

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 486  
3247319

BETWEEN TAEHYEONG KO  
Applicant  
AND SANG WON KIM  
Respondent

Member of Authority: Robin Arthur  
Representatives: Seungmin Kang, counsel and Sweden Lee, advocate for  
the Applicant  
Nick Carter, counsel for the Respondent  
Investigation Meeting: 7 August 2024 in Auckland  
Determination: 16 August 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Taehyeong Ko sought a finding he was employed personally by Sang Won Kim between 3 February and 16 June 2022. If that finding was made, Mr Ko also sought an order requiring Mr Kim to pay him wages and holiday pay for around 760 hours Mr Ko said he was owed for work done in helping to set up a restaurant and bar business in downtown Auckland.

[2] The business, which traded under the name Hive, was operated by Hive Group Limited (HGL). Hive opened for business on 24 June and closed on 13 December 2022 when HGL was placed into liquidation by shareholder resolution.

[3] Mr Kim had registered HGL on 29 January 2022. He provided most of the funds for Hive's 'start-up'. From 16 June 2022 he was HGL's sole director and held more than 90 per cent of its shares.

[4] Mr Ko had a written employment agreement with HGL, in the position of manager, commencing on 17 June 2022. However, Mr Kim said Mr Ko was also a co-investor in the business and, in that role, had agreed to work without pay from February 2022 to help get Hive ready for opening. Mr Ko paid \$5,000 for a five per cent shareholding in the company.

[5] Mr Kim denied Mr Ko was entitled to any payment for hours worked before Hive opened. He also estimated the hours Mr Ko worked during the set up as only around 75 hours, considerably less than Mr Ko claimed.

[6] In his application to the Authority Mr Ko also made an alternative claim. He said that if Mr Kim was not his employer, he should be deemed to have been employed by HGL in the period from February to June. If that finding were made, Mr Ko said Mr Kim should then be found to be a person involved in breaches of employment standards by HGL. While HGL was now in liquidation, such findings would enable Mr Ko to seek orders that Mr Kim was personally liable for wages and holiday pay Mr Ko said, in this alternative scenario, HGL owed him for that period.

[7] If Mr Kim was found to be his employer, Mr Ko also sought penalties against Mr Kim for breaches of statutory provisions requiring a written employment agreement, payment of the minimum wage and payment of holiday pay.

### **The Authority's investigation**

[8] Mr Ko and Mr Kim lodged written witness statements for the Authority's investigation. Under affirmation, they both answered questions from me and the parties' representatives at the investigation meeting. The representatives also gave oral closing submissions.

[9] Mr Ko was assisted by an interpreter of Korean in giving some of his oral evidence at the investigation meeting.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **The issues**

[11] The initial issue for resolution was whether the relationship between Mr Ko and Mr Kim during the days from 3 February to 16 June 2022 was really one of employee and employer or was, effectively, a business relationship between two investors working to set up and open their premises.

[12] If there was an employment relationship with Mr Kim, other issues for resolution could follow about what arrears of wages and holiday pay were due. If there was no such relationship with Mr Kim, the alternative scenario of HGL being the employer prior to 17 June 2022 could be considered. This would then turn to the question of whether Mr Kim was a person involved in breaches of employment standards, in his role as director, and could be personally liable for the arrears.

[13] For reasons given later in this determination, it was only necessary to deal with the initial issue.

## **How the relationship began and operated**

[14] Mr Ko and a friend, who need only be named as Mr C in this determination, both worked in the hospitality industry.

[15] Mr Ko came to New Zealand aged 15. He attended high school in Auckland in 2016 and 2017, leaving after completing Year 12. Over the next two-and-a-half years Mr Ko then completed a Level 5 Diploma in cooking while working part-time in a Korean restaurant and then a takeaway store. During 2020 and 2021 Mr Ko worked full-time as a cook in an upmarket Ponsonby restaurant.

[16] Mr C worked in a popular central city Korean restaurant.

[17] In late 2021 Mr C and Mr Ko talked about ideas for starting a business of their own. Initially they considered operating a food truck at night markets and then discussed the prospect of opening a restaurant selling Korean fried chicken.

[18] Mr C knew Mr Kim through a church they had both attended and involved him in those discussions.

[19] Mr Kim had moved from Korea to New Zealand as a young child. He had graduated from the University of Auckland with a Master's degree in architecture. He

had successfully established and sold a service industry business. Around late 2021 he was looking for other entrepreneurial opportunities.

[20] At this time Mr Ko was aged 20, Mr C was 24 and Mr Kim was 26.

[21] By the end of 2021 their discussions had pivoted from setting up a fried chicken restaurant on Auckland's North Shore to setting up Hive as a downtown bar and restaurant targeting a 'Gen Z' market.

[22] Their plan for Hive involved Mr Kim arranging finances and using his experience in setting up and opening a business, Mr Ko using his experience to develop a menu and run the kitchen and Mr C taking care of the bar and front of house.

[23] When HGL was initially registered Mr Kim's father was listed as its director and sole shareholder. Mr Ko and Mr C agreed to invest \$5,000 a piece but Mr C subsequently did not go ahead with buying a shareholding in HGL.

[24] Mr Kim said he had provided around \$150,000 for setting up Hive, with \$100,000 coming from his own savings and the remainder from his mother. He also arranged for his father, a builder, to 'fit out' Hive's premises. In January 2022 Mr Kim signed a lease for Queen Street premises. The lease had a commencement date of 22 April and nominated HGL as the tenant.

[25] Set up work began in February 2022. Mr Ko said he worked one day a week for five weeks on the Hive project before quitting his restaurant job on 10 March to work full time on preparing the business for opening. Mr Ko said he worked 45 hours a week for 12 weeks up to 5 June and then worked 60 hours a week for a further three weeks before Hive opened on 24 June.

[26] Mr Ko's work during these weeks included developing a menu for the restaurant, finding kitchenware and suppliers for the restaurant and bar, recruiting staff, preparing rosters and helping with painting of the premises and other preparatory work.

[27] In his oral evidence Mr Ko accepted he had exaggerated his claim that this work took at least 760 hours. He had based his calculations on all the hours he was available between nine to five each day, not actual hours he worked on the Hive set up.

[28] Conversely Mr Kim also accepted, in his oral evidence, that he had underestimated the total time Mr Ko worked on Hive set up during those weeks. Messages exchanged between the two men and in a group chat showed Mr Ko had worked on more days than Mr Kim's tally of less than 80 hours suggested.

[29] In his oral evidence Mr Ko said Mr Kim had agreed some time in February or March 2022 that Mr Ko would be paid for the hours he had worked on setting up Hive once the business was open and taking in revenue. He said Mr Kim had agreed that "when the income started coming in, we calculate everything and pay everything at one go". Mr Kim firmly denied he had given any such commitment. Mr Kim said he, Mr Ko and Mr C had each agreed to work without any payment until they opened the business and, once open, Mr Ko and Mr C would work as employees of HGL running Hive's restaurant and bar.

[30] Mr Ko's written employment agreement, with a commencement date of 17 June 2022, stated his hours of work would be 50-55 a week to be paid at \$22 an hour. It also listed "other remuneration" as "5.00% HIVE Group Limited shares". Mr Ko signed the agreement on 6 July 2022.

### **Was Mr Ko an employee or a volunteer from 5 February to 16 June?**

[31] Section 6 of the Act guides determination of the nature of the relationship between Mr Ko, Mr Kim and HGL in the period from 5 February to 16 June 2022:

(1) In this Act, unless the context otherwise requires, employee—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes—

- (i) a homemaker; or
- (ii) a person intending to work; but

(c) excludes a volunteer who—

- (i) does not expect to be rewarded for work to be performed as a volunteer; and
- (ii) receives no reward for work performed as a volunteer.

...

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

(3) For the purposes of subsection (2), ... the Authority—

- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[32] For Mr Ko to have been an employee of Mr Kim, or HGL, during those weeks, the parties must have held a common intention to enter into a legal arrangement between themselves and for that agreement to be one in the nature of employment. There was no written agreement to that effect. No other documents made at that time, such as emails or text messages exchanged between them, expressly described the relationship as one of employment. In those circumstances, their intentions may be gleaned inferentially, from those emails, texts and any other documents made at the time and from their performance of whatever arrangements were reached between them. Their subjective recall of their intentions, offered in hindsight, is not likely to resolve this question.<sup>1</sup>

[33] Mr Ko, in closing submissions, contended that texts exchanged between him and Mr Kim about when he should be working each day, and what he should be doing, demonstrated a degree of control of his activities that was indicative of an employment relationship.

[34] Mr Kim, in closing submissions, argued Mr Ko's activity was best described as being a volunteer, as defined in the Act, contributing time and labour for the benefit of the business in which he was an investor and, once opened, in which he would then work as an employee.

[35] While each situation where a person is said to be a 'volunteer' is assessed on its own facts, the general expectation is that:<sup>2</sup>

for somebody to be a volunteer there would be something in the nature of the enterprise, or in the relationship between it and the worker, that explained why the worker might wish to donate their work to the enterprise for no pay, to benefit that enterprise or the wider community.

[36] For the following reasons, the totality of the evidence favoured a conclusion that the parties had mutually intended that Mr Ko would work without pay, that is as a volunteer, during this set up phase rather than as the employee of Mr Kim or the newly-registered entity of HGL. There was, equally, a mutual intention that Mr Ko would

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<sup>1</sup> *Kidd v Beaumont* [2016] NZEmpC 158 at [73]-[75].

<sup>2</sup> *A Labour Inspector v Prisha's Hospitality (2017) Ltd* [2023] NZEmpC 89 at [47].

become an employee of HGL once the set-up work was completed and Hive opened for business.

[37] Firstly, Mr Ko's allegation that Mr Kim had agreed sometime in February or March 2022 that he would be back paid for the preparatory hours was not persuasive. It was a claim Mr Ko made late in the piece. It was not mentioned in a letter of 28 November 2022 when Mr Ko's claim for wages was first raised by the lawyer acting for him at that time. Neither was it mentioned in his statement of problem, lodged in the Authority on 24 August 2023, or in his witness statement, lodged on 21 June 2024, by present counsel. While Mr Ko has a privilege from disclosing what he may have talked about with those lawyers, and did not waive that privilege during this investigation, it was unlikely he would not have told them of such a promise by Mr Kim, if it had been made and, if told, that those lawyers would have missed out such an important fact in those legal documents they prepared putting forward Mr Ko's claim. The failure to mention this alleged promise earlier invites the inference that it was not mentioned because it was not an accurate description of what Mr Kim and Mr Ko had talked about as the basis on which Mr Ko would be working during the set-up weeks.

[38] Secondly, Mr Ko's own evidence was that he had not asked Mr Kim to be paid for his time spent on the set-up work until giving his resignation in September 2022. If there was an agreement made in February or March 2022 that he would be paid for that time after the bar opened (in June), it was unlikely Mr Ko would have waited until September to mention it.

[39] Thirdly, this extract from a text exchange between Mr C and Mr Kim on 22 January 2022, among the other documents in the evidence for the investigation, provided an indirect indication of the arrangements that the three men had made during the set-up phase:

Mr C: I have a question. We are not getting paid while preparing for the store right?

Mr Kim: Yes. Not enough money.

[40] Fourthly, Mr Ko did not have a persuasive argument that the degree of control and supervision exercised by Mr Kim showed their relationship was really one of employee-employer with unequal bargaining power.

[41] He said Mr Kim's role in signing the lease agreement indicated an intention that Mr Kim would be the sole owner rather than including Mr Ko and Mr C in business decisions. Signing the lease was, however, consistent with the administrative or executive aspects of the set-up tasks for which Mr Kim had taken responsibility while Mr Ko and Mr C worked on other areas within their experience.

[42] Mr Ko said there was a significant disparity in their knowledge and experience in running a business and, combined with a traditional deference in Korean culture to anyone older, this resulted in control consistent with being an employee.

[43] There was an inequality in the relationship but, on an assessment of the evidence overall, this reflected a difference in the level of investment and their intended roles when Hive opened. Mr Kim brought the bulk of the funds to the enterprise, thereby bearing the greater degree of risk, and was to be the director of the company running the business. As Mr Kim emphasised in his evidence, the business they were setting up also depended on the hospitality industry knowledge that Mr Ko and Mr C had and they made key decisions about aspects such as staffing and the restaurant menu.

[44] Mr Ko pointed to directions Mr Kim gave him in text messages about when to start and stop work and what tasks to do as being the kind of control exercised in an employment relationship rather than dealings between co-investors in a business. Again, however, this was consistent with their respective roles in the enterprise. Mr Kim was also working, without pay, during this period and co-ordinating a number of aspects, including his father's work on the fit-out, to complete a schedule of tasks necessary before Hive could open. His text messages were directing activity but this was consistent with someone leading a business project, not necessarily a relationship of employer-employee.

[45] Similarly, the respectful tone and wording of Mr Ko's messages to Mr Kim were consistent with acknowledging Mr Kim's relative experience in business set-up rather than indicating obedience to an employer's orders. The evidence did not support a conclusion that Mr Ko was a naïve person drawn into someone else's scheme. He had completed four years of secondary and tertiary education in New Zealand and had worked full-time for two years. The idea and initiative to set up a business came from him and Mr C who then brought Mr Kim into their plan, to secure knowledge and money they needed, not the other way around. It was not an equal business relationship,

largely because of the respective level of financial risk each bore, but this did not mean it was therefore an unequal employment relationship.

[46] Considering the characteristics of a volunteering situation, referred to earlier, there was something in the nature of the business enterprise that Mr Ko, Mr C and Mr Kim were embarking on that explained why they each wished to donate their labour in the set-up stage. They each expected to benefit from the fruits of that effort but there was no sufficient evidence, assessed on the balance of probabilities, of any mutual intention that they would be paid as employees for hours they each worked in the set-up period.

[47] Realistically assessed, this was a situation of three young men jointly venturing to set up a business for which they had high hopes. Like all such ventures, some succeed and others fail. While Hive failed, to the disappointment of all involved, this was not grounds to retrospectively recast the relationship of Mr Ko and Mr Kim into one of employment during the weeks spent setting up the business.

### **Outcome**

[48] Mr Ko's application for a finding that Mr Kim was his employer is declined. On the same evidence, it was also clear that HGL did not become Mr Ko's employer until the agreed commencement date of employment of 17 June 2022. The company was not his employer before that date and is not liable to pay him for work done in setting up Hive's premises and business prior to 17 June.

### **Costs**

[49] Both parties were legally aided for their representation in this matter. In those circumstances, no orders for costs are made.

Robin Arthur  
Member of the Employment Relations Authority