

Attention is drawn to an order prohibiting publication of parties' identification

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 143
3087392

BETWEEN XJ
Applicant

AND UH Limited
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person
Jessica Babe, counsel for the Respondent

Investigation Meeting: 25 February 2021 in Christchurch

Submissions Received: 25 February 2021 from the Applicant
23 February 2021 from the Respondent

Date of Determination: 14 April 2021

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Pursuant to s 10 (1) Schedule 2 of the Employment Relations Act 2000 (“the Act”) the Authority has resolved to not publish the parties names and certain features of this dispute that involve sensitive relationship matters that are the subject of Family Court proceedings. Identification of the parties would impact upon the confidentiality of those court proceedings including the necessity to have regard to the impact upon the applicant and respondent’s children.

[2] I use the following identifiers :

- XJ - the male applicant and formerly five percent shareholder of UH Limited.
- UH Limited - is the respondent company.
- MM – is the applicant’s ex female partner and is a five percent shareholder of UH Limited
- JU – is the father of MM and is a forty five percent shareholder of UH Limited.
- LC – is the mother of MM and is a forty five percent shareholder and the sole director of UH Limited.

The employment relationship problem

[3] XJ and MM are married with two young children and are both qualified actuaries. They came to New Zealand in 2015 and purchased and ran an accommodation business as joint owners. On 5 October 2016 UH limited, a then newly established company, purchased a Christchurch fast food franchise with funds provided by JU and LC secured over a mortgage of their family home. JU and LC resided in Sydney at the time and are MM’s parents.

[4] XJ and MM jointly ran the franchise business. At the franchisors insistence, XJ was trained and designated as the “nominee manager” which entailed, as per the franchise agreement, XJ working

Full Time in the Franchise Business including during all peak and busy periods.
Default by the Nominee Manager of any obligations shall render the Franchise Owner in default of this agreement.

[5] By contrast MM assisted in administration/accounts work (including administrating the ACE/MYOB payroll system) and occasionally worked in the shop whilst taking prime responsibility for the care of their two young children. Neither XJ nor MM entered into employment agreements with UH Limited, but both drew a wage from the business that was the subject of PAYE deduction.

[6] XJ claims that he was an employee of UH Limited while the company contends that he was an owner/operator rather than an employee. There was no shareholder agreement or any documentation on how relationships should operate.

[7] The alleged employment relationship problem arose because tension between XJ and MM led to an incident on 19 July 2019 that entailed court proceedings, a court order immediately excluding XJ from the workplace and XJ feeling that thereafter he had been prevented from returning to the workplace and effectively had been dismissed.

[8] UH Limited deny there being an employment relationship and contend that if I find that there was one, then XJ resigned his employment and did not indicate that he had a personal grievance within 90 days.

Issues

[9] The issues I have to determine are:

- (i) Was XJ an employee of UH Limited?
- (ii) If found to be an employee, did XJ raise a personal grievance within 90 days of the date he says he was dismissed?
- (iii) Was XJ unjustifiably dismissed by UH Limited?
- (iv) If I find XJ was unjustifiably dismissed, what remedies are appropriate given XJ is claiming:
 - (a) lost wages including arrears; and
 - (b) Compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (“the Act”).
- (v) If any remedies are awarded should they be reduced taking into account s 124 of the Act if it is found XJ contributed to the situation given rise to his personal grievance claim.
- (vi) Costs of these proceedings.

The Authority's investigation

[10] At the investigation meeting I heard evidence from XJ, MM, JU and LC.

[11] Pursuant to s 174E of the Act, I make findings of fact and law and outline a conclusion on identified issues. Whilst I record that I have carefully considered all material placed before me, I do not record all evidence and submissions received. The discussion below in attributing recollections and assertions made by witnesses draws from their written statements, the parties' submissions and attached documentation.

What caused XJ's employment relationship problem?

[12] The parties have agreed that specific details leading up to the alleged dismissal not be included in this determination as they impinge upon sensitive family issues, suffice to state that entirely due to his own actions XJ found himself in a position where he could not legally enter the workplace or be in the proximity of MM from the date of a 19 July 2019 incident. UH Limited led evidence that it was their belief that XJ at the time, signalled that he did not wish to return to work and he had effectively resigned. XJ by contrast, asserted that he did not resign and signalled to MM on 4 August 2019, that he wished to be placed back on the roster and continue in employment. Upon receiving no response, XJ signalled by email of 12 August 2019 that he wished to access accumulated holiday pay.

[13] In the interim before responding, MM contacted the franchisor to remove XJ from access to their internal IT systems used to manage the business. UH Limited asserts that XJ was then paid all outstanding leave owed to him on 30 September 2019.

[14] In early October 2019 MM received an email from the mediation service saying XJ wished to attend mediation with her – this request was declined by MM for reasons I find entirely valid. MM also recalls being made privy to emails from the franchisor in December 2019 and January 2020 referring to XJ's belief that he had been underpaid during his engagement with UH Limited.

[15] UH Limited was then served a copy of a statement of problem on 22 January 2020 having been lodged in the Authority, claiming that XJ had been unjustifiably dismissed. UH Limited contends that this was the first time that they became aware of the unjustified

dismissal claim and as such it was raised outside the 90 day timeframe set out in s 114 of the Act. XJ did not make an application under s 114(3) of the Act to have the matter heard out of time.

[16] A further complicating factor that is beyond the Authority's jurisdiction, is UH Limited have unilaterally removed XJ as a shareholder on 24 April 2020.

[17] Before dealing with the timing of the personal grievance I first have to determine:

Was XJ an employee of UH Limited?

[18] The premise that an individual may have a concurrent shareholding and an employment relationship in a limited liability company is well established.¹

[19] To further analyse the issue, the Act sets out a test to determine the real nature of the relationship² but this is usually applied to determine the question of whether a person is engaged as an employee or a contractor. As Judge Holden has observed in *Dillon v Tullycrine Ltd*: "There are few cases in which a family arrangement is examined and none since section 6 of the Act was enacted in its current form"³.

[20] Upon examining the facts of this situation I note that although the alleged employment arguably arose out of a family relationship, this is a case not involving a family 'arrangement' akin to *Tullycrine*⁴ but a situation where the intention of the family appears to have been for XJ and MM to operate as business partners using MM's parents' finance to support the purchase and running of a franchise operation where XJ and MM took active roles.

[21] In the circumstances, I now apply the statutory test that requires that the Authority examine the true nature of the relationship and assess all relevant factors including applying the relevant legal tests set out and affirmed by the Supreme Court in *Bryson v Three Foot Six Limited*⁵. If I find XJ was not an employee then I have no jurisdiction to determine his personal grievance claims.

¹ See discussion of Privy Council decision *Lee v Lee's Air Farming Ltd* [1961] NZLR 325 in *Smith v Practical Plastics Ltd* [1998] 1ERNZ 323

² Section 6 Employment Relations Act 2000

³ *Dillon v Tullycrine Ltd* [2020] ERNZ 125 at [35]

⁴ The situation being where a specific role was created to support a parent struggling financially

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

[22] The following matters from *Bryson* require my attention:

- [i] The intention of the parties.
- [ii] Whether there was any written documentation setting out the terms of the relationship or 'label' attached to such.
- [iii] An examination of how the relationship operated in context including looking at issues of control and integration.
- [iv] Whether overall, it could be reasonably established that Mr Burt was operating a business on his own account; and:
- [v] Whether there is overwhelming evidence of any industry practice defining contractual relationships.

[23] Applying the above factors involves carefully assessing the evidence of both parties and weighing up various considerations as none are individually determinative.

Intention of the parties

[24] The absence of written agreements determining the intentions of the parties at the commencement of the relationship is problematic as there is no partnership agreement or employment agreement setting out the party's roles and responsibilities.

[25] What I observe is the fact of a domestic relationship and an expressed intention from JU and LC's evidence (the financiers of the business) that XJ and MM operate in 'business together'. I take this to be the intention of UH Limited.

[26] The sole documentation is a franchise agreement that UH Limited entered that all four parties signed as joint and severally liable guarantors. Generally, the nature of a franchise agreement is the franchisees see it as an opportunity to be in business on their own account as opposed to seeking employment with an existing franchisee.

[27] Evidence disclosed that it was agreed that XJ took on the responsibility of being the "nominee manager", a position required by the franchise agreement but involving duties that would be consistent with either running the business or being an employee. I do not see this as indicative of an employment relationship being intended.

[28] I conclude from the limited evidence and the nature of how the franchise was entered into that these factors are not indicative of an employment relationship being the intention of the parties.

The control test

[29] Applying this consideration requires the Authority to examine where the ultimate authority in the relationship lies.⁶

[30] Due to the nature of the franchise agreement requiring a designated and trained nominee manager working full-time including during peak and busy periods, XJ 'on the surface' did not have the choice to turn work down and he was the subject of control compromising his independence. In practice however, XJ (with MM's concurrence) undertook work elsewhere during the day and worked at the franchise in the evening despite this breaching the franchise agreement. I detected less or no control being exercised by UH Limited as XJ and MM worked collaboratively.

[31] I find that notionally the franchise agreement controlled the timing and allocation of XJ's work and where it was to be performed but the franchisor was not the employer and XJ in signing the franchise agreement, willingly acceded to the terms of such.

[32] I find that applying the control test is not particularly useful in the unusual context of the party's situation but marginally against there being an employment relationship as XJ had a degree of control over his hours and responsibilities and was answerable to no one on a day to day basis. .

The Integration Test

[33] This test requires a consideration of whether XJ could be viewed as an integral part of the business. It is relatively easy to determine this test as without a trained nominee manager approved by the franchisor, UH limited was in breach of the franchise agreement. That aside, XJ was a shareholder in UH limited and he carried out all of the work in the franchise using equipment belonging to UH limited and he had 'on paper' no flexibility to work elsewhere.

⁶ See discussion in Gordon Anderson and John Hughes, *Employment Law in New Zealand* (1st ed, Lexis Nexis, Wellington, 2014) at 121: *Humberson v Northern Timber Mills Ltd* (1949) 79 CLR 389 (HCA).

[34] I find XJ was integral to UH Limited's business in the sense they could not operate the franchise without him, unless they sought the consent of the franchisor to allow MM to assume the nominee manager role or promote an existing employee or employ an external person in that role.

Fundamental test

[35] The application of this test is a consideration of whether XJ could reasonably be considered to be in business on his own account or performing services on his own account and thus assuming an element of risk in his engagement with UH Limited including profit and loss from any joint venture.

[36] In this regard I found that whilst XJ did not run a business on his own account, he did so in collaboration with MM and he at the time, had a beneficial share in UH Limited that provided him with remuneration that would not have otherwise arisen but for his shareholding and family ties.

[37] In applying the fundamental test I am also obliged to take into consideration in this context, the objectives set by legislation that at s 3(a)(ii) of the Act mandates that I acknowledge and address "the inherent inequality of power in employment relationships".

[38] I find that this was a venture between equal parties notwithstanding XJ's small shareholding, his lack of investment in the business and that he was not a director of UH Limited. Overall XJ and MM were effectively set up by MM's parents to be in business on their own account.

Taxation Issues

[39] I was provided with evidence of wage and time records that showed XJ was treated the same as other employees in the sense that his hours were recorded and UH Limited paid PAYE tax on such. MM was treated likewise.

[40] I find nothing indicative turns on this however, as XJ and MM have arranged their tax affairs by consent for their own convenience and could equally have drawn money from the business and paid company tax on such.

Industry Practice

[41] I have nothing before me to determine what industry practice is but I observe by the nature of a franchise agreement the franchisors are presumptively lured to such in the expectation that they are conducting a business in their own account rather than being employees of another entity.

Overall finding

[42] Section 6 of the Act allows the Authority to determine the true nature of the relationship and in these circumstances for reasons discussed in taking the totality of the relationship and how it was formed into account, I conclude that XJ was not an employee but had entered a business venture with MM and that the company UH Limited was the vehicle for this to limit liability of the parties. I make this finding on these particular circumstances and not as a general precedent for those engaged in dual roles as franchisees and employees.

[43] As such, the Authority has no jurisdiction to determine XJ's personal grievance claim and I do not have to determine the further issues I have identified. I observe that the dispute between the parties is essentially one involving the division of matrimonial property that has to be determined by the Family Court.

[44] **I have found that:**

XJ was not an employee of UH Limited and that he is unable to pursue his personal grievance claims under the Employment Relations Act 2000.

Costs

[45] Costs are at the discretion of the Authority and here XJ was unsuccessful in establishing any of his claims and UH Limited is entitled to a consideration of costs incurred.

[46] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[47] If no agreement is achieved, UH Limited has fourteen days following the date of this determination to make a written submission on costs and XJ has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David Beck
Member of the Employment Relations Authority