immigration consultation services in China. Shenzhen was set up with the intention that it would financially benefit from the proposed new New Zealand based business that Mr Wang and Mr Yee had been discussing.

[29] Mr Yee moved to New Zealand on 15 January 2015.

[30] On 15 April 2015 Mr Yee incorporated NZNBL. Arthur Lim and Ahmad Bin Zainudin were named as the directors of NZNBL and they also each held 500 of NZNBL's 1000 total shares.

[31] On 17 April 2015 Mr Grant Louis Dixon was also appointed as a director of NZNBL.

[32] On 07 May 2015 Mr Yee was appointed as a director of NZNBL.

[33] On 07 May 2015 Mr Wang was allocated 1001 new shares in NZNBL. Mr Zaiundin's and Mr Lim's shareholdings were reduced from 500 each to 333 each. Mr Dixon received 334 shares, being 172 each from Mr Lim's and Mr Zainudin's original shareholding.

[34] On 31 May 2015 Mr Yee applied for a Specific Purpose Work visa to establish and develop NZNBL's franchise operation.

[35] On 15 June 2015 Mr Yee was granted a two year work visa by Immigration New Zealand (INZ) to "*work as Specialist personnel*" for NZNBL until 15 June 2017. This work visa was subsequently renewed on 29 April 2017 for two more years, until 20 April 2020.

[36] On 17 July 2015 Mr Wang transferred all of his 1001 shares in NZNBL to Shenzhen.

[37] At 17 July 2015 Shenzhen was recorded as NZNBL's majority shareholder with 50.05% of shares. At that time Grant Dixon held 16.7% of shares and Arthur Lim and Ahmad Zainudin each held a 16.65% shareholding in NZNBL.

[38] On 23 December 2015 Shenzhen's 1001 shares in NZNBL were transferred to:

- (a) Mr Dixon (333 new shares in NZNBL) bringing Mr Dixon's total shareholding to 667 (consisting of 334 original shares + the 333 new shares); and
- (b) Mr Lim (334 new shares in NZNBL) bringing Mr Lim's total shareholding to 667 (consisting of 333 original shares + then 334 new shares);
- (c) Mr Zainudin (334 new shares in NZNBL) bringing his total shareholding in NZNBL to 667 (consisting of 333 original shares + the 334 new shares).

[39] On 22 February 2016 Shenzhen was again registered as a new shareholder of 1000 NZNBL shares. Shenzhen received 334 shares back from Mr Lim, 333 shares back from Mr Zainudin, and 333 shares back from Mr Dixon.

[40] On 17 June 2016 the directors, including Mr Yee, ratified "*advances*" from NZNBL to its directors.

[41] On 11 September 2017 Mr Dixon ceased as a director and transferred all of his 334 shares in NZNBL to Shenzhen. That same date Shenzhen also received 133 shares from Mr Lim and 133 shares from Mr Zainudin.

[42] On 12 October 2017 Arthur Lim ceased as a director of NZNBL.

[43] On 6 November 2017 Mr Yee and Mr Zainudin signed “*Directors’ Resolutions*” that recorded that no remuneration or loans had been authorised to either of them for the financial year ended 31 March 2017.

[44] On 13 November 2017 Mr Yee signed a “*Deed of Agreement*” that recorded his resignation as a director and the CEO of NZNBL. Clause 1.7 of the Deed stated:

Frank acknowledges per NZNBL’s financials to be filed with Inland revenue Department that Advances of \$144,080 from the company have been made to him as at 31 March 2017.

[45] On 30 November 2017 Mr Jinxiong (Peter) Wang became a director of NZNBL.

[46] On 12 February 2018 NZNBL’s lawyer wrote to Mr Yee seeking repayment of the “*advances*” he had received while a director of NZNBL.

[47] 30 July 2018 Mr Yee filed these Authority proceedings.

What do key dates relating to ‘the status of the relationship’ indicate?

[48] NZNBL was incorporated on 15 April 2016. Mr Yee could not have been employed by NZNBL before then.

[49] By the time NZNBL was incorporated, Mr Yee had already done a couple of months’ work on the proposed new business while he was still in China and approximately three months’ work on it while he was here in New Zealand.

[50] Mr Yee was also not legally permitted to work in New Zealand before INZ granted him a work visa on 15 June 2015. He therefore could not have been employed by NZNBL before then.

[51] These key dates indicate a business partnership relationship, not an employment relationship, because Mr Yee had already been doing significant unpaid work for at least 6 or more months before he could have legally become an employee of NZNBL.

[52] There was no evidence of the relationship status of the parties having changed after Mr Yee got a work visa in mid-June 2015. Mr Yee kept working for NZNBL in the same way he always had.

What did the parties agree regarding NZNBL?

[53] No written terms were entered into by Mr Yee and NZNBL or by Mr Wang/Shenzhen and Mr Yee.

[54] Mr Wang and Mr Yee entered into an oral agreement that:

- (a) Mr Yee would go to New Zealand on behalf of Shenzhen to set up a new New Zealand based business;
- (b) Mr Yee would be CEO of the new NZ based business, which would subsequently become NZNBL;
- (c) Mr Wang would provide all of the funding for the new NZ based business (NZNBL). Mr Yee would not be required to make any financial contribution to the proposed new business;
- (d) Mr Wang would pay Mr Yee's wife, who stayed in China with one of their children, approximately RMB 6,500 (approximately \$NZ1,000) per month while her husband Mr Yee was based in New Zealand;
- (e) Mr Yee would provide all of the 'hands on' operational business expertise involved in setting up NZNBL, managing it and making it profitable, in accordance with the overall strategic objectives set by the proposed new businesses' Board, which Mr Yee would be a member of;
- (f) Mr Wang would cover all of Mr Yee's costs associated with setting up the proposed new business in New Zealand including but not limited to:
 - (i) All expenses associated with setting up and running the proposed new NZ, such as office expenditure/expenses, travel and business recruitment, their accommodation and the entertainment related expenses of any potential franchisees;
 - (ii) All of Mr Yee's living costs, such as his accommodation, food, utilities, vehicle, vehicle expenses, phone, internet and the like.
- (g) If/once NZNBL became profitable, then Mr Yee would receive a 25% shareholding in Shenzhen (the Chinese based entity) to compensate him for the

work he did for the proposed new business. It was never intended that Mr Yee would receive any shares in NZNBL.

[55] The parties did not discuss or define how or when the proposed new business would be deemed “*profitable*” or how it would be assessed. Mr Yee told the Authority he trusted Mr Wang to “*look after him*”.

Were there divergences from or supplementation of the agreed terms?

[56] Mr Wang, Mr Yee, NZNBL and Shenzhen all acted consistently with the terms Mr Wang and Mr Yee had agreed to before NZNBL was even established. The Authority was not made aware of any divergences from these agreed terms.

[57] Mr Yee’s evidence was that he would go to New Zealand to help Mr Wang establish a new business and in return Mr Wang would “*look after him*”, meaning Mr Yee.

[58] The only expense Mr Yee was personally responsible for while he was in New Zealand was his personal (non-business related) entertainment. Because Mr Yee’s job required him to host and entertain potential franchisees who were visiting from China, in actual fact almost all of his expenditure was either paid for up front by Mr Wang or later reimbursed to Mr Yee as business expenses.

[59] There appeared to be a supplementation to the agreed terms, in that Mr Wang paid credit card bills that Mr Yee and/or his wife would present to him. Mr Wang said he did that as a goodwill gesture because Mr Yee was helping him out in New Zealand by setting up and managing NZNBL. That was consistent with Mr Yee’s belief that Mr Wang would “*look after him*” while he was in New Zealand.

[60] The discretionary payment of the Yee family’s credit card bills is not indicative of an employment relationship. It tends to support Mr Wang’s evidence that he and Mr Yee operated as business partners, where Mr Yee helped Mr Wang out by establishing a new business in New Zealand, while Mr Wang informally helped Mr Yee’s family out financially in China. on an as required basis.

What financial arrangements were agreed?

[61] The fact there was no discussion about NZNBL paying Mr Yee any wages/salary/remuneration for the work he did suggests the parties had not entered into an

employment relationship. It would be unusual for an employee to accept an offer of employment without knowing what they would be paid and/or how their remuneration was going to be calculated.

[62] The only reward that was discussed and agreed was that if/once NZNBL became profitable then Mr Yee would be given a 25% shareholding in Shenzhen, without having to pay for those shares.

[63] The ‘reward’ (if any) was clearly never going to come from NZNBL but would be provided to Mr Yee by the parent company, Shenzhen. That tends to suggest that any legal ‘relationship’ (to the extent one existed) was more likely than not to have been between Mr Yee and Shenzhen, and not Mr Yee and NZNBL.

[64] This type of reward, that was agreed on before NZNBL had even been established, more closely aligned with Mr Yee and Mr Wang/Shenzhen having entered into a common business enterprise where, if it became profitable, Mr Yee had the opportunity to significantly financially benefit in future from the work he had done for NZNBL.

[65] Mr Yee’s ability to profit was not tied to the hours he worked or even to the specific work he did for NZNBL but was instead an outcome based reward, that was dependant on NZNBL’s profitability. That contingent financial arrangement was consistent with a business partnership type relationship.

What did the parties intend Mr Yee’s relationship with NZNBL to be?

[66] Mr Wang claimed that Mr Yee told him a number of times that he (Mr Yee) could not be an employee of any kind of business because if he was that would adversely affect his pension in Holland, as a Dutch national. Mr Yee disputed that.

[67] Mr Wang said the intention was always that Mr Yee would be his business partner and would end up being a shareholder, as well as a director of Shenzhen.

[68] There is no dispute that the parties never mentioned creating an employment relationship. The words “*employer*” and “*employee*” were also never mentioned. The focus and discussion was on starting a new business enterprise in NZ that would utilise Shenzhen’s expertise in China, thereby financially benefiting that overseas entity.

[69] Mr Yee said that although the parties never discussed the status of his relationship with NZNBL, there was no reason why he would work for NZNBL unless he was being paid for it.

[70] However Mr Yee also agreed that he expected to receive a 25% shareholding worth approximately NZ\$400,000 in Shenzhen once NZNBL was “profitable”, so the Authority considers that was how Mr Yee had intended to be potentially ‘compensated’ for the work he did for NZNBL.

How did the relationship operate in practice?

[71] The relationship operated in accordance with what Mr Wang and Mr Yee had discussed and agreed would occur before NZNBL was incorporated.

[72] Mr Wang supplied the financial resources and strategic business acumen for NZNBL from China. He paid all of Mr Yee’s living costs and all of the start-up costs associated with setting up the new NZNBL business and attracting potential franchisees from China.

[73] As NZNBL’s CEO, Mr Yee had considerable freedom to run the NZNBL business how he wanted to. Mr Wang trusted Mr Yee completely and never queried any of his (Mr Yee’s) requests for money for the business or expenses Mr Yee had incurred.

[74] Mr Yee was free to do whatever was necessary in terms of business activities or commit to business expenditure that would have helped develop the NZNBL business, consistent with the direction that had been set by the Board, of which Mr Yee was a director.

[75] Mr Yee was not required or expected to work:

- (a) At a specific location - he could choose where he worked from;
- (b) In accordance with a job description or position specification – he could choose what he did and how and when he did it;
- (c) Specific days – he set his own schedule;
- (d) Set hours of work - he could work whenever he chose to. He was not required to be in the office at set times and could work as much or as little as he chose to;

- (e) In a particular way – Mr Yee was autonomous because he decided what work was necessary and he then decided how and when and by who the necessary work was done. He could choose to outsource work at his discretion, so he did not have to personally perform any specific activities himself, other than liaising with Mr Wang about the business;

[76] Mr Yee was viewed by the other directors as having a special relationship with Mr Wang.

[77] Mr Zainudin said the other directors knew Mr Yee was in charge of the NZNBL business in New Zealand, but was not a shareholder, and had some sort of commercial relationship with Mr Wang, the terms of which were unknown to the other directors, who did not have a personal connection with Mr Wang.

[78] The highly informal and flexible way the relationship worked in practice did not tend to indicate it was an employment relationship, because of the level of autonomy Mr Yee had.

Relevant documentation

[79] *Individual employment agreement* – Section 65 of the Act requires every employer to provide every employee with a written employment agreement. Mr Yee, as CEO was the person responsible for ensuring that occurred.

[80] However there was no written employment agreement or written agreed terms and conditions of employment. That strongly suggests Mr Yee did not view himself as an employee at the time he was doing work for NZNBL.

[81] *Written contract* – There was no written independent contractor contract. Mr Yee as CEO would have been responsible for preparing that, if it was needed. The parties' intention regarding the status of Mr Yee's relationship with NZNBL was not recorded in any contractual documentation. That tends to suggest an informal oral business partnership.

[82] *Timesheets* – Mr Yee was not required to complete timesheets or time recording of the days and hours he worked. He had complete autonomy over his time and work routine, so did not have to account for how he was spending his time. That suggests he was not an employee or contractor but engaged as a director in a business partnership to develop a new business.

[83] *Invoices* - Mr Yee did not submit invoices in order to be paid. Instead from May 2016 he received monthly “*director advances*,” which he was required to repay. That suggests Mr Yee was a director who was building a new business, and not an employee or contractor engaged by NZNBL.

[84] *Bank statements* – bank statements produced to the Authority show Mr Yee was paid “*advances*”, not wages/salary. That also suggests he was a director, in a business partnership, who involved in setting up a new business.

[85] *Employer Monthly Schedule* - An Employer Monthly Schedule is an Inland Revenue Department (IRD) document that every employer must submit to the IRD each month. The EMS must record the date every employee starts and finishes work for an employer, the gross amount paid to each employee each month and the PAYE deductions made from each employee’s gross remuneration that has been paid each month.

[86] Mr Yee as CEO was responsible for ensuring NZNBL met all of its legal obligations to IRD. The fact NZNBL did not submit any EMSs to IRD, so Mr Yee was not recorded as an employee of NZNBL, strongly weighs against the existence of an employment relationship.

[87] *Wage and time records* – Section 130 of the Act requires every employer to keep wage and time records for every employee. As CEO Mr Yee was responsible for ensuring accurate wage and time records were kept for all employees. The fact NZNBL did not have any wage and time records for Mr Yee strongly weighs against the existence of an employment relationship.

[88] *Holiday and leave records* - Section 81 of the Holiday Act 2003 (HA03) requires every employer to keep holiday and leave records for every employee. As CEO Mr Yee was responsible for ensuring accurate holiday and leave records were kept for all employees. The fact NZNBL did not keep any holiday and leave records for Mr Yee strongly weighs against the existence of an employment relationship.

[89] *NZNBL financial accounts* – NZNBL’s financial accounts for Financial Year End (FYE) 31 March 2017 did not record any wages/salary payments to Mr Yee. Mr Yee signed these accounts as correct.

[90] If Mr Yee as CEO of NZNBL believed he was an employee who had not been paid for the work he had done then he should have ensured that any outstanding remuneration and unpaid HA03 entitlements were noted in the NZNBL financial accounts as liabilities.

[91] The information recorded in NZNBL's financial accounts, which Mr Yee had signed off on as being correct, was inconsistent with the existence of an employment relationship.

[92] *Director advances* – NZNBL's company accounts for FYE 31 March 2017 identified "*Advances to Directors*" that included \$144,080 that was recorded as having been advanced to Mr Yee in 2017 and \$23,086 in 2016. From April 2016 until March 2017 Mr Yee was also recorded as having received repayable director advances of \$5,000 per month.

[93] If these advances had not been made to him as "*director advances*" then Mr Yee, as the person who signed off on the accuracy of the financial statement, should have corrected that information in the company accounts. However he did not do so. This document was therefore inconsistent with the existence of an employment relationship.

[94] *Ratification of advances* – Mr Yee signed a "*Ratification of Advances to Directors Duly Passed on 17 June 2016*" that provided for advances of \$5,000 per month be made to three executive directors (not Mr Yee) from August 2015 and from May 2016 for Mr Yee, against their shares of future profits.

[95] This was stated in the document to have been passed on 13 August 2015, and it was signed by Mr Yee on 17 June 2016.

[96] The advance to the other four NZ based directors was described in the Minute as "*advance funds (against future profits) to cover living expenses in August 2015.*" The 17 June 2015 Minute resolved that:

[...] advances of \$5,000 per month to be made from August 2015 to three executive directors and from May 2016 for Fee Weng Yee - such advances to be offset or repaid against shares of future profits.

[...]

[...] the resolution on advances was duly passed by the Board of Directors of NZNBL on 13 August 2015.

[97] This arrangement was inconsistent with the existence of an employment relationship.

[98] *Deed of Agreement* - Mr Yee signed a Deed of Agreement dated 13 November 2017 that recorded he “*acknowledges as per NZNBL’s financials to be filed with Inland Revenue Department that Advances of \$144,080 from the company have been made to him as at 31 March 2017.*” Receiving repayable advances tends to suggest a business partner relationship.

[99] *Directors resolution* – A directors resolution dated 6 November 2017, signed by Mr Yee that same day, recorded that he had not been paid any remuneration (inclusive of directors’ fees, salaries, wages, bonuses, commissions, management fees, and the like) for his services to NZNBL. This directors’ resolution also authorised Mr Yee to sign NZNBL’s financial statements for the FYE 31 March 2017.

[100] As CEO Mr Yee should have known that an employee must be paid at least the minimum wage for all hours they work. Mr Yee’s confirmation that he had not been paid anything for the work, and his failure to take exception to that, was inconsistent with the existence of an employment relationship.

[101] *Certificate of directors* - A certificate of directors signed by Mr Yee on 6 November 2017 also stated that he and Mr Zainudin were not to be paid remuneration for the FYE 31 March 2017. That resolution, which Mr Yee agreed with, was inconsistent with the existence of an employment relationship.

[102] *Repayment of director advances* - From August 2015 four of the executive directors (not including Mr Yee) decided they could no longer provide their services without financial compensation so they arranged to receive advances against their shares, that would be paid back, by way of sale of shares, once NZNBL started making a profit.

[103] Mr Yee entered into the same arrangement from May 2016. Mr Yee claims those payments were remuneration for the work he did for NZNBL, while NZNBL says he was never an employee, and that the \$5,000 per month payments were “*repayable advances (loans).*”

[104] It was only when Mr Wang commenced civil action against Mr Yee for recovery of these advances that Mr Yee claimed he was an employee of NZNBL.

[105] The ‘director advances’ paid to Mr Yee are indicative of a business partnership and were not consistent with the way an employee would be remunerated for work they did for their employer.

Taxation arrangements

[106] Mr Yee told the Authority that he did not pay any tax in any country.

[107] Every employer is legally required to deduct PAYE from an employee’s wages/salary and remit that PAYE to the Inland Revenue Department (IRD) every month. That also had to be accurately recorded on the employer’s monthly EMS to the IRD.

[108] As CEO Mr Yee was responsible for ensuring these things occurred. It was therefore obvious to him that NZNBL was not treating him as if he was an employee for taxation purposes. Mr Yee went along with that willingly, knowing that he was the only person at NZNBL who had the power to change that, had he wanted to do so.

[109] Taxation arrangements suggest that Mr Yee arranged his financial affairs as if he was in a business partnership, as Mr Wang claimed, and not in an employment relationship, as Mr Yee claimed.

Industry practice

Although industry practice is potentially a factor that can assist the Authority in determining the real nature of the relationship, it is not relevant in this case.

Problems with the NZNBL business

[110] At the beginning of the NZNBL business there was a steady flow of potential franchisees. However that changed in July 2017 when Immigration New Zealand (INZ) changed its approach to the issuing of franchisee visas, and stopped giving franchisees visas.

[111] That change meant the NZNBL business no longer needed Mr Yee’s skills as CEO, so he retired. Mr Yee claimed he was forced to retire but he did not raise a personal grievance claim about that at the time.

Integration test

[112] The integration test assesses whether not Mr Yee was “*part and parcel*” of NZNBL.² Under a contract of service the person’s work is an integral part of the business. Under a contract for service the person’s work is not integrated into the business, and is only accessory to it.

[113] NZNBL needed hands on management support from someone in New Zealand, and that is what Mr Yee as the CEO provided. He was effectively the person in charge of NZNBL’s operations in New Zealand, but he had considerable flexibility in terms of how and when he did that.

[114] The integration test is equivocal in terms of determining the status of the relationship because the factors that applied to this case could have equally described a situation where Mr Yee was integrated into the NZNB business or an accessory to it.

Control test

[115] The Court of Appeal in *Challenge Realty Ltd v Commissioner of Inland Revenue* defined the “*control test*”.³ A high level of control, that is known to the person who is doing the work, is indicative of an employment relationship.

[116] Here there was minimal, if any control over Mr Yee. He could work as much or as little as he chose to. He could choose what work he would do personally and what he would engage others to do. He could to spend any money he deemed necessary for the business. He had to follow the general overall direction of NZNBL, as set by the Board, but apart from that Mr Yee was effectively completely autonomous.

[117] Mr Yee was not subject to any control or oversight or restrictions. He was free to engage in other business on his own behalf that was unrelated to NZNBL, and he did so with his itunes business he set up while in New Zealand.

[118] Mr Yee had a broad mandate to set up and develop the NZNBL business so it became profitable, but he had complete control over how he could do that. He could decide what days he would work, what times he would start and finish work, how many total hours he would work each week, and from where, and how, he would do the work.

² *Horizon Concepts Limited v Hayward* [2019] NZEmpC 75 at [34].

³ [1990] 3 NZLR 42.

[119] This very high level of autonomy, the lack of oversight or accountability Mr Yee had to anyone else, suggests that he was not an employee. The control test indicates that the parties were not in an employment relationship.

Fundamental/economic reality test

[120] The fundamental test, also known as the economic reality test, asks whether or not Mr Yee was genuinely in business on his own account.

[121] In this case all of the features point to Mr Yee being in business on his own account. Mr Yee took the risk of putting his time (sweat equity) into starting the new NZNBL business. He did so with the expectation that he would be rewarded for his efforts if/when NZNBL became profitable by receiving 25% of the shares in the China based Shenzhen company. That 25% shareholding would have been worth approximately NZ\$400,000.

[122] Mr Yee knew he was not being paid per hour or for specific tasks. He also knew that he only stood to benefit financially from the work he was doing on the new business if NZNBL became profitable. The evidence before the Authority was that NZNBL was doing very well until INZ changed the visa rules for overseas franchisees in July 2017.

[123] The Authority considers that the fundamental test does not support the existence of an employment relationship.

Overall assessment of the real nature of the relationship

[124] Mr Yee failed to discharge the onus of establishing on the balance of probabilities that he had an employment relationship with NZNBL.

[125] The evidence strongly indicated that there was no employment relationship. Mr Yee and Mr Wang appear to have entered into a mutually beneficial business partnership.

[126] Their business partnership was based on relatively informal oral terms. This level of informality likely arose from the high levels of mutual trust Mr Wang and Mr Yee had in each other due to their good friendship, former work together, and respect they had for each others' business skills and expertise.

[127] This mutual business arrangement was highly flexible with Mr Wang providing the money for the business, NZNBL's Board setting the strategic goals for the new business, and

Mr Yee having the freedom and autonomy to set up and develop the business as he thought fit, consistent with the overall objective of making it as profitable as possible, as soon as possible.

[128] Mr Yee appeared happy to be engaged by NZNBL as if he was in business on his own account, until he was required to repay his director advances. It was only then that Mr Yee, for the first time, claimed he was an employee.

[129] It is significant that before then Mr Yee had not acted as if he was an employee.

[130] Nor did Mr Yee, in his capacity as CEO of NZNBL, take any steps to ensure that the minimum code employment obligations NZNBL had towards him – if he were an employee – were met by NZNBL.

[131] There was no employment documentation, and no agreed terms and conditions that would have related to an employment relationship. The usual employment indicators of minimum statutory entitlements such as paid annual holidays, paid sick leave and public holiday entitlements did not exist in this case.

[132] There was no evidence that the business arrangement Mr Wang and Mr Yee had agreed to in China, regarding setting up a new NZ based export franchisee business, ever changed after NZNBL was established.

[133] Mr Yee essentially set up and ran NZNBL at his own discretion. He was not subject to any supervision or specific direction. Mr Yee had complete flexibility to identify what work he would undertake, when it would be done, how it would be done, and he did not have to answer to anyone in that regard.

[134] Mr Yee was free to engage in or undertake other business activities if he wanted to and he did not have to ask for anyone's prior permission or approval to do that.

[135] Mr Yee was known to the other directors to be "*the boss*" of NZNBL and they believed he was an investor in the NZNBL business.

[136] Mr Yee took considerable risk in terms of investing his time and energy into making the NZNBL business profitable. He knew that if that did not happen then he would not have

received any reward for his efforts. That is the sort of risk that is indicative of a business partnership, not an employment relationship.

[137] Mr Yee elected to carry the financial risk of moving to New Zealand to set up a new business in the hope that would result in him obtaining approximately NZ\$400,000 of shares in Shenzhen, NZNBL's China-based parent company.

Outcome

[138] The Authority does not have jurisdiction to investigate Mr Yee's claims against NZNBL because it was not satisfied that he was ever in an employment relationship with NZNBL or that he met the s 6 definition of employee in the Act.

What, if any, costs should be awarded?

[139] NZNBL, as the successful party, is entitled to a contribution towards its actual costs.

[140] The parties are encouraged to resolve costs by agreement. However, if that is not possible then the following costs timetable applies:

- (a) NZNBL has 14 days within which to file its cost submissions;
- (b) Mr Yee has seven days within which to file his costs submissions in response;
- (c) NZNBL then has a further three working days within which to file any reply costs submissions, should it wish to do so.

[141] The parties are invited to address the Authority on costs based on its usual notional daily tariff. This will include providing proof of the actual costs incurred and identifying any factors which the parties say should result in adjustments being made to the notional daily tariff, to reflect the particular circumstances of this case.

Rachel Larmer
Member of the Employment Relations Authority