

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 165  
3077934

BETWEEN	ROGER RONG CHIU Applicant
AND	ANCES LIMITED First Respondent
AND	JIN WU Second Respondent
AND	XIAMIN SONG Third Respondent

Member of Authority: Michael Loftus

Representatives: Julian Springer, counsel for Applicant  
Marty Braithwaite, advocate, and Michelle Hua, counsel for  
Respondent

Investigation Meeting: 17, 18 and 19 December 2019 at Christchurch

Submissions Received: Simultaneous exchanges on 17 and 24 January 2020

Determination: 24 April 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This is an application pursuant to s 137 of the Employment Relations Act that the first respondent be compelled to pay unpaid wages the applicant claims he is due. In the event the

first respondent fails to make any payment ordered I am asked to pass liability to the second respondent pursuant to s 142Y of the Act.

[2] There are also claims all three respondents be penalised for various breaches.

[3] The respondents deny liability on the ground Mr Chiu was never employed and no more than an active director and shareholder. It follows the Authority therefore has no jurisdiction and the claim must fail in its entirety.

## **Background**

[4] The First Respondent, Ances, operates a number of motel and tour service businesses from Christchurch. For some operational purposes it used the name Joytour. Mr Wu is one of two current directors though not a shareholder. His partner, Xiamen Song, is the majority shareholder with 50%.

[5] Mr Chiu, a Chinese national but also a New Zealand citizen, met Mr Wu, the person he describes as Ances's controlling mind, and Ms Song as a result of their children going to the same school. Mr Chiu has experience in some areas similar to those in which Ances operates having run a travel agency and worked as a tour guide.

[6] Mr Chiu says this led to repeated requests from Mr Wu and Ms Song over a period of approximately 18 months that he invest in Ances and join as a director. He says he declined largely because he did not have the funds required.

[7] Ances has a contrary view saying it was Mr Chiu who approached it suggesting that their businesses in New Zealand might benefit from co-operating.

[8] In October 2018 Mr Chiu travelled to China and while there paid a brief visit to another of Mr Wu's company's to provide some training about operating tours in New Zealand. He says while there he was again asked by Mr Wu to take a role in Ances.

[9] Mr Chiu says he again declined but the conversation turned to a statement by Mr Wu that the lack of funds no longer mattered as Ances needed Mr Chiu's skills and sought him as its manager. Mr Chiu says Mr Wu expressed doubts about the suitability and

efficiency of the then manager who, for the purposes of this determination shall be referred to by his nickname, Polo. Mr Chiu says he again declined given he considered himself partially retired and felt he had little recent managerial experience. He says he agreed to invest some money in the business and become a director who would assist Polo. The directorship and shareholding were actioned with effect 17 December 2018. Mr Wu says the transfer of shares was limited to some applicable to its Chinese operation and that was a point he repeated despite the fact it is inconsistent with entries on the New Zealand Companies register. Mr Wu was unable to explain that inconsistency and this approach was further undermined by Ms Song saying she agreed Mr Chiu could purchase 10% of her shares in the New Zealand business though the money went to Mr Wu's account.

[10] Mr Chiu says he met with Polo on his return and discovered the later did not have a work permit and raised this with Mr Wu. Mr Wu denies this either occurred or was possible as he says Polo never performed any work for Ances but was instead engaged with one of Mr Wu's Chinese interests.

[11] Mr Chiu say he did not feel he got a proper reply but shortly thereafter Mr Wu rang, advised Polo had departed and again asked he take over management. Mr Chiu says he again expressed doubts he was the right person but in the absence of any alternate agreed to look at the hotels and then respond.

[12] Mr Chiu says he then visited the hotels operated by Ances and concluded that as he could benefit the company and there was no replacement for Polo he would accept an offer of a six month fixed term while Ances sought a permanent appointee. He says they agreed a salary of \$60,000 by way of Mr Wu offering that amount and he, Mr Chiu, accepting. Mr Wu denies any such arrangement was ever discussed, let alone concluded.

[13] Mr Chiu says he commenced as Ances's General Manager/Executive Director on 17 December, which was also the day he became both a director and shareholder.

[14] Mr Chiu says he asked the arrangement be formalised through an employment agreement a number of times but that never eventuated despite Mr Wu often promising one would be provided. Mr Chiu also says he made repeated requests he be paid through

December 2018 and January 2019 but the response was that Ances was working to finalise budgets and payment never occurred. That said I note there is no evidence supporting either claim in the form of WeChat or email and Mr Chiu also gave oral evidence that he didn't really pursue it as he trusted Mr Wu as a friend and accepted it was a busy time with Mr Wu likely to be otherwise engaged.

[15] Mr Chiu claims to have performed a number of crucial tasks during his brief tenure. In particular he says he implemented a new business plan and attempted to restructure the organisation. While these are actually Mr Stringer's words I agree Ances appears to be asserting Mr Chiu was an over eager non-executive director who was protecting his investment. That said Mr Wu also agreed it was good a director *be more involved*.

[16] Mr Chiu says on either 21 or 22 February he met with Mr Wu who was visiting during Chinese new-year and was advised a new manager had been appointed. When he asked what duties she would, perform Mr Chiu says he was told *all jobs* to which he replied what can I do? Mr Chiu says he was told Mr Wu wanted him to continue with business development and source more investors.

[17] The evidence is there was a second meeting though there is some confusion as to when. Mr Chiu originally said the meetings were 25 and 28 February though the first changed to 21 or 22 and the second had to have been no later than the 27<sup>th</sup>. Mr Wu made no mention of actual dates.

[18] The upshot is Mr Chiu says that in addition to the agreement he would remain and assist the new manager it was also agreed he would cease to be director and shareholder. The arrangement was formalised in a document entitled Acknowledgment for Severance Pay. It reads:

Based on friendly negotiation, to regards the matter of Mr Roger Chiu withdraws his position as the shareholder and director, Mr Jin Wu (the director and actual controller) has decided to make the severance payment as followed.

1. The severance pay will be made by weekly and the ending date will be 30<sup>th</sup> June 2019. The weekly standard payment will be NZ\$1153.85. It will be paid to ANZ Bank and the account number is ...

2. Mr Roger Chiu will fully cooperate with the transfer of the management authorities and relevant work transition.

3. The decision is effected immediately.

[19] Mr Wu accepts he signed the agreement but protests he was forced to as Mr Chiu had threatened to damage the company's reputation. It was then his evidence got somewhat convoluted. It appears there was a dispute over the original shareholding arrangement and Mr Chiu's failure to make a second payment as agreed. Indeed, there is evidence the two are still engaged in litigation elsewhere. Mr Wu was also asked if the above payments were made and initially said he didn't know. When it was agreed they probably hadn't and he was asked if that was prudent if acting under duress he said that was because he had to be sure the share transfer had been actioned. When it was pointed out that occurred around 5pm on 27 February the answer was that didn't address the chinese shares, the existence of which has never been established.

[20] Notwithstanding the issues above Mr Chiu did receive a payment around this time. It was for \$9,230 and paid on 25 February 2019. He says he was told it was eight weeks pay which, assuming a salary of \$60,000, it is as an untaxed sum (which it was). Why it was made remains a mystery. Mr Wu denies all knowledge while Ms Song said she made the payment on Mr Wu's instruction.

[21] Notwithstanding that, and despite numerous attempts to contact Mr Wu, Mr Chiu was still not paid though he accepts he also ceased doing any work for Ances. Mr Wu's position is payment did not occur because Mr Chiu effectively ceased to work that day and having performed no further work was not entitled to pay. Ms Song, who the confused evidence suggests would actually make the payment, essentially said she didn't as (a) she didn't like the deal; (b) she did not consider it had appropriate Board approval and (c) she would therefor wait till she got a specific instruction which never occurred.

## **Discussion**

[22] There are potentially two issues to be decided. The first is whether or not Mr Chiu was an employee of Ances there being no claim or suggestion he was employed by either Mr Wu or Ms Song in their individual capacity. If so the issue of remedies arises.

## ***Employee or not***

[23] Turning first to the question of whether or not Mr Chiu was an employee. Here it should be noted Ance, having referred to the case of *Lee v Lee's Air Farming Ltd*, accepts the principle a director and shareholder can be an employee.<sup>1</sup>

[24] 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*

[25] In *Bryson v Three Foot Six Limited (No.2)*<sup>2</sup> the Supreme Court stated, amongst other things, what *all relevant matters*<sup>3</sup> 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*

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<sup>1</sup> [1961] NZLR 325 (PC)

<sup>2</sup> [2005] ERNZ 372

<sup>3</sup> Section 6(3)(a) of the Employment Relation Act 2000

*on his or her own account (the fundamental test) which were important determinants of the relationship at common law...*

[26] 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 was effectively working on his own account.

[27] If there is one thing the parties agree upon it is their evidence is well apart on the question of intent. The evidence regarding what occurred during various meetings is at polar opposites – indeed there is even disagreement some of the meetings occurred. Essentially it is Mr Chui's position he was offered and accepted employment and the nature of the relationship is confirmed by various documents to which I will refer when considering what is in writing.

[28] Ances takes the position Mr Chiu cannot substantiate his claim of offer and acceptance or that a salary was agreed and that he failed to furnish documents he say existed such as a job description. It then takes issue with various actions of Mr Chiu and suggest they confirm he knew it was never intended he be employed. For example it is argued that if he was the Manager why did he not simply act accordingly and rectify the alleged deficiencies in documentation and pay. Similarly why did he accept expenses as a director yet fail to pursue his salary if he was truly employed as he claims to have been.

[29] I return to the fact both parties have very different views over this and therefore turn to the other factors to see if they can determine the matter.

[30] While there is no employment agreement there is relevant documentation and communication. First there is agreement Mr Chiu held the title of Executive Director and the parties had agreed that would be so.

[31] This, according to any business dictionary, implies employment and Mr Chiu's position is that is because the title accurately reflected his position. In his brief Mr Wu stated the title was suggested by Mr Chiu and he agreed as he considered it an honorary one. He also said it had a perceived status that could be used to attract customers. When he was asked about this he said they couldn't use the title manager as in China almost everyone is a manager and there is no real status attached. He also reiterated the view he thought executive director more of an honorary title but later undermined this by saying (a) he never really thought about it and (b) he understands the various types of directorships.

[32] There is then a WeChat exchange between Messrs Chiu and Wu dated 19 December 2018 in which Mr Wu says *Mr Chiu, you are the more suitable person for the management than him [Polo]. The management team is the strength source. We need to change the manager if he does not change his ideas.*

[33] Mr Chiu responds asking *Why does Polo crash?* To which the answer was *he doesn't know what to do.*

[34] When asked to comment on this and other WeChat exchanges which appear to support Mr Chiu's claim the response was inevitably WeChat exchanges can be altered. That was not convincing especially in the absence of any supporting evidence or alternate versions of the exchanges.

[35] There is then a communication from a Mr Gong, who Mr Wu accepts was his personal assistant in China, to a Christchurch law firm. Included therein is advice that:

ANCES hope to start a business relationship with ... Lawyers in the coming 2019, as your professional lawyer service will protect the future development of the group.

Mr Roger Chiu is now the Executive Director of ANCES group and he is responsible for the management of our business in Christchurch. We are willing to discuss with you in detail after the Christmas holiday.

[36] Mr Wu's response is he had no knowledge of it and had not authorised the communication. That struggles as Mr Wu was copied into the message and he subsequently resiled saying he had no memory of it.

[37] There was also an exchange on 9 January 2019 between Mr Braithwaite's firm and Mr Wu. In it the law firm states *I am having Roger on our office this morning advising he is now the executive director of the company and he becomes the first contact person for ANCES LTD. Can you please confirm this.* The message then went on to state Mr Chiu had requested all documents relevant to the company's management and seeking Mr Wu's permission to release them.

[38] Mr Wu's reply read:

*Confirmed. Roger has the independent right to recruit and fire for New Zealand Joytour team. He has access to all contracts. And according to the constitution he is one of the two directors with authority to make contracts legal.*

[39] In my view these documents strongly support Mr Chiu's claim he was an Executive Director with managerial responsibilities that would not normally reside with a director whose focus is governance.

[40] Turning to how the relationship worked in practice. There is more than adequate evidence Mr Chiu was performing as a manager would. It is clear he was regularly visiting various establishments managed by the company, met with subordinate staff and give instruction, including written ones. The evidence is he was a regular attender at Monday morning team meetings and Ms Song confirmed he was at two of those.

[41] It is also accepted Mr Chiu dismissed an employee which is again the function of a manager. While Mr Wu did at one point when giving oral evidence say he should not have done so that was undermined by the fact no issue was taken at the time, Mr Wu's own advice to his lawyers states otherwise and when answering later questions he said Mr Chiu could, as a director, dismiss though he immediately contradicted that by again saying Mr Chiu could not dismiss. There is also evidence Mr Chiu prepared a board report on improving the business and was embarking on the task for which he says he was primarily appointed.

[42] There is then the question of control with a high level, known to the person doing the work, often considered indicative of an employment relationship.<sup>4</sup>

[43] The evidence is Mr Chiu was keeping both Mr Wu and Ms Song informed of his actions and they were regularly copied into emails including ones about what I would consider mundane aspects of the businesses day to day operation.

[44] The evidence also suggests payments are made by Ms Song and while she vacillated and gave some contradictory answers, it would appear she ultimately controlled the finances as instructed by Mr Wu. Mr Chiu had no say here.

[45] More importantly there is Mr Wu's evidence he was the ultimate decision maker within Ances and he says he maintained strict control. There is other evidence of control with one being an email by Mr Gong on 24 January giving Mr Chiu quite explicit instructions. In other words, and while Mr Chiu exhibited the autonomy one would expect of a senior manager, he was also subject to constraint and control exercised primarily by or on behalf of Mr Wu.

[46] Finally there is the issue of whether or not Mr Chiu was working on his own account. The issues discussed above strongly suggests the answer is no. He was working for the benefit of Ances and as instructed by it. While Ances tried to suggest Mr Chiu continued to operate his other business interests it was unable to substantiate that. Finally I note that when he was ultimately paid, the amount was totally consistent with that he says the parties agreed.

[47] By way of summary and while the parties remained at polar opposites over intent I have to say I preferred the evidence of Mr Chiu. It remained relatively consistent and when there were apparent contradictions they were explained. The same could not be said of the evidence proffered on Ances's behalf. That of Mr Wu was often contradictory and, just as concerning, incomplete. When faced with apparent contradictions in his evidence the answer often became silence, *I don't know* or *I don't recall*. There were also attempts to imply fault with Mr Chiu's evidence which when explored could not be sustained. One example was Ms Song's attempt to suggest he was an infrequent attender at Monday meetings but when

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<sup>4</sup> *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42

pushed, and after considerable toing and froing, it transpired she could not really attest to his non-attendance as she had only attended two herself. All in all the impression was not good.

[48] That said my preference for Mr Chui's evidence would not, in itself, be enough given the onus lies with him to establish a prima facie case. That is where issues of documentation, control and how the relationship operated in practice come in. All strongly point toward Mr Chiu being an employee as claimed and support his consistent evidence over that of Ances which, as already said, was less than satisfactory.

[49] For the above reasons I conclude Mr Chui, was as claimed, an employee.

***Remedies – wages and interest***

[50] Mr Chiu asks for an order he be paid his wages along with interest and seeks the imposition of penalties with part thereof payable to him.

[51] In terms of wages he seeks a total of \$26,250.18 being:

- a. Unpaid wages from 17 December 2018 to 27 February 2019 totalling \$2,622;
- b. Interest on that amount from 27 February 2019 pursuant to the Interest on Money Claims Act 2016 totalling \$46.41;
- c. Unpaid wages due under severance agreement from 27 February 2019 to 30 June 2019 totalling \$20,769.30 plus interest of \$297.50;
- d. Unpaid holiday pay totalling \$2,492.32; and
- e. Interest on unpaid holiday pay totalling \$22.65;

[52] For reasons which shall become apparent I consider these claims should be addressed in two parts. Up to and after 27 February.

[53] I have concluded Mr Chiu was an employee. It therefore follows he is due wages for the period employed.

[54] Section 132 of the Employment Relations Act 2000 provides that in the absence of time and wage records I may accept the claim as quantified by the applicant unless the respondent can prove the claim wrong. In respect to the time Mr Chiu worked, given he accepts he resigned on 27 February, that is what shall occur given a lack of records and Ances's inability to disprove the claims. The \$2,622 is payable.

[55] Turning to interest on that amount. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt Ances has, by failing to make payments properly due, continued to have use of money rightfully belonging to Mr Chiu. This is, I conclude, a circumstance in which interest should be payable. The amount is determined under the Interest on Money Claims Act 2016 and calculated via a tool on the Ministry of Justice's website. It shows that with the additional passage of time an amount greater than that claimed is due which will lead to an order \$96.52 be paid.

[56] The claim for payment after 27 February does not succeed. At its simplest employment is an exchange of labour for remuneration. Mr Chiu accepts he resigned and he performed no further work for Ances after 27 February. In other words, and even if there had been a fixed term agreement, it was his choice to void it. His argument payment is justified relies on the severance agreement but therein lies a problem.

[57] The document specifies it is in respect of, and recognises, his withdrawal as a shareholder and director, not as an employee. It would therefore appear to fall beyond the jurisdiction of the Authority and cannot be enforced here. Even if that were not the case Mr Chiu's consideration was an agreement he *fully cooperate with the transfer of the management authorities and relevant work transition*. His own evidence is he didn't.

[58] Next there is the claim for holiday pay which includes recognition of working public holidays. Again s 132 applies and Ances is incapable of disproving the claim though it is overstated as it includes holiday pay on the severance payment which, given my finding about that, is not due. The residual amount owing is \$830.78 plus interest of \$30.58.

[59] Finally under this heading there is a request that in the event Ances fails to pay liability be transferred to Mr Wu pursuant to s 142Y of the Act. It is clear Mr Wu is eligible

to be considered a person involved in that he is a Director.<sup>5</sup> It is equally clear he was instrumental in procurement of the breach and here I rely on his own evidence he was the ultimate decision maker within Ances and maintained strict control ([45] above).

[60] In the final submission it was also asked Ms Song be potentially liable as well. For two reasons the answer is no. First, that was not sought in the statement of problem. Second Ms Song was not a director. The only way she can be included is pursuant to s 142W(3)(e) as a person exercising significant influence. Again I refer to the evidence it was Mr Wu who exercised ultimate control and also have to say the evidence tends me toward a conclusion that while Ms Snog played a part in business she did so under instruction from Mr Wu and was essentially his local eyes and ears given the evidence is he was only present in New Zealand for four to six weeks a year.

[61] The application liability pass to Mr Wu should Ances fail to pay is granted but this does not extend to Ms Song.

### ***Penalties***

[62] Mr Chiu also seeks the imposition of penalties against *the respondent*. Here he seeks:

- a. A penalty for a breach of good faith resulting from the proffering of misleading reason for failing to provide an employment agreement or pay wages due;
- b. Failure to provide a written employment agreement; and
- c. Failure to pay wages due.
- d. failures to pay holiday pay and keep time and wage records as required by the Holidays Act 2003.

[63] It is not said which respondent in the statement of problem but I conclude it is the first, Ances, as there is a separate and specific claim Mr Wu and Ms Song be penalised for

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<sup>5</sup> Section 142W(3)(a) of the Employment Relations Act 2000

breaching the employment agreement under s 134(2). Mr Chiu's submissions would, in my mind, support this conclusion.

[64] The imposition of penalties is a discretion and for a couple of reasons I am not inclined to exercise it despite the fact some breaches have occurred. In this regard it is clear payments were not made and nor was an employment agreement provided. That said penalties are to punish deliberate and malicious wrongdoing. I am far from convinced that occurred here, at least during the employment.

[65] While the hearing was testy and the evidence and way it was presented make it clear the parties now dislike each other it does not support a conclusion that was the case prior to February 2019. Instead the evidence shows the parties entered into their arrangement as friends and rather than being the product of a deliberate and malicious course of action the failures are much more likely attributable to the fact friendship led to shoddy procedures and neither cared too much. Here I again note the one assertion from which Mr Chiu resiled related to how stridently he pursued these issues. The animosity only developed after the two fell out and the evidence supports a conclusion that was not due to employment issues but disagreement over their business arrangements.

[66] I also note the submissions are, in this respect, minimal and finally the evidence suggest this is, at least to some extent, an attempt to obtain redress for an unjustified dismissal which could not be pursued for time related reasons. That is not the purpose of penalties.

### **Conclusion and orders**

[67] For the above reasons I conclude Mr Chiu was, as acclaimed an employee of Ances, up to 27 February 2019. As a result wages are due and the following orders are made:

- a. The first respondent, Ances Limited, is to pay Mr Chiu \$3452.78 (three thousand, four hundred and fifty two dollars and seventy eight cents) gross being outstanding wages and holiday pay;
- b. The first respondent, Ances Limited, is to pay Mr Chiu a further \$127.10 (one hundred and twenty seven dollars and ten cents) being interest on the wages and holiday pay;

- c. Payment is to be made no later than 4.00pm on Friday 15 May 2020;
- d. Should Ances fail to pay liability transfers to the second respondent, Jin Wu pursuant to s 142Y of the Employment Relations Act.

[68] The application for penalties does not succeed.

[69] Costs are reserved with the parties being encouraged to resolve these themselves and in this respect their attention is drawn to the Authorities tariff approach.

Michael Loftus  
Member of the Employment Relations Authority