

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 648
3142503

BETWEEN	REBECCA YOUNG Applicant
AND	BOURSON LIMITED First Respondent
AND	YUZHEN QIU Second Respondent
AND	DE KAI LIU Third Respondent

Member of Authority:	Nicola Craig
Representatives:	Emma Brankin, advocate for the applicant De Kai (Larry) Liu, agent for the respondents
Investigation Meeting:	23 and 30 August and 6 September 2022 by audio visual link
Submissions received:	22 August and 6 September 2022 from the applicant 7 September 2022 from the respondents
Date of determination:	7 December 2022

DETERMINATION OF THE AUTHORITY

- A. Under s 137(1)(b) of the Employment Relations Act 2000 (the Act) Bourson Limited is ordered to comply with two Authority determinations by paying Rebecca Young \$10,000 compensation, \$7,500 costs and \$71.56 for the Authority's filing fee, within 28 days of the date of this determination.**
- B. Under s 137(2) of the Act Yuzhen Qiu and De Kai Liu are ordered to take the steps necessary to ensure Bourson Limited meets its obligations to make payment in full of the amounts due to Ms Young.**

- C. Bourson Limited is to pay interest on the sums owing, from the dates they were due to be paid under the determinations until the date of payment.**
- D. Bourson Limited, Ms Qiu and Mr Liu are jointly and severally liable and ordered to pay Ms Young within 28 days of the date of this determination:**
- (a) \$1,437.50 as costs; and**
 - (b) \$71.56 for the filing fee.**

Employment relationship problem

[1] Rebecca Young and Bourson Limited (Bourson or the company) were involved in an earlier proceeding regarding their employment relationship. Ms Young worked in the Muffin Break café at Auckland's Botany Town Centre which was operated by Bourson.

[2] The Authority issued a determination finding that Ms Young was disadvantaged by unjustifiable actions of Bourson and awarding her compensation totalling \$10,000.¹ A later determination awarded \$7,500 to Ms Young as a contribution to her costs along with \$71.56 for the filing fee.²

[3] Bourson failed to pay anything to Ms Young. She brings this claim against the company. Also she pursues orders against current Bourson director Yuzhen Qui and former director De Kai (Larry) Liu (the directors). Mr Liu is sometimes referred to in documents as Mr Lu. Bourson and the directors oppose the orders sought.

The Authority's investigation

[4] Initially the claim against Bourson was to proceed on the papers, with service of the statement of problem having occurred on the company's registered office. There were difficulties with ensuring service on the directors during Covid-19 lockdown and higher Alert levels. An investigation meeting to consider claims regarding the directors was set.

¹ *Rebecca Young v Bourson Limited* [2021] NZERA 113.

² *Rebecca Young v Bourson Limited* [2021] NZERA 174.

[5] Ms Qui contacted the Authority through a Bourson email address identifying Mr Lui's name. She advised the Authority that she was in China and unable to attend a meeting due to border restrictions.

[6] Before the investigation went ahead, it was discovered that Bourson had been removed from the Companies Register. The timetable was vacated and investigation meeting adjourned.

[7] Ms Young's representative was able to get the company restored in June 2022 and the case proceeded. The parties agreed to the compliance order application against Bourson being dealt with on the papers and an investigation meeting being held on the application regarding the directors.

[8] Written witness statements were provided by Ms Young, her mother Catherine (Cathy) Young, a friend of Ms Young, along with Mr Liu and Ms Qiu.

[9] An investigation meeting was held by audio-visual link on 18 and 23 August and 6 September 2022. It took some time for Mr Liu to obtain and/or provide documents directed by the Authority to be provided, requiring the investigation meeting to be adjourned and resumed. I heard oral evidence from Ms Young, her friend, her mother and Mr Lu. An interpreter of Mandarin assisted at the meetings.

[10] Ms Qiu did not make herself available for the investigation meeting, initially communicating that she was sick, with Mr Liu saying she was still sick for the second day a week later and for the last meeting repeating that he was representing her. At no point did Ms Qui seek an adjournment.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

The issues

[12] The issues for determination in this case are whether:

- (a) a compliance order be made against Bourson;
- (b) compliance orders be made requiring Ms Qiu and Mr Liu to do everything possible to make the company pay the outstanding amounts owed to Ms Young;

- (c) interest be awarded on the outstanding amounts and
- (d) either party be required to contribute to the other's costs.

Events at Botany Town Centre

[13] Bourson did not make payments under the determinations and this matter was pursued in the Authority. Adding to Ms Young's sense of dissatisfaction was an impression that Bourson and/or Mr Lui were continuing to operate the café.

[14] Ms Young finished work at the Muffin Break café in January 2019. Her view was that the café at Botany Town Centre continued to operate after she finished working there, including after the time Bourson was said by Mr Liu to have ceased trading. Ms Young was living away from the area for a while and so did not visit the Town Centre regularly throughout the entire period but did move back to the area more recently and visits often. Ms Young recognises that there was a change in the shop and noticed the café had a new name, she thinks from some time in 2021.

[15] Ms Young saw Mr Liu working the café in about March or April 2022 and a staff member confirmed to her that Mr Liu is the boss. She also saw other former Muffin Break staff working at the new café. Ms Young had been told by a worker at the Town Centre that Mr Liu's wife had taken over running the café although this was denied by Mr Liu.

[16] In April 2022 Cathy Young also saw Mr Liu in the café, instructing staff, writing on paper and using the coffee machine. She noticed the café using a different colour scheme and logo. On a different day in April Ms Young's friend spoke to a café staff member who confirmed Mr Liu worked there, was the boss and would be in the next day. The friend has also seen Mr Liu working in the café on numerous occasions in recent times.

[17] Having seen Mr Liu working in the café this year, Ms Young believed he had simply carried on with the café but changed the operating name or franchise.

Companies Office records

[18] Companies Office records for Bourson show:

- On 8 July 2019 Mr Liu's ex-wife's shares in Bourson were transferred to him. There is no record of this in the financial statements, referred to below.
- On 24 September 2020 at a registration time of 21:06 hours, Mr Liu stepping down as director and Ms Qiu stepping in, with that being reversed at 21:13, seven minutes later. Both are shown as having the same address.
- On the same day at 21:08 the company's shares were registered as being removed from Mr Liu and allocated to Ms Qui, that being reversed via a registration at 21:14 hours.
- On 25 September 2020, Mr Liu filed a consent from Ms Qui to become a director. She is added as a second director.
- On 25 November 2020 shareholding was transferred from Mr Liu to Ms Qui and Mr Lui ceased as director.
- On 6 December 2021 Bourson was removed from the Companies Office register.
- On 3 June 2022 Bourson was restored to the register.

Bourson and the closure of the Muffin Break café

[19] Mr Liu's evidence is that Bourson stopped trading from 25 February 2019 and has not had business activity since then. Further, it was agreed with Ms Qiu from 1 April 2019 that she would take over the company shares and the director's role. More about this later. Mr Liu describes he and Ms Qui as kind of friends.

[20] According to Mr Liu the lease of Muffin Break premises operated by Bourson expired and could not be renewed seemingly because of the mall owners.

[21] Audited accounts for Bourson were sought by the Authority. Mr Liu supplied unsigned and unaudited accounts for the year ending 31 March 2019, advising that they had come from his accountant. The accounts indicate that the accountant relied on information provided by Bourson.

[22] Cross examination of Mr Liu challenged why the amount of stock purchased was so high but he maintained it was purchased for the Muffin Break café with some being thrown out when the business closed. Submissions for Ms Young emphasise unusual features such as Bourson ordering an average of \$2,100 net of stock per day but average net sales only being \$2,300 per day, giving a less than 7% gross profit. Mr Liu's explanation was that food had to be thrown away when the business closed in February 2019. No explanation was offered as to why supplies could not be on-sold to Mr Liu's other company LG Food Services Limited (LG) which also operates a café. An explanation suggested for Ms Young was that Bourson had been buying goods for another company, such as LG.

[23] Mr Liu described the assets which Bourson held and listed the amounts they sold for. Some assets were rented so were returned to the owners. He indicates that the total value of the assets was less than \$5,000. This reflected the age of many of the assets, some having been there for more than ten years prior to him taking over in 2015. No assets remain. Bourson was also responsible for the demolition of the café and an invoice from the franchisor was provided.

[24] Mr Liu spoke of taking out a loan for \$40,000 from a finance company and using cash flow from his other business to pay the debts of Bourson, with the exception of Ms Young's awards. In his written statement he said he took out the loan but at the investigation meeting he said the loan was taken out by his other company LG.

[25] Mr Liu expressed a responsibility towards the suppliers, customers and staff but did not appear to accept that Ms Young was deserving of any money. Payments to creditors were completed in March 2019. In theory Mr Liu, or LG then became a creditor of Bourson. The accounts do not show LG as a creditor but have Mr Liu's shareholder account showing Bourson owing him over \$1.3 million. It was not evident when that liability arose. Bourson's accounts to 31 March 2019 show a net loss before tax of over \$650,000.

[26] Mr Liu admitted under cross examination to himself taking two vehicles owned by Bourson with a book value of over \$26,000, as he was paying the company's debt (including through his other company LG).

The sale of Bourson shares

[27] Mr Liu's evidence was that as Bourson had a huge loss that could be used for tax purposes against profit from a new enterprise. The IRD income tax return for the year to 31 March 2019 shows a net loss to carry forward of over \$800,000. The 2020 tax return shows the same figure.

[28] At the investigation meeting Mr Liu provided a translation of the sales agreement with Ms Qui from Mandarin, which was approved by the interpreter. The agreement is dated 31 March 2019. It provides that Ms Qiu will take all the shareholding and assets of the company from Mr Liu for the payment of \$500.

[29] Mr Liu says he handed over all the information and documents, including email, bank account and IRD account to Ms Qui in 2019. He does acknowledge that she may not have had access to the accounts due to the limit of online access to gmail in China.

[30] The actual change of directorship and transfer of Bourson's shares did not occur in terms of the Companies Office until late 2020 – with a September change of director reversed shortly after it occurred and the two then being joint directors until November 2020. Ms Qui then took over by herself.

[31] It appears Ms Qui was not able to take up the directorship whilst she was overseas. Under s 10(d) of the Companies Act 1993 companies may have one or more directors but at least one director must be a New Zealand resident or live in an enforcement country.³

[32] Mr Liu also mentions difficulties with Ms Qui's RealMe account to enable Companies Office changes. RealMe requires a New Zealand passport, citizenship or birth or alternatively immigration details.⁴

[33] Mr Liu was not able to be very specific about when Ms Qui first came to New Zealand after the agreement to sell the company. His attendance at the Authority's investigation on 26 November 2020 regarding Ms Young's grievance claims was said to be to assist Ms Qui, who did not attend.

³ Companies Act 1993 Regulations 1994, regulation 12. Australia is the enforcement country, with a requirement that the person live in Australia and be a director in that country.

⁴ <https://www.realme.govt.nz/how-apply>

[34] Ms Qui advised the Authority that she had taken over Bourson from November 2020 but that the business had stopped running more than two years before and so would not be able to pay any debt. Mr Lui described any plan to establish a new enterprise being thwarted by Covid and its impact on Ms Qui's Chinese business.

[35] Mr Liu was asked under cross examination about whether there was an agreement that Ms Qui, as Bourson, will pay him back for the money he or LG advanced Bourson for the payment of creditors. He failed to answer, instead focusing on the company not being able to afford to do that. When I repeated the question about whether there was such an agreement, Mr Liu said he did not think so but maybe when things picked up after Covid. I indicated that it was surprising he was willing to give up a such a large loss for tax purposes without an agreement to get something in return. Mr Liu replied that he had been intending to use the loss himself but it took him a year to pay back the loan he had taken out to pay off Bourson's debts and by that time Covid had arrived.

[36] Mr Liu gave the impression of being an astute businessman. It seems unlikely that if he was the major creditor, he would sell the business for \$500 with no agreement or timeframe as to any repayment. Submissions for Ms Young suggest that that is unlikely, so either there was no debt as the details about the shareholder liability/equity were incorrect and/or there is some arrangement.

Mr Liu continues to work at the café

[37] Mr Liu did not deny working at the café under its new name.

[38] An advertisement in Skykiwi in May 2022 for staff for a Botany coffee shop has Mr Liu's business email address from his other café business and his phone numbers.

[39] Mr Liu says he is not and was not an owner or director of the business but did work as a manager. He indicated he only worked weekend days, describing it as casual work. He was directed to provide his employment agreement with the new café business, which he did after some correspondence. Mr Liu was reluctant to supply the agreement, at one point indicating that he had a right under the Evidence Act 2006, regarding self-incrimination.

[40] Eventually a contractor agreement was provided between a company (referred to as Company C) and Mr Liu commencing on 1 December 2021. Mr Liu did some work for Company C before the contractor agreement was signed.

[41] Company C has its registered office at a Stonefields' address. Mr Liu is not a director or shareholder of that company. However, the business starts with two capital letters which are the same as those of a company owned by Mr Liu from 2017. The presenter of the form for Mr Liu's shareholding in that company has the same name as the director of the company running the new café. I refer to her as Ms M. She was also a shareholder in Mr Liu's business for a period. Mr Liu acknowledges that he has business connections with Ms M.

[42] Bourson's business address from April 2021 is a Stonefields' address which is also Ms Qui's address according to Company's Office records. It was also the address for the Company C from 2018 to 2019. Despite these factors, Mr Liu says he did not recognise the address.

Bourson must comply with the Authority's determinations

[43] Ms Young has not received any payment from Bourson under the two determinations. Her representative chased the company demanding payment but to no avail. The company says it is unable to pay.

[44] Bourson owes Ms Young money under the determinations and there is no valid reason why a compliance order should not be issued.

[45] Under s 137(1)(b) of the Act Bourson Limited is ordered to comply with two Authority determinations by paying Rebecca Young \$10,000 compensation, \$7,500 costs and \$71.56 for the Authority's filing fee, within 28 days of the date of this determination.

Compliance orders regarding non-parties to the employment relationship

[46] Compliance orders may be made against under s 137(2) of the Act against a person who is a party (to the proceeding) in respect of non-compliance. This includes non-compliance with any order or determination of the Authority.⁵ The availability of such orders against those who were not a party to the employment agreement was

⁵ The Act, s 137(1)(b).

confirmed in *Allen Chambers Limited v Pelabon*.⁶ The necessary degree of control must exist. There the Employment Court ordered a director to ensure that company made the necessary payments.

[47] This is not a determination that a director is personally liable to make the payment as the employer. It concerns directors taking steps to ensure the employer company makes payment.

[48] Mr Liu mentions of the beyond reasonable doubt burden of proof, but that is not applicable to cases such as the present, where the civil standard of the balance of probabilities applies.

Ms Qiu and Mr Liu must take steps

[49] In considering whether a compliance order should be made against Ms Qiu and/or Mr Liu, the following factors are significant:

- Ms Young's first personal grievance was raised by 3 December 2018 letter whilst she was still employed. In early 2019 she raised a constructive dismissal grievance.
- Mediation occurred in early February 2019.
- In about February and March 2019 Mr Liu arranged for payment of all of the creditors of Bourson - except for the contingent liability to Ms Young and part of what is in the shareholders account as owing to him. Mr Liu made it clear in his evidence that he did not regard Ms Young as a deserving creditor.
- Even Mr Liu received some payment, by way of receipt of two vehicles with a book value of over \$26,000 - well over the total of the Authority's awards against Bourson. There is no record in the financial statements filed with the IRD to indicate any change in Bourson's financial position between the 2019 and 2020 financial years.

⁶ *Allen Chambers Limited v Pelabon*. [2019] ERNZ 64 at [45] and [46].

- The vehicles were seemingly transferred into Mr Liu's name despite LG borrowing the money used to pay Bourson's debts. The lines between the companies and Mr Liu seem blurred.
- In the absence of some additional arrangement, the identification of the sale to Ms Qiu as occurring in late March 2019 does not fit comfortably with Mr Liu saying he was intending to use the loss for tax purposes himself but had to take a year (until early 2020) to repay the loan taken out to clear Bourson's debts.
- Mr Liu has represented the company in the Authority in the earlier proceeding, before and after he ceased being a director and shareholder of the company. He also represented Bourson and Ms Qiu in this proceeding. This supports the possibility of some on-going arrangement between them.
- Bourson had a large loss, available for tax purposes plus on the accounts owed Mr Liu a large amount of money but he sold it for \$500. The nature of the arrangement to give him a return seems surprisingly vague, especially when a two-page written agreement was filed regarding the sale and that agreement fails to mention this element. Clearly Mr Liu does regard himself as having some entitlement to use that loss for his own business purposes.
- There was no explanation offered for why Mr Liu's other company, which had reportedly helped fund the payment of Bourson's creditors, did not take advantage of the loss itself. Or why Bourson was just not left to sit dormant until Mr Liu had the opportunity to arrange a suitable enterprise himself.
- Ms Qiu became a director of Bourson on 25 September 2020. She was the director at the time of the investigation meeting in the earlier proceeding and when the determinations were issued.
- The final part of the transaction between the directors was registered one day before the Authority's investigation meeting into Ms Young's personal grievance claims on 26 November 2020. Yet the sale and

transfer did not feature in that proceeding. There was no indication that Ms Qui was in New Zealand at that time nor mention of a sale or transfer.

- Mr Liu had access to Bourson's gmail account when he was communicating with the Authority from that address in the period from mid-2020 to December 2020. He accepts he still has access but does not use it.
- Ms Qui was aware of the Authority's determinations at least by November 2021. She did not respond to correspondence on behalf of Ms Young and from the Authority until minutes after the Authority emailed about setting down a hearing date for this compliance order matter. She allowed Bourson to be removed from the Companies Register due to a failure to file an annual return.
- Commonality of addresses. Mr Lui denies knowing whether Ms Qui and Ms M from Company C know each other, despite them seeming to have the same address and he being friendly terms and/or having business connections with both.
- Mr Liu's works in a managerial capacity at the new café operating on the same premises is suspicious. His explanation of a casual arrangement is not compelling. He suggests that his Skykiwi account was used for convenience to advertise for staff, but it seems Ms M could establish her own account for free. The inclusion of Mr Liu's email address and phone numbers for job seekers to respond to make it clear he has a substantial role in the business. His explanation of only working weekend days is not consistent with the staff member identifying that he was working on 7 April 2022, which was a Thursday. Cathy Young witnesses him there on a Monday, although it was a public holiday.
- Mr Liu was reluctant to provide his agreement with the new café. The agreement reveals the company to have a sole director and shareholder Ms M with whom Mr Liu shared a business previously.
- Mr Liu and Ms M have previously had and continue to have shared business interests.

[50] I am satisfied that this is a situation where both Ms Qui and Mr Liu should have a compliance order made regarding them. They both have had control over Bourson. Given that some of the events described above happened when only Mr Liu was the director and that only Ms Qui is the director, it is necessary to make order regarding both to ensure that their steps work together to ensure payment occurs.

[51] Under s 137(2) of the Act Yuzhen Qiu and De Kai Liu are ordered to take the steps necessary to ensure Bourson Limited meets its obligations to make payment in full of the amounts due to Ms Young.

Bourson must pay interest on the amounts outstanding

[52] Bourson Limited is to pay interest on those sums from the dates they were due to be paid under the determinations until the date of payment, calculated in the Ministry of Justice's civil debt interest calculator.⁷

Further costs must be paid

[53] Ms Young seeks additional costs of \$1,250 plus GST (\$1,437.50) as a contribution to costs incurred in seeking payment by Bourson and orders concerning the directors. The application relies in part on the delays caused by Bourson and the directors regarding in complying with the Authority's directions.

[54] Ms Young has been successful in her application. The Authority's notional daily tariff for a one-day investigation meeting is \$4,500. Due to delays in providing documents by Bourson and the directors this matter was spread over three short investigation meeting days, totalling about two hours and 45 minutes.

⁷ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

[55] The amount sought by Ms Young is reasonable. She is unable to set off GST. Bourson, Ms Qiu and Mr Liu are jointly and severally liable and ordered to pay Ms Young within 28 days of the date of this determination \$1,437.50 as costs and \$71,56 for the filing fee.

Nicola Craig

Member of the Employment Relations Authority