

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 61

File Number: 5311160

BETWEEN Fuqiang (James) Yu  
Applicant

AND Xin (Bill) Li and Symbol  
Spreading Limited  
Respondents

Member of Authority: Denis Asher

Representatives: Mr Yu represented himself  
Mr Li represented himself and the Company

Investigation Meeting Wellington, 12 April 2011

Submissions Received By 17 April 2011

Determination: 26 April 2011

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1] Was Mr Yu an employee of the respondents (Mr Li or the Company), or was he a contractor? If he was an employee, was he unjustifiably disadvantaged and what if any remedies are payable to him? Is he entitled to other damages from the respondents?

[2] Notwithstanding my earlier recommendation they do so, the parties did not undertake mediation in respect of this employment relationship problem. Mr Li's and

Mr Yu's conduct and demeanour toward one another during the investigation on 20 April confirmed my earlier assessment there was no value in directing the parties to mediation.

### **The Investigation**

[3] During a telephone conference on 1 November 2010 the parties agreed to a one-day investigation of the employment relationship problem in Wellington on 12 April 2011 and a timeline for the provision of witness statements.

[4] I received a late application from Mr Li that the investigation set down for the following day be adjourned. The reason advanced for the application was the non-availability of a Company employee to act as its representative and provide evidence because of a "*personal emergency*" (email from Mr Li received 3.09 p.m. 11 April).

[5] I declined the application because of the absence of particulars (such as a doctor's certificate, etc) and because the respondent had agreed 5 months earlier to provide witness statements but had failed to do so (again without providing any explanation).

### **Background**

[6] The parties agree that Mr Yu worked for the Company from April 2009 until 20 July 2010.

[7] The parties disagree as to whether Mr Yu was an employee or an independent contractor per the agreement he and Mr Li signed in early April 2009

[8] Mr Yu says, and Mr Li did not disagree, that he was required to train on the job for a month before starting work; he was not paid for that time.

[9] Mr Yu says that, during the time he worked for the Company, he did not have control of his hours: he was required to work from 9.00 a.m. to 6.00 p.m. each day and take one hour for lunch, the time for which being set by a white-board roster. Late attendance and early departure resulted in pay deductions.

[10] As confirmed by the applicant's employment contract, Mr Yu's pay structure was a fixed "*base payment*" (attachment to statement of problem) of \$250 per week plus a 20% commission of advertising bookings (after GST) for the month. A missed day resulted in a \$50 deduction from his weekly base payment.

[11] He was also required to record the time and location of every client he visited. Time spent visiting clients was limited, i.e. 20 minutes if the client was in Wellington, 30 in Lower Hutt and 40 in Upper Hutt and Porirua.

[12] Mr Yu says, and it was not disputed, that he was also expected to do office work including answering the phone, chase overdue payments, contact clients for ad material and assist the designer doing ads art work.

[13] While Mr Yu made use of the Company's land line and computer to contact clients, the Company required long distance and cell phone calls be at his expense, as was the use of his own car and any associated expenses.

[14] Mr Yu could not offer his service to competitors.

[15] Mr Yu says his last day in the office was on 20 July 2010, when – on that date – Mr Li refused to pay him for the preceding month, despite the applicant having completed bookings for the respondents in the same period.

[16] The remedies sought by the applicant, as particularised in submissions received from him on 17 April 2011, are :

- a. Commission on booking from June 2010;
- b. The minimum wage, holiday pay and (as set out in his statement of problem) sick leave taken during the time he worked for the Company;
- c. Work related costs, including the use of his car, petrol, phone cards etc;  
and
- d. Compensation for hurt and humiliation of \$3,000.

[17] In total, Mr Yu claims \$39,718.

### **Respondent's Position Summarised**

[18] Mr Li says that, when approached by the applicant in March 2009, he explained to Mr Yu that the Company's only vacancy was for a salesperson and, as it was a performance based job, it only hired contractors to sell advertising. The applicant agreed to be a contractor. It was also agreed the Company would offer him training and, in return, he would commit to a 24-months contract term.

[19] Tax deducted for Mr Yu was withholding tax, not PAYE.

[20] Once Mr Yu obtained his permanent residency, and in breach of the contract terms, he terminated his relationship with the Company by way of a letter dated 3 June 2010 giving less than two months notice. When reminded of the contract terms, the applicant then made a claim for 34% commission earnings. When that request was refused the applicant lodged a claim with the disputes tribunal. Following a hearing at the tribunal Mr Yu changed his claim and started to argue he was an employee.

[21] Mr Yu placed anonymous gossip on a website aimed at damaging Mr Li's personal reputation and that of the Company.

[22] Mr Yu enjoyed flexible working days and hours, including taking 12 days off during his employment so as to go to Auckland airport to meet, separately, his mother in law and mother, attend the hospital at the birth of his child, etc (refer to the copy of his work diary). Mr Yu never sought the respondents' agreement for that time off. The applicant came to the Company's office because it suited him to do so; he was responsible for the costs of using the Company's phone, fax, papers etc. Usually Mr Yu made appointments with potential clients and went, at his own free will, to meet with them.

[23] The applicant was able to do his personal shopping as he wished during office hours.

[24] Mr Yu not only sold advertising space to a client but also set up a business relationship with them and sold vehicles for that client; that work was not restricted only to weekends.

[25] During the investigation Mr Li counter-claimed in respect of Mr Yu's failure to give 3-month's notice and, per the parties' contract, for reimbursement of training costs for failure to complete a contracted term of 2-years employment.

## **Discussion**

[26] The starting points for determining whether Mr Yu was an employee are the relevant provisions of the Act and the judgement of the Supreme Court in *Bryson v Three Foot Six Ltd (No 2)* ERNZ 372.

[27] As was appreciated by the parties going into the investigation, s. 6 of the Employment Relations Act 2000 (the Act) requires the Authority to consider and determine the real nature of the relationship between Mr Yu and the respondents.

[28] The inquiry, as noted by Chief Judge Colgan in *Tsoupakis v Fendalton Construction Ltd* unreported, 18 Jun 2009, WC 16/09, is "*intensely factual*" (par [3], above).

[29] Section 6 provides as follows:

### **6**      *Meaning of employee*

(1)      *In this Act, unless the context otherwise requires, **employee**—*

(a)      *means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*

(b)      *includes—*

(i)      *a homemaker; or*

(ii)     *a person intending to work; but*

- (c) *excludes a volunteer who—*
- (i) *does not expect to be rewarded for work to be performed as a volunteer; and*
- (ii) *receives no reward for work performed as a volunteer.*
- (2) *In deciding for the purposes of subsection (1)(a) 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.*
- (3) *For the purposes of subsection (2), the court or the Authority—*
- (a) *must consider all relevant matters, including any matters that indicate the intention of the persons; and*
- (b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[30] As is made clear in *Tsoupakis* (above),

*..., the most authoritative interpretation and application of s6 was by the Supreme Court in Bryson. Principles in deciding cases such as this, identified by the Supreme Court, include:*

- *Section 6 defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service, a definition which reflects the common law.*
- *The Authority or the Court, in deciding whether a person is employed under a contract of service, is to determine “the real nature of the relationship between them”: s 6(2).*
- *The Authority or the Court must consider “all relevant matters” including any matters that indicate the intention of the persons: s 6(3) (a).*

- *The Authority or the Court is not to treat as a determining matter any statement by the persons that describes the nature of their relationship: s 6(3) (b).*
- *“All relevant matters” include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship.*
- *“All relevant matters” will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.*
- *“All relevant matters” include features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).*
- *Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental tests.*
- *Industry practice, while not determinative of the question, is nevertheless a relevant factor.*
- *Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.*
- *Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.*

**Facts affecting work status**

[31] As is made clear above (par 10), during his employment with the respondents, and consistent with the provisions of his employment agreement, Mr Yu was paid “*a base pay for services*” (clause 3.3, attachment to statement of problem) of \$250 plus 20% commission. Withholding tax was deducted by the respondents.

[32] Mr Yu had no business card indicating he was available for contract work. In fact his employment agreement was expressed as being for two-years, expiring on 1 May 2011 (clause 2.1). It also provided for non-competition (clause 9), and expressly prohibited Mr Yu from working in any way for a competitor of the Company during and for 6-months after the termination of his employment. He was and is not GST registered.

[33] There is no evidence of Mr Yu working for a competitor before or during his time with the respondents, or of him being in business on his own account. While he agrees he sold cars during his employment with the respondents he says he did so in his own time, at weekends. There is no evidence to contradict that claim. Mr Yu says a newspaper advertisement produced by Mr Li makes clear he was available for car sales only at weekends and by appointment.

[34] The written agreement between the parties described itself as an “*independent contract*”, and stated that, “*The Contractor shall provide services to the Company as detailed in the first schedule*” (above). It also provided at clause 5.1 that, “*This contract is for services and in no circumstances shall the Contractor be regarded or deemed to be an hourly rate paid employee of the Company*” (above).

[35] Mr Yu worked regular, Monday to Friday business hours during which time he assisted in the respondent Company’s office the administration of its business, including participating in a lunch-time roster, while also worked by himself when contacting clients and potential clients. Failure to work his prescribed hours would result in deduction from his base payment

[36] Mr Yu was required to make use of his own vehicle and personal mobile phone.

[37] Mr Yu took no financial risk in the parties' relationship, or at least no risk other than employees take in an employment relationship. However, the contract purported to make him liable to the respondent Company in respect of any action brought against it as a result of the applicant's "... *negligence or breach of this contract or as a result of the services supplied by (Mr Yu) breaching the rights of a third party*" (clause 4.7, above).

### **Conclusion**

[38] Other than the employment contract, which purports to reflect a common intention that Mr Yu's employment was as a contractor, and the use of his own car and portable phone at his own expense, and in the absence of evidence of industry practice, all of the evidence points to Mr Yu being in reality an employee of the respondent Company. That is because an application of the control and integration tests clearly supports the conclusion that Mr Yu was an integral part of the respondent Company's business and it was the latter, via its director, Mr Li, that highly controlled his work activities.

[39] Mr Yu's primary responsibility, to sell advertising space, was central to the respondent Company's business and economic survival.

[40] Mr Yu was an as much part of the respondent Company's business as one would expect of an employee. The real nature of the relationship was that of employer and employee and Mr Yu is therefore entitled to the employee benefits of the Act.

### **Remedies**

#### **Unjustified Disadvantage**

[41] Mr Yu says he was unjustifiably disadvantaged. As I understood Mr Yu's evidence, his feelings of hurt and humiliation arose out of the respondent Company's

failure to pay him for June and July 2010. That failure caused Mr Yu to be unable to pay for his living expenses and meet his obligations to his partner and young daughter; he was obliged to borrow money, from GE Finance and Insurance and his family. The first evidence of the alleged grievance being raised with the respondents is by way of Mr Yu's statement of problem filed on 3 September 2010. Mr Yu gave notice of his resignation, with termination effective from 30 July of that year. His notice of grievance is therefore within the statutory 90-day time frame.

[42] While limited in depth and scope, Mr Yu's evidence as to actual hurt was clear. As an employee, Mr Yu was entitled to prompt payment of his wages and commission earnings. The Company's failure to meet that obligation, or to undertake steps to promptly resolve the resulting employment relationship problem, resulted in Mr Yu experiencing hurt and humiliation, as a result of an unjustified disadvantage. Bearing in mind the evidence of distress, I am satisfied compensation of \$2,000 is appropriate in all the circumstances.

### **Contributory Fault**

[43] There is no evidence of any actions on Mr Yu's part that contributed toward the situation that gave rise to his personal grievance.

### **Commission Earnings**

[44] In his statement of problem Mr Yu says, "*I am entitled to get paid 34.9% commission on bookings from June 2010*" (par 1, 3<sup>rd</sup> page, undated attachment). He sought a total of \$11,198.3.

[45] I questioned the applicant on his claim during the investigation, pointing out the contracted provision that he be paid 20% commission of the pre-GST signed advertising order (par 3.2). In his submission emailed to the Authority on 17 April Mr Yu appears to accept that any claim for commission order is properly limited to 20%. In that communication he calculated the figure to be \$6,493.

[46] Mr Li's position, that the applicant owes his Company significant damages (a total of \$5,509.99: refer to counter-claim received on 12 April 2011) was anticipated

in his counsel's letter of 15 July 2010 to Mr Yu in which the respondents raised the following matters:

- Mr Yu's resignation with less than 2-months notice was in breach of his contracted obligation to provide 3-month's notice and would cause loss;
- The Company had invested significant resources and training in Mr Yu and, as provided for by clause 8.5 (c) of the employment contract, the applicant was obliged to compensate the Company for one and a half month's earnings to cover this;
- Some of Mr Yu's clients had refused to pay the Company thus obliging it to spend resources in an attempt to recover overdue payments: Mr Yu was therefore on notice, consistent with the terms of his contract, that any loss the Company suffered through breaches of the contract would be recovered from him; and
- As a result of his resignation Mr Yu was not available to obtain materials from clients for advertising purposes and the Company therefore had no liability to pay anything after his resignation had terminated.

[47] No evidence was produced by the respondents in support of its claim that Mr Yu's resignation with less than 3-months notice had caused them financial loss.

[48] Similarly, no evidence was produced by the respondents to support its training costs claim.

[49] Unsurprisingly, no evidence was produced by Mr Yu in support of his claim that he was owed unpaid commission earnings of \$6,493. Mr Li did not provide evidence of advertising, etc earnings from Mr Yu's sales, following his resignation effective 20 July 2010.

[50] On the evidence before the Authority it is impossible to quantify what if any unpaid commission earnings are owed to Mr Yu.

### **Unpaid Wages**

[51] Mr Li confirmed that wages payable to Mr Yu for June and July 2010 were withheld and not paid to him, following notice of his resignation.

### **Outcome**

[52] Consistent with the provisions of the Minimum Wage Act 1983, the parties are to attempt to reach agreement as to what if any wages are owed to Mr Yu by the Company by applying the following formula:

*Minimum weekly adult rates for the period April 2009 to 20 July 2010, less weekly base payments for services of \$250 less weekly commissions earned by, or payable to, Mr Yu = in the event of a shortfall, minimum wages payable to the applicant, plus holiday pay calculated on the greater amount.*

[53] For the period 1 April 2009 to 31 March 2010 the minimum weekly wage payable to an adult worker was \$500. For the period 1 April 2010 to 20 July 2010 the figure increased to \$510 per week.

### **Direction to Mediation**

[54] In the event the parties are unable to reach agreement on the resulting figure the parties are directed to mediation on this matter, and if resolution cannot be reached then the calculation can be referred back to the Authority.

[55] In that event the Company is to provide records of all base payments and commissions earned by, or payable to, Mr Yu over the period April 2009 to 20 July 2010.

**Other Matters**

[56] In the absence of relevant contractual terms, Mr Yu's claim for damages arising out of his agreement to provide the Company with the free use of his car and portable phone cannot succeed.

[57] Mr Yu became entitled to paid sick and bereavement leave after his first 6-months continuous employment: s. 63 Holidays Act 2003. He was entitled to five days for every 12-months of employment: s. 65. He is therefore entitled to seek payment of wages for any period of sick leave consistent with these provisions.

[58] As provided for in par 53 above, leave is reserved to the parties to return this matter to the Authority if agreement on the same cannot be reached in mediation in respect of Mr Yu's entitlement.

**Counter-Claim**

[59] In the absence of evidence in support of damages arising out of Mr Yu's failure to give 3-months notice as provided for in his contract and of evidence in support of the claimed training costs, while bearing in mind the applicant's uncontested evidence he was not paid for his first month's employment, I decline to award any monies under this heading.

**Determination**

[60] Mr Yu is an employee of the respondent Company and, per the formula provided above, the Company is to calculate, and pay to him, his outstanding wages, as well as holiday pay calculated in respect of the same, and sick leave.

[61] The Company is to pay compensation of \$2,000 (two thousand dollars) to Mr Yu for hurt and humiliation.

[62] Costs are reserved. As the parties represented themselves, and as costs typically follow the event, Mr Yu is entitled at least to recover his filing fee.

**Denis Asher**

**Member of the Employment Relations Authority**