

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 141
3041572

BETWEEN	YANG (ELLE) LYU First Applicant
AND	KUAN MIN (KENT) CHEN Second Applicant
AND	BEAR PAW CAFÉ PATISSERIE SANDWICH LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Royal Reed and Shalveena Rohde, counsel for the Applicants Jordan Todd, counsel for the Respondent
Investigation Meeting:	29 March and 17 April 2019 at Wellington
Submissions Received:	At the investigation along with further input up to and including 3 May 2019
Determination:	6 April 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants, Yang Lyu and Kuan Chen, claim they were unjustifiably disadvantaged and then unjustifiably dismissed by the respondent, Bear Paw Café Patisserie Sandwich Limited (Bear Paw). They also say wages remain to be paid and these are sought.

[2] Bear Paw says the applicants are incapable of bringing their claim as they were never employees of the business.

Background

[3] Bear Paw was incorporated in December 2016 for the purpose of purchasing and operating a café. Its sole director and shareholder was Fang Yi Lin though she is of the view both applicants were active partners. Ms Lin hails from Taiwan though is now a New Zealand resident having first come to study in 2013.

[4] Ms Lin says she and Ms Lyu mooted the idea of owning and running a café over a period of nearly two years and this culminated with the purchase of a suitable business in February 2017. In the interim Bear Paw had been incorporated and both Ms Lin and Ms Lyu contributed money to the project though the business was purchased in Mr Lin's name as Ms Lyu had advised her immigration status prevented her from being identified as an owner. This, according to Ms Lin also led to her agreeing to cover Mr Lyu's involvement by concluding an employment agreement. It is Ms Lin's view that notwithstanding the employment agreement the business operated as if both were owners and partners therein.

[5] Ms Lyu says she and Ms Lin met when both were studying at Le Cordon Blue. She says the two discussed Ms Lin's desire to establish a bakery with Ms Lin suggesting they do so together. Ms Lyu accepts she was tempted and the two discussed a joint financial arrangement. Ms Lyu says she later declined the proposal she be a business partner given advice from an immigration consultant but Ms Lin convinced her to retain a financial interest and then *invited* her to be a baker. She accepted but claims she did so as an employee.

[6] Mr Chen was in a personal relationship with Ms Lin which had commenced when the two lived in Taiwan. Mr Chen joined Ms Lin in Wellington in 2016 and, according to Ms Lin, expressed an interest in being involved in the business. She says this made sense given Mr Chen was her partner and she and Ms Lyu had earlier involved a third business partner though that person subsequently choose to withdraw. Ms Lin says Mr Chen did not put any money into the business' establishment with the plan being that his share would be earned through time and effort in the business.

[7] Mr Chen denies this. He says Ms Lin told him about the proposed café in mid-2016 and suggested he complete a barista's course so he could perform that role. He says he did so in Taiwan before joining Ms Lin in Wellington.

[8] He says he only joined the business in May 2017 given a decision ... *to work for her* [Ms Lin] *because I wanted to help her business to do well.*¹ He claims he always understood he did so as an employee having agreed with Ms Lin that he would be paid the minimum wage for each hour worked.

[9] It would be fair to say the business did not perform to expectation which was one of two problems which led to its dissolution. As Mr Todd put it in submission:

The business fails to perform anywhere near adequately. In line with her obligation as director of the company not to trade recklessly, the named owner takes steps to sell the business. Her business partners, motivated at minimum by the opportunity to get returns on their respective investments, allege that they are employees. This, despite continuing to operate and manage the business in the named owner's absence.

[10] The reference to the applicants continuing to operate it in the owners absence reflects the fact Ms Lin effectively left the business around the end of June 2017 with that being occasioned by what the oral evidence would suggest was the real cause of dissension between the three. In June Ms Lin was reviewing security footage and saw what she considered inappropriate conduct between Ms Lyu and Mr Chen. As she put it orally:

It about the relationship between my boyfriend of 8 years and a girlfriend of 4 years inappropriately touching. I was not respected.

[11] She raised her concerns which led to arguments and a total destruction of the trust that had earlier existed between the three. Ms Lin ceased to participate in the businesses day to day operation; she says at the behest of Mr Chen. Ms Lyu and Mr Chen say Ms Lin abandoned them but irrespective of which is correct Ms Lyu and Mr Chen continued to operate the business till ceased operating some months.

Discussion

[12] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority

¹ Statement of problem at [7]

decided exceptional circumstances existed to allow a written determination of findings at a later date.

[13] There are, potentially, two issues to be determined. That said it was agreed this determination address only the first of those which is the whether or not the applicants were employees. If they were not engaged as employees the Authority lacks jurisdiction to consider their claims further. If they were employees the second issue of whether or not the applicants were unjustifiably dismissed and/or owed wages will be considered at a later investigation.

[14] Section 6 of the Employment Relations Act 2000 provides the meaning of employee. The material provisions state:

*(1) In this Act, unless the context otherwise requires, **employee** —
(a) means any person of any age employed by an employer to do work for hire or reward under a contract of service; ...*

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

*(3) For the purposes of subsection (2), the court or the Authority —
(a) must consider all relevant matters, including any matters that indicate the intention of a person; and
(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*

[15] In *Bryson v Three Foot Six Limited (No.2)*² the Supreme Court stated, amongst other things, what *all relevant matters*³ means. It said:

“All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly require the Court or Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test) which were important determinants of the relationship at common law...

² [2005] ERNZ 372

³ Section 6(3)(a) of the Employment Relation Act 2000

[16] In other words I am required to consider the following in order to determine the nature of the relationship:

- a. The intention of the parties;
- b. Was there anything in writing to indicate the terms of the relationship between the parties;
- c. How the relationship operated in practice and this includes, as an essential element, issues of control and integration; and
- d. Whether the applicant(s) were effectively working on their own account.

Ms Lyu

[17] Ms Lyu, in her oral evidence, readily accepts both she and Ms Lin intended she be a partner and equal owner of the business. One example of this concession was the statement *it was intended we be equals*.

[18] The real dispute is whether or not that remained the situation with Ms Lyu saying an immigration advisor told her that her visa meant she was not able to participate in the businesses ownership. She says she told Ms Lin and acted on that advice by agreeing to become an employee when Ms Li then asked.

[19] Ms Lin says the initial intention never changed with Ms Lyu continuing to perform as a partner, providing the same financial input as her and making numerous arrangements for the establishment of the business. She then continued to make day to day operational decision in concert with her other business partners.

[20] On this I prefer the evidence of Ms Lin. It is accepted Ms Lyu was talking to her immigration advisors as early as June 2016 yet she accepts she did not tell Ms Lin of her inability to be a partner till November or December. Here it should be noted her evidence suggests multiple advisors.

[21] When asked when she became aware there might be an issue there were inconsistent answers though it appears most likely July or August. When asked to explain the delay in advising Ms Lin she was incapable of doing so and left the

impression she had been trying to find a way to continue the intended arrangement. Indeed, and as discussed later, she clearly continued to act as if nothing had changed performing various roles in respect to both the establishment and then management of the business. I also note any advice given by the immigration advisor can only be considered less than fully informed given Ms Lyu's admission she never told him she had invested in the business.

[22] Turning now to a key issue which is the documentation and, in particular, the employment agreement Mr Lyu and Ms Lin signed. The agreement was signed on or about 29 April 2017 though it should be noted that as a matter of law its existence is not, of itself, determinative of the true nature of the relationship.

[23] Ms Lyu claims the employment agreement confirmed her altered intent and resulting status as an employee. Ms Lin says it was a charade designed to assist Ms Lyu obtain a work visa and then maintain a pretence she was abiding by its restrictions. Similarly, she says Ms Lyu's purported inability to be seen as an owner led to the decision to enter into various business related agreements in her name alone.

[24] There is no dispute the employment agreement was prepared by Ms Lyu's immigration advisor and then passed to Ms Lin by Ms Lyu. That, in itself, would be odd if Ms Lyu was truly an employee and my reservations were exacerbated by her inability to adequately explain why she took it upon herself to have the agreement prepared along with an apparent inconsistency with the original assertion it was Ms Lin who invited her to be an employed baker. There are then other factors that suggest this was not a truly operative document such as Ms Lyu's acceptance that she performed tasks well beyond those one would expect of a baker and those specified in the attached job description.

[25] Ms Lin's version of events is, I conclude, far more probable given the issues noted above. She says Ms Lyu told her of the immigration advice and advised she would have to sign the agreement to allow Ms Lyu to remain and participate in the business as was always intended. She says she trusted Ms Lyu and simply complied and here I note uncontested evidence Ms Lyu told her the agreement *was just for show* when it was signed.

[26] Turning to how the relationship operated in practice.

[27] An essential element of this consideration is the level of control exercised by one party over the other and, as Mr Todd put it, *An assessment of control involves looking at where the ultimate authority in the relationship lies.*⁴

[28] Mr Todd went on to say:

The Respondent's submission on this point is that the dynamic between the First Applicant and Ms Lin on a day-to-day level was consistent with two business partners trying to make a success of their café venture. No one partner held, or had a right to hold, power over the other.

[29] The evidence would support that submission. When asked about the allocation of tasks, and who decided who did what, Ms Lyu said task allocation was the result of discussion and mutual agreement between herself, Ms Lin and Mr Chen with an underlying assumption each would concentrate on what they were best at. That meant she, Ms Lyu, would take primary responsibility for the baking and share client contact with Mr Chen, while Ms Lin would cover the finances while also baking.

[30] When asked about any changes to their agreed routine she said they would normally talk as friends. A similar response was given in respect to how hours were prescribed with the answer being that while they were essentially set by the needs of the business and its opening hours any changes would be managed proactively with each of the participants (herself, Ms Lin and Mr Chen) simply altering their hours to do what was required.

[31] Similarly Ms Lyu said day to day decisions were inevitably made as a result of discussion between the three with an example she gave being changes to the product line. She said most proposals for change would come from her, then be discussed with the final decision being a mutual one.

[32] There is then the fact Ms Lyu was an active participant in the businesses establishment and while contracts were entered into in Ms Lin's name, Ms Lyu made many of the necessary arrangements and continued to do so after she says she withdrew from the partnership. One significant example was continued participation in discussions about the businesses purchase. Another was a decision to renovate

⁴ Gordon Anderson and John Hughes *Employment Law in New Zealand* (1st ed, Lexis Nexis, Wellington, 2014) at 121; *Humberstone v Northern Timber Mills Ltd* (1949) 79 CLR 389 (HCA).

with the interior designer liaising with Ms Lyu and saying it was her vision they were bringing to life.

[33] There is then the statement of a media advisor who says she *met with Kent and two woman who represented themselves to be the owners of the café*. The two woman were Ms Lyu and Ms Lin. This person then asserts she considered Ms Lyu to be the final decision maker in respect to procuring her marketing services.

[34] Also of note is a message from Ms Lyu to Ms Lin around the time Ms Lin's day to day involvement was ceasing and she was commenting on how they might wind the business up. Ms Lyu, when replying, refers to both her financial input and the circumstances of Ms Lin's departure saying:

This way means that I lent you money to open the shop, that's not right; don't treat it as if you having borrowed money from me, pay me dividends from the profit. At the beginning, we agreed you would go and find another job and I will stay running the business...

[35] In my view that says a lot. While Ms Lyu later, and when pursuing this claim, tried to portray herself as a lender of funding that is not how she portrayed herself even when the business was floundering and the partnership breaking up. I also note her later claim she borrowed the money to *assist a friend* but is unable to proffer any documentary evidence to support that. Instead Ms Lyu's message maintains the position she was a business partner entitled to dividends (and drawings) as opposed to wages.

[36] I also note the comment it was she who was now to run the business. If an employee there would be no incentive to try and run a floundering business, especially in the absence of wages. That would not be normal for an employee yet Ms Lyu was incapable of explaining why she would want to do so for, as it turned out, some months.

[37] Finally there is the fact payments to Ms Lyu were subject to PAYE deductions but the evidence leads me to discount that. First there is the fact PAYE is a natural consequence of the employment agreement. Second there was Ms Lin's uncontested evidence she felt some angst that her business partners were getting some return while she got none though she also accepted that the money being paid to Mr Chen ensured both he and she could survive. Third there was another uncontested statement that

when she raised her angst about the inequity of payments Ms Lyu replied there would be problems with Immigration New Zealand if she wasn't getting wages.

[38] Turning to integration. It is agreed Ms Lyu was fully integrated into the business but as Mr Todd submits the evidence overwhelmingly supports a conclusion that was as a business partner who participated fully in its establishment and had at least an equal say in how it operated.

[39] While there is some documentary evidence suggesting Ms Lyu was employed such as the employment agreement and the fact business contracts were entered into using Ms Lin's name alone I conclude the bulk of evidence strongly points the other way and leads to a conclusion Ms Lyu was not an employee but an owner and equal partner in the business. Aside from the fact those documents suggesting employment were necessary to maintain an image they are contradicted by a significantly larger number of documents which show Ms Lyu's involvement in establishing the business and its ongoing operation, direction and management. There is then the evidence about how the business was actually run and Ms Lyu's admissions with respect to control and decision making.

[40] The weight of evidence strongly supports a conclusion Ms Lyu was not an employee but that the original intent remained and she operated as a partner and owner.

Mr Chen

[41] Mr Chen claims he was employed so that he could assist his personal partner with her business and ensure it succeeded. Ms Lin says like both she and Ms Lyu he was a partner though his interest was to be generated by effort as opposed to an initial financial investment.

[42] In deciding intent I again note correspondence written when the business was floundering. In it Mr Chen comments that he expected recompense via either money paid after a profit was attained or a share of the proceeds of a sale if that eventuated. While some of Mr Chen's oral answers referred to wages and underpayment there-of, other reiterated the view he was to be paid via a share of profit or the proceeds of a business sale. That is not how an employee would expect to be recompensed and inconsistency did not assist his claim.

[43] With respect to direct questions about whether or not he was a business partner Mr Chen's evidence again vacillated. While he gave answers which indicted he did not feel he was a partner he twice gave ones which openly accept he was though he suggests this did not come about till May or June 2018 which was after his commencement which was, according to Ms Lin, always as a partner. One instance is discussed in paragraph [45]. The other occurred when Mr Chen commented about being underpaid and was asked why he might put up with that. The answer was because he was a partner.

[44] Opposing Mr Chen's inconsistent answers were Ms Lin's which remained consistent throughout and must therefore be preferable. They indicate Mr Chen's involvement was at his insistence and that it was always as an active business partner.

[45] There was no employment agreement in Mr Chen's case though once again PAYE was being deducted from payments he received. When asked about the lack of an employment agreement there was another telling answer. When Mr Chen was asked why one was not entered into he said the matter was discussed but Ms Lin had told him it as necessary as he was a business partner. Mr Chen accepts he did not challenge or question that. With respect to the PAYE I apply the same answer as that which applied to Ms Lyu – Mr Chen was on a work visa which necessitated it.

[46] Turning now to issues of control and how the arrangement worked in practice. First I note Ms Lyu's answers which said decisions were made by the three acting in concert. That was not only consistent with Ms Lin's evidence but also that of Mr Chen himself. He accepts he actively participated in decision making and acted in what he thought the businesses best interests as opposed to being instructed. One of the decisions he takes credit for was changing the businesses trading name. That is not the action of an employee.

[47] There is also documentary evidence of Mr Chen's involvement in activities not normally associated with those of an employee, especially a barista in a café, but are more consistent with an interested business partner.

[48] Perhaps the most telling indicator of Mr Chen's status is what occurred when Ms Lin ceased to be an active day to day participant in the business. Ms Lin states and Mr Chen accepts this was at his volition and he effectively took over the running of the business. He controlled the accounts and, according to his own evidence,

managed to override Ms Lin's view regarding hiring and firing decisions. The person Ms Lin wished to see removed was Ms Lyu. Finally I note Mr Chen states it was he who ultimately decided when the doors would shut.

[49] These are not the actions of an employee and an employee would never be capable of effectively removing his employer and taking over. They are the possible actions of a business partner.

[50] When pursuing a claim it is incumbent on an applicant to establish a prima facie case. In this jurisdiction that means one must also establish one was an employee. The onus to do so falls on the applicant. For a number of reasons I must conclude Mr Chen has failed to do that with the evidence strongly supporting a conclusion he was also a business partner. While his answers were inconsistent some contained admission that was his intent but more importantly the evidence shows that after Ms Lin's departure he acted as if he was an owner protecting his own interests. Unfortunately the businesses viability was such that was not possible.

Conclusion

[51] For the above reasons I conclude neither Ms Lyu nor Mr Chen were employees. That means the Authority lacks jurisdiction to consider their claims which are dismissed.

[52] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority