

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Raiha Coral Wilson and others (Applicants)

AND Mr X Limited (First Respondent)
Sue Hughes (Second Respondent trading as:
Grace's Place Hunters Corner;
Grace's Place Manurewa;
The Owl Bar and The Rock Bar.

REPRESENTATIVES Francis Sabbineni for the Applicants
Jim Roberts for First Respondent
Sue Hughes in person

MEMBER OF AUTHORITY Yvonne Oldfield

INVESTIGATION MEETING 13 June 2006

**FURTHER INFORMATION
AND SUBMISSIONS** 12 July, 25 July, 26 July, 27 July, 7 August 2006

DATE OF DETERMINATION 14 September 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Wilson and the other applicants in this case have come to the Authority because they say they were abruptly and unfairly dismissed from their various jobs in Grace's Place Hunters Corner, Grace's Place Manurewa, The Owl Bar and The Rock Bar. They worked in those establishments for varying periods between February 2005 and January 2006.

[2] Throughout that period Mr X Ltd held liquor licences for the premises concerned. The original statement of problem identified that company as the employer. However, Mr X Ltd responded that pursuant to a management contract the bars were run as independent businesses by Ms Sue Hughes (who was the holder of a bar managers certificate) and that she, not Mr X Ltd, employed the applicants. Ms Hughes denies being the employer of the applicants, at least at the time their employment ended. The applicants agree with her, but have joined her as second respondent to the employment relationship problem so that the issue can be resolved.

[3] The sole issue in this preliminary determination is therefore the identity of the employer. The investigation of that issue has involved a meeting with all the parties and the gathering of documentary evidence. I have also had regard to the provisions of the Sale of Liquor Act 1989 and have given the parties the opportunity to make submissions to me on their relevance, if any, to this matter.

Who employed the applicants?

[4] As well as the liquor licences Mr X Ltd held the leases and gaming licences¹ for the premises in which the bars operated. Mr X Ltd was wholly owned by Mr Jin Peng.

¹ The gaming licences were in favour of the Lion Foundation and Trillion Trust.

Between late 2004 and mid 2005 Mr Peng entered into a "contracting bar agreement" with Ms Hughes for each of the premises. At first I was told by both Mr Peng and Ms Hughes that the agreements between them were oral. Then Mr Peng discovered written agreements for three of the bars and presented copies of them to the Authority.

- [5] Although Ms Hughes has not disputed their authenticity, I place limited reliance on these documents, partly because they were initially overlooked, but also since what Mr Peng and Ms Hughes told me in person indicates that in practice the arrangement between them did not operate according to the agreed terms. It does not appear that Ms Hughes ever paid the contract purchase price, or her half of the rental and power, as set out in the agreement.
- [6] However, she was completely responsible for the operation of the bars and was in business on her own account. She was GST registered, furnished GST returns and paid GST. She hired bar staff, including the applicants in this matter, without consultation with Mr Peng. She banked all bar takings into an account in the name "Sue Hughes, Grace's Bar Manurewa", out of which she paid wages and all other outgoings for the bar including gas, Eftpos services, the karaoke machine, all alcoholic and non-alcoholic beverages and other stock, security services, and accounting services. She also paid the insurance premiums (and on one occasion made a claim) although the policies were in the name Mr X Ltd.
- [7] All of the applicants are related, either directly or by marriage, to Ms Hughes, and all were engaged by her at varying times between January and June 2005. At no time was Mr Peng privy to any of the hours or other terms and conditions of employment of the applicants, and was not even sure in which bar each of them worked. Payslips provided to the applicants carried her name at their foot, but some also had the name "Mr X Ltd" at the top.
- [8] The balance of the revenue the bar generated represented Ms Hughes' profit, and was hers to keep.
- [9] Mr X Ltd received and retained the income derived from gaming on the premises (fees paid by the Lion Foundation and Trillion Trusts in consideration for the machines being housed on the first respondent's premises.) Out of this income it paid the rent and power on each of the premises.
- [10] It was part of the duties of bar staff to clean the gaming area and to pay out winnings. Gaming monies were the property of the Trusts concerned but in practice bar and gaming takings were not always kept separate. Winnings came out of bar takings and in turn it was Ms Hughes' responsibility to maintain the gaming floats. This necessitated a process of reconciling what were bar takings and what were gaming takings. Initially this reconciliation and the job of forwarding gaming takings to the Trusts, were Ms Hughes' responsibility. As things eventuated, she did not always do so promptly or in full and the Trusts advised Mr Peng that they were considering the termination of their arrangements with him. Mr Peng then began to visit the premises to collect the money himself. Ultimately, conflict around this issue was to lead to the breakdown and ending of the arrangement between Mr Peng and Ms Hughes, with Mr Peng now claiming that Mr X Ltd has had to pay a substantial shortfall to the Trusts and continues to be owed this money by Ms Hughes.
- [11] During my investigation meeting, Ms Hughes acknowledged that when she first engaged the applicants, she was doing so on her own behalf. This was also the understanding of some of the applicants, although others said that they thought that they were employed by Mr X Ltd from the outset. (One also told me that her initial understanding was that Mr Peng and Ms Hughes were partners in the businesses.)
- [12] In about April or May 2005 Ms Hughes was advised by a management consultant that she (not being the holder of a liquor licence) should not be running the bars as her

own businesses. From about May onwards (with Mr Peng's agreement) PAYE and GST payments for the bars were made under the name "Mr X Ltd." Mr X Ltd says this was simply a device to comply with licensing requirements and did not create an employment relationship between it and any of the applicants. In submissions, it points to the fact that after this date Ms Hughes continued to enter into contracts for services with third parties in her own name, and to pay the applicants out of her own accounts.

The Sale of Liquor Act

[13] The object of the Sale of Liquor Act is:

"to establish a reasonable system of control over the sale and supply of liquor to the public with the aim of contributing to the reduction of liquor abuse, so far as that can be achieved by legislative means."

[14] The "underlying principle" of the Sale of Liquor Act is:

"The sale of liquor to the public or any member of the public requires a licence. "

[15] An On-licence authorises the holder of the licence (which may include a Company within the meaning of the Companies Act 1993)-

(a) to sell and supply liquor, to any person present on the premises...described in the licence, for consumption on the premises..."

[16] In addition, the Act also provides for "managers certificates" which authorise the holder to manage any licensed premises.

Determination

[17] The arrangement between Ms Hughes and Mr X Ltd was very simple. In return for free rent and power for her bars Ms Hughes agreed to manage the gaming operation which provided Mr X Ltd with an income. This was not a case of principal and agent. I am satisfied that Ms Hughes was independently in business for herself, albeit without a licence and so possibly in breach of the Sale of Liquor Act 1993.

[18] I have also concluded that Ms Hughes was the employer of the applicants in this case, for the following reasons:

- i. Ms Hughes was in business on her own account operating several bars, which included banking and keeping all bar takings and taking responsibility for all the bar outgoings except the lease and electricity;
- ii. Ms Hughes hired staff to work in this enterprise for her, paying them out of the takings;
- iii. although staff in each of the bars also performed some tasks which related to the gaming operations these did not form the bulk of their duties, and were subsumed within what they had agreed to do for Ms Hughes;
- iv. the payment of PAYE under the name "Mr X Ltd" was simply a device to hide the fact that Ms Hughes was operating a bar without a licence;

[19] The first respondent is therefore removed as party to these proceedings.

[20] Now that the issue of the identity of the employer has been decided investigation of the substantive employment relationship problem can proceed. However, it would appear from what the applicants told me that they may not wish to proceed against Ms Hughes, who is a family member and whom they do not hold responsible for the loss of their jobs. No further action will be taken by the Authority until receipt of advice as to the applicants' intentions.

Costs

[21] The applicants and the first respondent have a period of 28 days in which to make any submissions on this issue.

Yvonne Oldfield
Member of Employment Relations Authority