

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 63/08
5052650

BETWEEN LYDIA YANG
Applicant

AND TEGAN ALLEN
Respondent

Member of Authority: Vicki Campbell

Representatives: Danny Jacobson for Applicant
Rohan Bignall for Respondent

Determination on the papers: 28 February 2008

DETERMINATION OF THE AUTHORITY

Background

[1] I was the Authority member who conducted an investigation into Ms Allen's original problem as lodged in the Authority.

[2] My determination, dated 19 June 2007, followed an investigation meeting conducted on 24 May 2007 at Tauranga at which both Ms Allen and Ms Yang were present. The result of Ms Allen's application was a finding that she had been unjustifiably dismissed. The Authority ordered Ms Yang to reimburse Ms Allen for lost wages in the sum of \$1,182.00 nett, holiday pay in the sum of \$36.67, as well as compensation for injury to Ms Allen's feelings resulting from her dismissal in the sum of \$1,125.00 plus contribute to Ms Allen's costs in the sum of \$750.00.

[3] On 5 October 2007 Ms Yang applied to have the investigation reopened and claimed that the proper respondent was not her personally but a company called Lydia Sea Limited. I granted the application for re-opening on the basis that I could not rule out the possibility of a miscarriage of justice if the investigation was not reopened on the narrow but obviously important question of the identity of Ms Allen's employer.

[4] I also noted that Ms Yang has put Ms Allen to considerable trouble and expense through her own inaction in this matter to date.

[5] With the consent of the parties I have determined this matter on the papers I have in front of me.

The identity of the employer

[6] Ms Yang attended the May investigation meeting personally and provided evidence on oath. Ms Yang now says that she personally was not Ms Allen's employer; rather Ms Allen was employed by a company called Lydia Sea Limited. In support of her application, Ms Yang says she has an extremely poor grasp of English language and that this resulted in her not communicating effectively with the Authority concerning who the actual employer was. Effectively Ms Yang is saying there should be a change in the name of the respondent in the original determination to Lydia Sea Limited.

[7] The companies' office register shows Lydia Sea Limited has as one of its named shareholders and Director, Dan Yang. Having reviewed the documents produced in respect of this application I am satisfied that Ms Yang's full name is Lydia (Dan) Yang and that she is the major shareholder and the only director of Lydia Sea Limited.

[8] The real issue before the Authority now is whether Ms Yang ever held herself out to be the employer personally and if so, the circumstances which would entitle the Authority to say she personally entered into binding legal relations with Ms Allen.

[9] A failure to notify or make the employee aware is not conclusive in determining these types of cases (*Insurance etc IUOW v Parsons and Hobdell (t/a The Insurance Centre)* [1998] NZILR 547).

[10] Ms Yang submitted that Ms Allen would or ought to have been well aware as to the identity of her employer from her own bank statements and from the Council's Registration of Premises Certificate which must be prominently displayed in the café premises.

[11] The Authority requested a copy of the Registration of Premises certificate but that document is not available. Instead Ms Yang has provided a copy of the Application for Transfer of Registration of Premises. That document shows the

applicant as being Lydia (Dan) Yang on behalf of Lydia Sea Limited, however, the new occupier is stated to be Lydia (Dan) Yang and not Lydia Sea Limited. An extract of the Tauranga City Council Audit Report for the premises occupied by the café has also been provided which shows the premises proprietor and primary contact as being Lydia Sea Limited.

[12] In support of her application Ms Yang also provided copies of various invoices for goods and services all made out in the name of Lydia Sea Limited, together with IRD records relating to PAYE and a parental leave form completed in the name of Lydia Sea Limited for another employee working in the café on 23 July 2006.

[13] All the documents produced by Ms Yang are of limited probative value as there is no conclusive evidence that Ms Allen had access to, or viewed any of these documents during her short tenure of employment with Ms Yang.

[14] At the time Ms Yang took over the café Ms Allen had been working at the café for 3 years. Before Ms Yang took over the café, it had been operated by Ms Terri Ewart.

[15] It was common ground that Ms Allen received a written employment agreement from Ms Yang during the first week of her employment and that the agreement was signed by Ms Allen but not Ms Yang.

[16] Ms Allen says the employment agreement identified the employer as being Ms Yang in person and did not make mention of a company. The agreement was discarded in the rubbish by Ms Yang prior to the first investigation meeting and was not available to the Authority.

[17] I am satisfied the documentation provided to the Authority shows that Ms Yang was, at all times, operating her business as a limited liability company. The bank statements show that Ms Allen's wages were paid by internet banking to Ms Allen's bank account from the account of Lydia Sea Limited but I have no evidence to show that Ms Allen knew that that is where her wages were coming from.

[18] There is no evidence to show that Ms Allen had seen or heard any reference to Lydia Sea Limited during the period of her employment. Indeed, I have accepted Ms Allen's undisputed evidence that the written employment agreement

she signed identified the employer as being Ms Lydia Yang and not Lydia Sea Limited.

[19] On the balance of probabilities, I am satisfied that the Ms Allen's employer was Ms Lydia Yang personally and not Lydia Sea Limited. Even if it had been the intent of Ms Yang that Ms Allen be employed by Lydia Sea Limited, it is more likely than not, based on the information available to me, that the identity of that legal entity was never disclosed to Ms Allen. If Lydia Sea Limited was the undisclosed principal, Ms Yang was its agent and never made the identity of Lydia Sea Limited plain to Ms Allen. Not having discharged that onus, personal liability rests on Ms Yang (see *Cuttance v Purkiss* [1994] 2 ERNZ 321; *Cowan v Baggstrom*, unreported, Shaw J, WC39/99 13 July 1999; *Kim McDonald v Tracy Gifkins t/a Grey Lynn Veterinary Clinic and Grey Lynn Veterinary Clinic Limited*, unreported, Member Arthur, AA59/08, 22 February 2008).

[20] I confirm the orders set out in AA182/07. Ms Yang is ordered to pay to Ms Allen within 14 days of the date of this determination the following amounts:

- \$1,182.00 nett pursuant to section 123(1)(b) of the Employment Relations Act 2000; and
- \$1,125.00 pursuant to section 123(1)(c) the Employment Relations Act 2000; and
- \$36.67 nett, being unpaid holiday pay; and
- \$750.00 as a reasonable contribution to costs.

Costs

[21] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority