

Attention is drawn to the order prohibiting publication of certain information referred to in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2024] NZERA 721
3239499

BETWEEN	LRN Applicant
AND	Y First Respondent
AND	YZT Second Respondent

Member of Authority:	Antoinette Baker
Representatives:	Ramses Hunt, counsel for the Applicant Stephen Rennie and Will McMaster, counsel for Respondent
Investigation Meeting:	30 April, 1 May 2024
Submissions received:	1, 13, 27, 28 May 2024
Last information received:	3 September 2024
Determination:	3 December 2024

DETERMINATION OF THE AUTHORITY

[1] This matter is subject to non-publication orders that I explain below.

[2] At the heart of this matter is an unfortunate matrimonial dispute between Ms S, the sole director and shareholder of the applicant LRN Limited (LRN), and Mr Y, the first respondent who is also Ms S's estranged husband.

[3] LRN was incorporated in 2012 to run a business that both Ms S and Mr Y set up together and worked in. The couple met when Ms S was the older Mr Y's employee in a previous business he co-owned. They formed a romantic relationship in 2009. In 2013 the couple married. Approximately ten years later having continued to run the LRN business and after they had a child together in 2015, Ms S and Mr Y separated acrimoniously when Ms S discovered Mr Y had started a romantic relationship with an employee of LRN about 12 months before.

[4] After the separation there were live issues about relationship property division that remained unresolved; Ms S was diagnosed with cancer and suffered from serious post operative complications; Mr Y (without telling Ms S until it was done) incorporated YZT Limited (YZT) with him as sole director and shareholder and transferred LRN's ongoing business, assets, and employees to YZT to be under his control. YZT became the new tenant of the business premises which had previously been on a monthly lease with LRN. Mr Y includes that his reason to take these actions were that Ms S was depleting LRN's financial reserves by spending on luxury items and because by then she had closed off his access to his company credit card leaving him just with a 'nominal' salary.

[5] Around the same time that Mr Y transferred LRN's business to YZT he filed proceedings for division of relationship property in the Family Court and listed both LRN and YZT for division. Mr Y also lodged proceedings in the High Court relating to him alleging Ms S is to stop dispersing relationship property. The couple have financial interests beyond just LRN.

[6] Ms S instructed these proceedings to be lodged for LRN in the Authority on the basis that Mr Y was an employee of LRN.

[7] LRN claims financial loss as a result of Mr Y's alleged breaches of contractual employee duties (the implied duty of fidelity, and the duty of good faith) based on his actions transferring LRN's business to YZT without authority as an employee to do so. LRN claims remedies against YZT as a party that 'aided and abetted' Mr Y's breaches of his IEA under s 134 of the Employment Relations Act 2000 (the Act). LRN claims penalties.

[8] Mr Y says this matter cannot proceed in this jurisdiction because he was not an employee of LRN. He says that any 'show' of employment was intended by Mr Y and Ms S to avoid child support liability to Mr Y's previous wife and children.

[9] LRN says that Mr Y was an employee and that it would be unprecedented not to find an employment relationship given the letter of offer of employment, the written and signed IEA, annual leave accrued, and a salary paid with PAYE deducted. Ms S says she now has no business to run through LRN because of Mr Y's unauthorised actions. She maintains the LRN business was always *hers* in her sole capacity as its only director and shareholder.

[10] This determination only deals with the threshold issue of whether Mr Y was an employee of LRN. Without there being an employment relationship, the claims brought are outside of this jurisdiction. As will be seen, for the reasons set out below, I determine that Mr Y was not an employee of LRN, and this matter cannot continue in this jurisdiction.

Non Publication

[11] This determination is subject to non-publication orders for reasons that follow.

[12] The Authority has the discretion to prohibit publication of matters before it.¹ The exercise of that discretion is based on a principled basis with a starting point of open justice.² On the first day of the investigation meeting I invited counsel to consider non-publication given the circumstances before me. I indicated this could be on the second day of the scheduled two day meeting.

[13] On the second day of the investigation meeting, the respondents indicated no opposition. LRN had no comment. Subsequent to the investigation meeting the respondents lodged an application and submissions supporting non-publication. I then timetabled a response from LRN. LRN replied in submissions opposing non-publication. The respondents replied briefly to this opposition.

[14] For the respondents it is submitted that the public interest does not need to include personal and health information and the identification of Ms S and Mr Y's young child. Further that it is not in the public interest to identify a third party (I take this to be the now former employee of LRN who Mr Y entered a romantic relationship with) and commercially sensitive information regarding 'wages, gross profit and net profit figures' that relates to LRN and YZT.

¹ Employment Relations Act 2000, schedule 2, clause 10 (1).

² *Erceg v Erceg* [2016] NZSC 135; *Courage v The Attorney-General* [2022] NZEmpC 27.

[15] For LRN through Ms S it is submitted that Ms S is untroubled by her medical and personal family information being identified; that appropriate parenting of the child of the marriage is sufficient to mitigate any future concern that the child may have with publication; that there is a need for the public to know that LRN was unjustly wronged by the actions of the respondents and particularly important to uphold Ms S's professional, and LRN's commercial, reputations. It is submitted for LRN that any concerns about identification of third parties or commercial sensitivity can be discreetly done without full non-publication.

[16] The threshold issue in this determination as to whether Mr Y was an employee involves considering whether employment documentation for LRN was a 'sham' mutually intended to avoid Mr Y's child support liability to his prior marriage. Evidence needs to be considered including communications at the time that the documentation was entered into. At its core this evidence will relate to members of the prior family and in disparaging terms. Even if they are not named they could (in this digital 'social media' age) easily be identified. This to me all extends beyond the public interest for the sake of 'open justice' and into the public's 'interest' simply in the personal lives of others.

[17] Considering the above I consider that anonymising the parties still enables 'open justice' in that the application of the law can be observed being applied to what is an uncommon threshold question of employment status in a familial context. The unusualness is (Mr Y) asking *not* to be regarded as an employee. While Ms S seeks to have a public notification to (particularly) former clients of LRN to redeem what she explains is her professional reputation and LRN's commercial reputation, this relates to liability issues which (as I have already foreshadowed) I do not find are to continue in this jurisdiction.

[18] The respondents ask me to consider interim non-publication as supported by an approach taken by the Employment Court. This approach gave weight to granting orders until the substantive matter can be fully considered.³ Noting my foreshadowing of this determination outcome, I take analogous support from the Court's approach to non-publication on an interim basis. There is a likelihood that Ms S and Mr Y may not see this determination as the end of disputed issues between them. How their actual names become public in any future matters will be potentially for others to decide. For now, I find it reasonable based on the above, to preserve non-publication in this determination.

³ *FVB v XEY* [2020] NZEmpC 182 at [11] – [13]; I note also *JGD v MBC* [2020] NZEmpC 193.

[19] Accordingly, there are to be non-publication orders prohibiting from publication, the names of the parties, the name of the applicant's sole director, and any documentation lodged in these proceedings that may result in identification of the parties. These orders apply in this jurisdiction until or unless there is a further order of the Authority and the following random non identifiers will apply:

Applicant	LRN
Sole director and shareholder of LRN	Ms S
First respondent	Mr Y
Second respondent	YZT

[20] Any reference to commercial transactions or financial spending will be minimal. The non-publication orders prevent any publicised connection to the parties involved.

[21] To be clear, the names of third parties not part of this investigation will simply not be named. This also includes the name of the deponent of the one sworn affidavit before me.

The Authority's investigation

[22] Parties lodged statements of evidence from Ms S and Mr Y with associated documents. I held a two day investigation meeting. I and respective counsel asked Ms S and Mr Y questions under oath or affirmation. At the end of the investigation meeting, I heard submissions from respective counsel based on written summaries provided.

[23] After the investigation meeting, as already recorded above I received a written application and submissions regarding non-publication orders. While considering the material before me I then sought further information and comment from LRN about annual holiday pay and or entitlement. After this was received I further reserved my determination.

[24] As permitted by s 174E of the Act this determination states findings and expresses conclusions on issues necessary to dispose of the matter and then specifies the outcome. It has not recorded all evidence and submissions received.

Legal principles relating to whether a person is an employee

[25] The Authority has jurisdiction over the employment relationships that are defined in s4(2) of the Act including for present relevance that of an employer and employee. The New Zealand Supreme Court⁴ has observed that:

The Authority has exclusive jurisdiction to make determinations about “problems generally” not specific causes of action. The only requirement is that the problem must be an “employment relationship” one; that is, it must relate to or arise from the “employment relationship.”

[26] Section 6(1)(a) of the Act defines an employee as any person ‘employed by an employer to do any work for hire or reward under a contract of service’. Section 6(2) of the Act provides that in deciding 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.’

[27] Section 6(3) of the Act provides that when considering the real nature of the relationship the Authority must:

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

[28] Section 6(3)(b) has been considered in the context of contracts entered by parties who have recorded their relationship as one of contractor to contractor, sometimes expressly excluding the nature of the relationship as one of employment.⁵ The intention of parliament in enacting s 6 has been noted as⁶:

⁴ *FMV v TZB* [2021] ERNZ 740 at [60].

⁵ *Bryson v Three Foot Six Limited* [2005] NZSC 34.

⁶ *Leota v Parcel Express Limited* [2020] NZEmpC 61 per Chief Judge C Inglis at [35] quoting from the Employment Relations Bill 2000 (8-2) at 5–6.

The underlying policy intent of what was to become s 6 [of the Act] was to ‘stop some employers labelling individuals as “contractors” to avoid responsibility for employee rights such as holiday pay and minimum wages,’ in other words to prevent form trumping substance.

[29] Mr Y asks that I consider what I interpret to be ‘substance trumping over form’, the ‘form’ being the usual employee documentation including a letter of offer and an individual employment agreement that he signed as well as LRN’s record of paying him a salary and deducting tax as an employee. Effectively Mr Y claims the employment documentation was a ‘sham’. This makes this inquiry somewhat different to the usual factual matrix considered under s 6 of the Act which usually results in the end goal of finding a person is or is not an employee for the purpose of that person wanting to bring employee based claims for contractual or statutory rights and entitlements and/or grievances. That is what the case law generally focuses on in relation to the following tests.

[30] The Supreme Court⁷ has set out the factors to assess employment status under s 6 of the Act as:

- a. the parties’ intentions
- b. any written documentation about the relationship’s terms, including any label given
- c. control over the individual
- d. integration into the business
- e. whether the individual was in business on their own account
- f. any established industry practice

[31] It has been submitted for the respondents, and I agree, that I take note of what the Supreme Court had to say in the above case:

It is important that the Court of 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.

⁷ *Bryson v Three Foot Six Limited* [2005] NZSC 34.

[32] Relevant also is that the Courts have recognised a presumption of fact against an intention to create legal relations in circumstances where there is a familial context. This has been described as deriving from the way people in domestic relationships⁸ ‘usually do not intend to create legal rights and obligations but intend to rely solely on familial ties of mutual trust and affection.’⁹

[33] I will now consider the question of whether Mr Y was an employee of LRN.

Was Mr Y an employee of LRN?

The parties’ intentions

A jointly run business as husband and wife?

[34] Mr Y points to a number of communications around the time he and Ms S became a couple when they discussed setting up in business together. It is submitted these point to the reality of a joint ‘ownership’ in the business that LRN was set up to operate. I will consider these communications because while potentially those in business through a corporate entity might also be employees, Ms S’s position is simply that LRN was hers. Therefore, what was intended about the couple being in business together (or not, as Ms S says) is important to consider in relation to the parties’ intentions.

Exit from Mr Y’s previous business interest

[35] In extracting from his previous business Mr Y says that Ms S was fully involved in these discussions including the discussion with an advisor about various ‘options’ for them both to work together. By this time, I accept Mr Y’s description in his evidence that the business he was ‘extracting’ himself from had originally been set up in partnership (50/50) with a family member later replaced with a different partner during which time Mr Y and that person grew the business to a Trans-Tasman operation with 75 staff. After that, a new partner with Mr Y operated the business and it was from that partnership that Mr Y began to extract himself in 2012 after he commenced a relationship with Ms S in 2009.

⁸ The quote starts with ‘men and women’. I have taken licence to update the notion here of domestic relationships.

⁹ *Dillon v Tullycrine Limited* [2020] NZEmpC 52 at [30], Judge Holden.

[36] Mr Y says emails support that Ms S was involved in discussions about setting up in business together and or about Mr Y's future business options. I set some of these out below with italics added for emphasis:

- a. Sometime after their relationship started in 2009 Ms S drew up a 'one page' 'A3' plan about how Mr Y and Ms S would run a business together which includes life together as well;
- b. By March 2012 when Ms S by then was working for a different business from the one co-owned by Mr Y, and when Mr Y was negotiating his extraction from that business or potentially staying on a different basis, Ms S emailed Mr Y on 5 March 2012 referring to being uncomfortable with him being *her* employer because he would have the 'power 100% in the relationship'. She expresses the view she wanted to be a 'partner (Junior)' if she returned to work in the business. My observation of that email is that it is expressed with affectionate overtones expected from a couple in a romantic relationship finishing with '... it's pretty important we get it right. Let's talk about it x'.
- c. By August 2012 Ms S and Mr Y were considering 'options' together using a financial advisor to assist them. Mr Y emails that advisor on 15 August 2012 and again on the 16 August 2012 using the term 'we' to what I accept by the context to be Ms S and Mr Y. The communications include wanting advice about how to move on from his prior business with a preference expressed as them wanting to 'build a new home studio where we can live and work (up to 6 staff)'. It is clear from the tenor of that email that Mr Y is unhappy with his then business partnership and wants to move on. It is also clear that Mr Y uses the language of someone very familiar with business dealings. His second email ends with '[Ms S] and I would really appreciate it if we could come and see you to discuss strategically how best to plan our negotiation tactics [with his previous business partner] now we have a clear view of *where we want to end up*. We are both looking forward to talking this through with you [references the time and date to meet]'. Mr Y refers to concerns about the effect of any potential commercial competition restraints on him from the business he sought to extract from in relation to being involved in their future business operations. The letter refers to an upcoming commercial mediation.
- d. On 31 August 2012 Mr Y further emails the same advisor with 'negotiation notes' prior to the advisor meeting to negotiate. The notes include Mr Y expressing that

his then business partner was 'very worried that I am going to set up in competition to [the business] with [Ms S].' Mr Y copied these notes to Ms S with a cover email saying 'yesterday's notes xxxx' to which she replied to the next day with, 'This is so good. Seeing it all laid out really makes me feel confident that *we* are coming from a pretty strong negotiation angle.' Ms S goes on to suggest in her response to Mr Y about what I take was a discussion of what Mr Y could be paid out from the business: 'our ideal figure of 2mil' 'I don't think we really solidified that when we last met last [with the advisor].'

- e. On 7 September 2012 Mr Y emails the advisor starting with, 'After having a long talk last night with [Ms S] ... 'Our stated goals have always been the following: To live together / To work together / to work without [the current business partner] on a day to day basis/ To be well rewarded for our efforts.' The email then includes proposing another option that includes buying out his business partner in just one geographical part of the Trans-Tasman business and 'retaining directorships and a '50% share in branding'. That I understand relates to the importance of a known brand built up in the business over the years that Mr Y had been involved in it through various entities. The email goes on to then include, 'Possible returns' for this option for Ms S and Mr Y including salaries of '\$250k' each, directorships, and profit shares both direct and from a share of the branding referred to above all relating to the geographical option of purchasing just a part of the business and being bought out of the rest of Mr Y's business interest.
- f. On 9 October 2012 Mr Y emails Ms S with 'the following is based on the assumption of selling [the business he had been a partner in] for 1 million with no restraint of trade'. It then goes on to refer to setting up their business (by now it had a name) 'in our rental residence' 'for the first year of operation' and goes on to refer to having funds from the first year of the new business to cover a mortgage Mr Y had on a property in [another town] and or clearing that debt and or purchasing a studio for their new business. It refers to further proceeds from an 'insurance' claim. It refers to the new business involving them both as 'creative Directors' with '1-2 Junior [employees] \$40,000.00' each, working from Mr Y and Ms S's rental home at first.
- g. Mr Y emails Ms S on 30 November 2012 saying 'we are free' copying to her a confirmation email that over \$800,000.00 was deposited into an account that I take it from a monetary settlement for Mr Y leaving his previous business. That account number was provided by Ms S to Mr Y earlier that day as being 'the newly opened

Personal On Call account' ... to deposit funds into.¹⁰ Ms S emailed the bank on 28 November 2012 to set this up wanting the settlement funds to be transferred into such an account to gain interest.

[37] While Ms S has referred to emails in Mr Y's evidence being cherry picked or incomplete with redactions, I find support in the above to show that around the time Mr Y extracted himself from his prior business, Ms S was actively involved in decision making with him about him leaving one business and then starting up together in their own joint business venture as a domestic couple.

Establishing LRN

[38] I accept that with the settlement of Mr Y's prior business interests there was then a concerted focus on setting up LRN to run a new business. In an email dated 13 November 2012 that was just before the above final settlement of Mr Y's previous business, Mr Y emailed the same advisor who had been helping him and Ms S. The email listed bullet points of their progress: 'Since Friday we have' registered a company [which after a necessary name change became LRN], 'designed' 'our identity', 'designed' 'our website' 'organized [sic] our b cards to be printed' and had a first job for invoicing. The email asked for a recommendation for a 'good accountant' 'who know [sic] a thing about tax and structuring etc.' It is clear Ms S was involved in all of this. Emails at the time include enthusiastic reference to the design of business cards and the costs to print. Again, all things one could expect of a couple intending to set up in business together.

[39] Mr Y has provided a sample of the business cards that were designed at this time albeit with the prior name chosen that had to be changed. Those cards included one for Mr Y and one for Ms S both having the label of 'Partner'. Further Mr Y has provided copy of a sample wording from a brochure that I accept is not disputed which included:

Who we are.

We are [Mr Y] and [Ms S],

The Founding Partners of [LRN]¹¹.

¹⁰ Document 10, email bank to Ms S 30 November 2012 Respondent Bundle of Documents page 21.

¹¹ LRN is referred to in that brochure with the same trade name that appears in the full 'Limited' registration name.

[40] Ms S's above mentioned email to the bank on 28 November 2012 was copied into Mr Y and included that Ms S said 'we would like' to open a business account with two eftpos and credit cards.

[41] These were things done before the letter of offer and IEA were signed in January 2013 which I will find below were back dated. I find the above supports a common focus of being in business together, sharing money through accounts for that business, or personal use, all as might be expected of two people, setting up in business together, in a domestic relationship.

Mr Y's child support obligations

[42] An examination of the parties intentions must be in the context of Mr Y's core submission which is that despite the formal documentation of employment between himself and LRN (the IEA and offer of employment), the intention was to create a 'sham' of employment. He has not used the word 'sham', but I find it a reasonable description for what he describes being that he and Ms S agreed to set up the appearance of employment to enable him to avoid personal liability for child support for the marriage he left behind with dependent children.

[43] The settled principles of the law on 'shams' in contract law have been held to extend to the employment jurisdiction.¹² A 'sham' requires a common intention between the contracting parties to create a sham.¹³ The remedy for a 'sham' is a finding that the contract is null and void from the start.¹⁴ In other words the absence of a common intention to create an enforceable legal relationship negates the ability of a party to then enforce the 'sham' via some sort of remedy.

[44] Mr Y says that Ms S got involved in his child support issues in early 2012.

[45] In an email dated 15 April 2012 Ms S emailed Mr Y with a cut and paste of material from an online article about child support prefacing this with 'I'm pretty sure you should be entitled to this as you do share the care of your kids'. In a second email soon after on the same day Ms S refers to estimating that 'on an annual income of \$250,000 you are entitled to pay just under \$500 per week.' She further explains her understanding from online material from Inland Revenue sharing with Mr Y a link to 'what happens if I have split custody, or I share the care

¹² *Principal of Auckland College of Education v Hagg* [1997] 2 NZLR 537 (CA).

¹³ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289, at [33].

¹⁴ *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293, at [63].

of my children.’ I find on its own this appears to be providing Mr Y with information. In the context of the following, I accept Ms S was actively involved in this issue with Mr Y.

[46] On 15 November 2012 at the time that Ms S and Mr Y were in full establishment mode with business cards and incorporating LRN, Mr S sent an email to his previous wife. Mr Y’s email includes that ‘[Ms S] and I will be going into business together to form a new ... agency’ saying this would be on 7 January 2013. He proposes that he would need to ‘devote the required time and energy to the business’ and then sets out what I understand was a reduction to what he had previously undertaken in terms of his time with his children and child support paid. This appears to have then sparked responses from Mr Y’s previous wife’s lawyer. I do not have copies of the responses and only a reference to the cover emails. Mr Y says they included a request to know the amount Mr Y redeemed from the sale of his previous business and raised child support issues. In later January 2013, Mr Y emailed an advisor that he had stopped child support payments at the end of 2012.

[47] On 13 December 2012 Mr Y emails Ms S with information he obtained about child support assessment and on the same day but later Ms S emails Mr Y. This includes options relating to child support including how to ‘work out what you are required to pay according to IRD standards’. Mr Y points me to the emotive nature of Ms S’s comments in this email and another to support his evidence that Ms S was concerned to protect his liability from child support going forward:

Basically, from where I’m standing, you got completely fucked over by her [Mr S’s previous wife] the first time round. It’s actually common that if the house is given to the ex, then you could have negotiated that the cost that covers the entire childcare payments and so forth. You didn’t do any of those things and even insisted on paying her 80k a year for years following! I’m not saying that to wind you up, but to try let you see that you don’t owe her anything! If anything, she owes you, as that shitty [suburb] house has increased in value so much!

[48] I understand the reference to the ‘80k’ above relates to the child support level Mr Y was paying before he extracted himself from his previous business interest.

[49] While Mr Y wants me to accept that Ms S was driving to reduce his child support to the children of his previous marriage, this is inconsistent with the email he sent to Ms S also on 13 December 2012 attaching a letter from his previous wife’s lawyer. Mr Y’s one line cover email to Ms S says, ‘Fucking bitch is at it again’. To this Ms S replies with, ‘It seems that the legal

letter [sic] below are full of nothing but false threats' and then attaches information 'from NZ Child Support which prove that your conniving ex witch wife aren't [sic] got nothing on you.'

[50] Mr Y emails an advisor on 14 January 2023 asking about amending his child support based on a \$65k salary noting that he did not have the same income going forward as when he was in his previous business earning over the '110k' threshold thus meaning he was paying by 'mutual agreement' \$438 per week. He asks for advice about whether to initiate an IRD assessment. The advisor having by then met with Mr Y and Ms S responds with a lengthy list of things that have been set up or discussed in relation to the business accounting for LRN (including GST, accounting software, Fringe benefit tax issue on Mr Y's car and Ms S's car). The advisor includes a view they think only Mr Y's earning would be assessed for child support and an uncertain view whether any assessment could offset a previously shared property with his previous wife. That advisor says that they were not '100%' confident having spoken with IRD. Ms S responded to this including that 'So plan of action is to just keep paying the maximum amount [what was previously assessed] until we have 3 months of earning proof under our belt (and a yearly forecast?) and get an assessment.' Ms S notes that she and Mr Y are to meet a family lawyer but thank the advisor for their 'opinion also.'

[51] The advisor in the above states briefly that Mr Y was going to talk with a lawyer about the relevance of an employment agreement 'for your circumstances'. This comes immediately after the discussion about liability for child support.

[52] While Ms S says there are only partial emails before me, some with redactions, I find the above sufficient to show me that Ms S was fully involved in discussing and expressing her opinions about Mr Y's previous payments toward supporting the children from his previous marriage. It is submitted for LRN that it is 'unremarkable' to be arranging salaries in relation to child support. I consider this material relevant because it supports that the issue of what level of child support Mr Y would be liable to pay was clearly a live issue and was likely more than just one of basic economics for the couple given the tenor of the emails between Mr Y and Ms S. The emotive responses are akin to acrimonious family separation dynamics that lends to a likelihood that there was a determined common intent to reduce liability to child support. I do not find that unremarkable. I find it shows me there was a common intention to arrive at a show of employment for Mr Y for this purpose.

Any written documentation about the relationship's terms, including any label given

[53] Before me is a letter of offer, an IEA, evidence of a nominal salary for the whole ten years of \$60,000.00 and LRN's evidence and submissions that Mr Y accrued annual leave. I will deal with these things under this heading because they are all part of what has been documented but to which Mr Y says did not reflect the reality. There are also emails that assist me. Some of this may repeat the above.

The timing of the IEA

[54] The offer of employment was dated 2 January 2013. The IEA was signed on 7 January 2013 by Ms S for LRN and Mr Y as employee. The above advice about getting an employment agreement in place for Mr Y 'in his circumstances' clearly came after these dates. Mr Y says the IEA and letter of offer were deliberately backdated by Ms S but I find that both sought advice and were likely making these decisions. I find there was a likely backdating. The backdating on the IEA is consistent with what would have taken Mr Y's 'employment' salary earnings from the beginning of the year, Mr Y having ceased child support payments in late 2012.

Role described in the IEA

[55] In the IEA there is reference to a role job description in a schedule for the title given. No job description has been provided. When I asked for it from both parties before the investigation meeting, none was found. Ms S during the investigation meeting became adamant that it existed. Mr Y says it did not. The role described was the professional position 'on the tools' and it is common ground that Ms S was very experienced and skilled in this area, and the older Mr Y had not worked in the front line profession for some time. His strengths have been described as marketing, promoting, and bringing in business through his long established networks in the industry that LRN's business was in. The latter appears not to be in dispute. Ms S's evidence included that Mr Y's role 'evolved'.

[56] LRN provided an example IEA¹⁵ that Ms S produced as a comparative IEA for another employee in the same described role. This comparator contains a job description but I do not accept that Mr Y was likely doing this role. That document is also is also dated several years after Mr Y signed the IEA.

[57] I find there was likely no job description attached to the IEA for Mr Y because combined with my above findings of a common intention, the documentation of employment was likely put in place simply with the common intention to reduce liability for child support.

Salary paid

[58] I accept that the salary recorded and paid (\$60,000.00 gross) was for the same reason as above, put in place for the purpose of child support assessment. It is also implausible that Mr Y in the seniority he was in the industry would genuinely work as an employee for this level of salary for ten years without negotiating a pay rise, as he says. As I have already noted above, figures much higher (\$250,000) as expected salary income for the couple had been discussed earlier. I do not accept Ms S's evidence as plausible when she says Mr Y was simply not worth more in terms of his skills 'on the tools' and that was why the salary was paid and remained at that level for ten years. I have before me from Mr Y affidavits that Ms S has provided in other court proceedings where she says the salary was kept low to avoid Mr Y's child support. The salary is also inconsistent with Mr Y likely not actually performing much of the 'on the tools' role at all which I have found above.

[59] Mr Y has obtained a sworn affidavit from a chartered accountant with stated expertise as a forensic accountant. I have no reason to doubt the veracity of this sworn affidavit. The deponent states they were asked to 'analyse bank statements provided by [LRN] to establish the movement of wages to [Mr Y].'

[60] The assistance I draw from this evidence is that, accepting as I do (and it is not in dispute) that Ms S was in control of the LRN finances, it shows me that Mr Y's 'salary' that was paid to him from 2015 for 2022¹⁶ while initially paid into a bank account in his name as a net figure was then moved into joint savings and credit accounts from which Ms Y then

¹⁵ The employee's name was appropriately redacted.

¹⁶ The period to which the LRN records were analysed.

transferred money for various dispersion. How that money has been dispersed from the couple's joint accounts is not a matter for me to consider. For my purpose I find that if Mr Y was genuinely an employee he is unlikely to have concurred with virtually all of his salary, the net payments of the \$60,000.00 salary being removed in this way by the director of his employer between the years from 2015 to 2022 when he 'left' LRN. This further supports Mr Y's position that in fact there was no intention that this was a genuine employment relationship.

Payslips

[61] I note the payslips provided to me after the Investigation meeting show that Mr Y's salary after tax continued to show child support deductions, variable but not greatly variable. I find a likelihood then that the common intention to continue the show of employment for this purpose continued to the end of the time Mr Y 'left' LRN and, in his view, continued the LRN business through YZT.

Employee entitlement to annual leave

[62] Ms S in her evidence refers to Mr Y having accrued annual leave which shows he was an employee. I asked for further information about this because if I were to accept Mr Y never took annual leave then by the time he left LRN the annual leave entitlement would be significant, including ten full years of four weeks per year. The pay records (payslips) that have been provided by LRN to me after the Investigation Meeting only start from May 2020 and run through to what appears to be the last salary payment to Mr Y in June 2023, consistent with when Mr Y 'transferred' everything to YZT.

[63] I accept the likelihood of Mr Y's evidence that while he managed requests for staff leave he never took paid annual leave. He says he simply didn't work if he wanted to go away with his family. There is no record from LRN showing he took entitled paid annual leave. If there was, I would have expected this to be provided when the opportunity to do so was given.

[64] LRN has put forward that Mr Y's accrued leave at the end of his 'employment' was '592 hours' owing. This appears to be based on a computerised payroll system. Based on a salary of \$60,000.00 gross for ten years, he was on a weekly gross pay of approximately \$1,153.85. Based on (say) a 50 hour week for a senior employee this would round to \$23.00

gross per hour. This would amount to LRN then saying that Mr Y was owed $592 \times \$23.00 = \$13,616.00$ gross of annual leave entitlement at the end of his ten years of employment based on a \$60,000.00 salary.

[65] An employee is entitled to at least four weeks paid annual holiday leave per year and any part year at the end of their employment is based on 8% total gross earnings.¹⁷ While an employee can follow a process to have their entitled paid leave paid out to them¹⁸ there is no evidence this occurred here. On a broad brush estimate if Mr Y was an employee then LRN would have had to pay him at the end of his employment for all untaken annual leave not by then taken based on four weeks per year. Taking Mr Y's employment (say) from January 2013 to July 2023 he would have worked ten full years and a part year of employment. At the very least that would have been entitled to 40 weeks of annual leave at (say) \$1,153.85 which is \$46,156.00 gross. This is significantly more than the apparent tally taken from LRN's computer generated incomplete pay records for LRN showing '592' hours. On a rough estimate, Mr Y's untaken annual leave would equate to just over eleven weeks. On top of that he would have then been entitled to an 8% of total gross earnings for the part year which is to include the payment for untaken holidays being \$46,156.00 gross.¹⁹ This is $24 \text{ weeks} \times \$1,153.85 = \$27,692.40$ gross + $46,156.00$ gross = $\$73,848.40 \times 8\% = \$5,907.88$ for the 8% part year payment. This coupled with the \$46,156.00 gross means that if Mr Y was an employee having taken no annual leave entitlement by the time he left LRN he was entitled on these broad calculations to (say) \$52,063.88 gross.

[66] I observe here that it would seem implausible that a business would allow an annual leave liability of over \$50,000.00 gross to have built up over ten years for a single employee. This with other matters above points away from the reality of Mr Y being an employee.

Resignation language

[67] When Mr Y notified Ms S he had 'transferred' all LRN employees he also emailed her saying he was 'resigning' followed immediately by reference to the unresolved relationship property issues, and Ms S's spending of LRN's reserves. He instructed a lawyer to follow up

¹⁷ Holidays Act 2003, ss 16 and 25.

¹⁸ Holidays Act 2003, s28A.

¹⁹ Holidays Act 2003, s 26.

the same message to her and also indicated the lodging of family court proceedings. For LRN it is submitted that Mr Y 'resigned' here and this points to him being an employee. However, considering all other matters in the round including no mention of final pay or holiday pay and that the letter mostly refers to the separation issues I do not find this adds anything to support that Mr Y was an employee.

Control over the individual

[68] A situation can include parties accepting a degree of control one to the other as 'necessary and/or beneficial to both of their business interests.'²⁰ Here, based on what is before me, I do not accept the submission that Mr Y was working in LRN's business for purely the beneficial interest of LRN and not for himself as an employee. This would make a fiction out of acknowledged drawings for both Mr Y and Ms S over and above their nominal salaries; the lifestyle Ms S says Mr Y had the benefit of from LRN's success; that they had a common intention (based on my findings above) to be in business together based in no small part on their domestic partnership which but for the acrimonious split LRN would likely still have been operating its business.

[69] While Ms S says that she had the control of the running of the business I find a likelihood that it was Mr Y who was present in the business premises from 2015 onwards and not Ms S. While management or control can be remote and while she says she had the last say on product designs I find it likely they were, before separation, likely working together as their visionary statements reflected when they set up in the business. I find Mr Y's actions when he managed, without apparent challenge, to transfer all employees and business to YZT's could be read either that he was dishonest about his legal authority to do this (as is Ms S's contention which may well be tested elsewhere) or that in reality his role was the face of the employer, the one in charge, the one who liaised with the clients and the delivery of services.

[70] To the extent that I am asked to consider whether Mr Y was working under the control of the director of LRN, Ms S, as the employer, I am not persuaded in the context of this matter and the history of the familial relationship that this is an accurate description.

²⁰ *Leota v Parcel Express Limited* [2020] NZEmpC 61 at [47].

Integration into the business

[71] It has long been established that a director and/or shareholder can also be an employee.²¹ However this test is based on whether or not the person was in business in their own right. I find that the emails I have already traversed above support that Mr Y and Ms S were in business together and reaped benefits from LRN's business together until Ms S stopped Mr Y's financial benefits beyond his nominal salary after separation. Ms S further sets out her views to an advisor in mid-2021 about 'succession planning.' She is firmly of the view that she did not want any claims by Mr Y's previous wife and children against the LRN business that she and Mr Y had built up together in the event that the older Mr Y died. Ms S compares her situation of only taking some time away from the LRN business to care for her and Mr Y's child to that of Mr Y's prior wife who did not. Ms S at this time refers to '... it is only the power of us together that we have been able to build the business we have.' An advisor replies to Ms S's above concerns about being recognised as a 'contributor of joint wealth' by saying 'I doubt very much if the structure you have today would have come about unless [Mr Y] trusted you and viewed you as a vital part of the team.' I find this supports two things. That Ms S's contention that LRN was simply hers and within her sole control is not plausible. Secondly, the comment from the advisor refers to a level of trust between Mr Y and Ms S that has been observed in relation to the way their business has been structured. This is consistent with Mr Y's position that he was avoiding legal title, and also that there is a trust commonly observed between those in an amical domestic relationship.

[72] The above 'planning' then ended up in a relationship property sharing document being drafted and Ms S placed her handwritten notes beside various parts of that draft including reference to their business together.

[73] Ms S says that in hindsight she viewed this planning was being driven by Mr Y at a time that he was already in a relationship with an employee of LRN. The timing supports this. However, I find support here that still in 2021, Ms S was reflecting how she saw the joint business and sharing of the wealth that generated from that business was '50/50' for her and Mr Y and benefiting their child to the exclusion of Mr Y's prior family's potential claims.

²¹ *Lee v Lee's Air Farming Limited* [1961] NZLR 325 PC and *Smith v Practical Plastics Limited* [1998] 1 ERNZ 323.

[74] I note further here that Mr Y emails Ms S's father in March 2021 asking his assistance to lend money for LRN to pay its tax obligations, a sizeable amount of over \$400,000.00. The emails includes, "We really appreciate your support and help with this matter." I find it reasonable to take it that the 'we' is Mr Y and Ms S. This would seem to be a request consistent with a person in business in their own right and not an employee ancillary to the business. The reply is a simple, 'Happy to support your operation.' Ms S in her evidence provides this evidence as supporting that her parents provided financial support to LRN over the years. This may well be the case but in its informality the above email shows this was clearly a familial context and that Mr Y was not likely an employee but a person with a stake in the business asking for help from that family through his wife, to pay a sizeable tax bill. This was before the separation. This is not an email consistent with Mr Y being an employee.

[75] In reality I find a likelihood that Mr Y was not likely an employee integrated into the business in a sense that he had no interest in it. I make no finding about arguments of equitable interests. These are for other forums.

Whether the individual was in business on their own account

[76] I find the above covers this point.

Any established industry practice

[77] I find little before me to support this factor. I have already referred above to the salary level and have not found Ms S's evidence plausible about Mr Y only being worth a \$60,000.00 per year salary for his level of skills.

[78] The description of how an industry studio works also adds little to an interpretation of any industry practice to assist me here.

[79] I pause to note that the above standard factors relating to employment status are not immediately of assistance in the facts of this matter and the defence that Mr Y raises. They are developed for cases that focus on those wanting to assert their entitlement to employment standards or rights to the grievance process and not unusually here, the reverse.

‘All relevant matters’

Family Context and the presumption not to create legal relations

[80] The Employment Court in *Dillon v Tullycrine*²² focused on the intention of the parties when considering whether an employment relationship was intended in a familial context. In that case one party sought to assert that they were an employee after he had been working in an intergenerational family business and after the business and familial relationship broke down.

[81] In *Dillon v Tullycrine* there was evidence that the parties had previously asserted the relationship was not one of employment. In that matter the Court found the applicant was not someone who did not understand business structures. It found he was not an employee, with an emphasis on the real relationship being familial.

[82] In *Dillon v Tullycrine*, matters were not disputed about whether the applicant was an employee until there was a breakdown in the relationship which was partly business but heavily in the context of the almost retired parents on the one side and their son and daughter in law living and working a joint business on land that they purchased together. But for a relationship breakdown between the couples, things may not have resulted in a later reliance by one party on employment in order to claim various employee entitlements due to work completed.

[83] In a non-familial situation, the Court also found a catalyst for an apparent reversed change of viewpoint about employment status. In *Singh v Eric James & Associates Ltd*²³ the Court found it was not until Mr Singh was pursued for overpayments in his commissions in the District Court relying on his independent contractor status that he then claimed to be an employee. The court found evidence of a *common intention* that satisfied it that throughout the period of the relationship Mr Singh was not an employee but an independent contractor.

[84] As above, I do not find based on the communications before me from Ms S to Mr Y when they were structuring their business in 2012 that there was an intent to create an employment relationship for Mr Y. Further the statements made to advisors in 2021 about succession planning and proposed drafts relating to sharing of joint wealth do not refer to employment as the basis for the relationship but rather a sharing of a business enterprise. I find that but for the acrimonious separation, it is likely that the ‘show’ of employment that Ms S and

²² [2020] ERNZ 125 at [46] and [47].

²³ [2010] ERNZ 61

Mr Y intended to enable avoidance of Mr Y's otherwise liability to his previous family was never likely to have been intended to enforce the claims being made in these proceedings. I also find the likelihood of a commonly intended 'sham' of employment which coupled with the presumption against intending legal relations in a familial context albeit through LRN as a corporate entity²⁴ which as noted above voids a contract from when it was entered, are factors that outweigh the structure and documentation of employment as genuine or enforceable.

Summary and outcome

[85] Based on the above, having looked at the matter from different angles I find that Mr Y was not in reality an employee of LRN.

[86] LRN's claims against Mr Y and, to secondary liability against YZT cannot proceed in this jurisdiction.

Costs

[87] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[88] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the respondents, Mr Y and or YZT may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum LRN will then have 14 days to lodge any reply to memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

²⁴ *Patrick v John & Anor* CA 185/09, 23 October 2009.

[89] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual 'daily tariff' basis unless circumstances or factors, require the Authority to consider costs should lie where they fall or that there is to be an adjustment upwards or downwards from the tariff.²⁵

Antoinette Baker
Member of the Employment Relations Authority

²⁵ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1