

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 192
3023309

BETWEEN LILI DONG
 Applicant

A N D KITCHEN MASTER LIMITED
 First Respondent

A N D SUIFANG LIANG
 Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: The applicant in person
 Paul Pang, counsel for Respondents

Investigation Meeting: 31 May and 1 June 2018 at Auckland

Submissions Received: 4 June 2018 from Applicant
 1 June 2018 from Respondents

Date of Determination: 18 June 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY
ON A PRELIMINARY MATTER**

- A. The underlying and true nature of the relationship between the parties was that of an independent contractor, not employment.**
- B. Accordingly, the Authority has no jurisdiction to investigate the claims by the applicant, Ms Dong, against the first respondent, Kitchen Master Limited (Kitchen Master) or the second respondent, Ms Suifang Liang.**
- C. Costs are reserved.**

Employment Relationship Problem

[1] The applicant, Ms Lili Dong, says she was employed by Kitchen Master from 20 February 2017 until 30 September 2017 in the role of Marketing Director.

[2] Ms Dong says that Kitchen Master did not pay her salary during the course of her employment due to financial difficulties. Ms Dong says Kitchen Master owes her outstanding salary totalling \$60,000 gross.

[3] The respondents, Kitchen Master and Ms Liang deny Ms Dong's claims. They say Ms Dong was never employed by Kitchen Master, she contracted her services to Kitchen Master and was paid a commission.

[4] On 8 May 2017, Ms Dong established her own company, K Master Appliance Limited, now named NZDMG Appliance Limited, and continued to provide services through it to Kitchen Master. Kitchen Master and Ms Liang say they had no control over Ms Dong's work and the real relationship between the parties was a commercial arrangement.

Issue

[5] The preliminary issue for determination by the Authority is whether the contractual relationship between Ms Dong and Kitchen Master was one of employment or independent contract.

Investigation meeting

[6] As permitted under s.174 of the Employment Relations Act 2000 (the Act), this Determination has not set out all the evidence received. The Determination states findings and relevant facts and legal issues in relation to the preliminary matter and makes conclusions in order to efficiently dispose of the matter.

[7] The investigation of this preliminary matter took two full days in the Authority. This was partly due to the volume of evidence produced by the parties. It was also due to the fact that some witnesses spoke the Cantonese language and some spoke the Mandarin language. The Cantonese language was then translated into the Mandarin language or vice versa and then translated into the English language.

[8] For the Authority's investigation, the applicant, Ms Dong and her husband, Mr Hua Duan, each filed a witness statement. Mr Haoran Mao, a former shareholder of Kitchen Master and the person Ms Dong says employed her; Mr Wenyuan Xie, a benchtop supplier to Kitchen Master; and Mr Bruce Hi, a customer of Kitchen Master, each also filed witness statements.

[9] Ms Suifang Liang, director of Kitchen Master, and her husband, Mr Weijun Chen, filed witness statements, as did Mr Zhiwei Deng, on behalf of Kitchen Master.

[10] Ms Elsie Wong, the former accountant for Kitchen Master, was summonsed to appear before the Authority and did so to answer the Authority's questions.

[11] Each witness confirmed by affirmation or on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information, and did so.

[12] The Authority was assisted by an interpreter fluent in the Mandarin and Cantonese languages.

Relevant facts

Kitchen Master

[13] Kitchen Master is in the business of designing, building and supplying kitchens to customers. Kitchen Master was incorporated on 4 October 2016. Kitchen Master was established to purchase the business of Ex-Space Limited, a kitchen supplier. At the time of incorporation, Ms Suifang Liang was the sole director and held 60% of the shares in Kitchen Master. Mr Haoran Mao initially held 40% of the shares in Kitchen Master.

Approach made to Ms Dong

[14] Mr Mao says he was anxious to ensure Kitchen Master was able to attract customers and decided to seek out a salesperson. Mr Mao undertook some research within the Chinese community to see who he could approach for such a role. Mr Mao also searched *The Mandarin Pages*, a Chinese newspaper, and noticed that Ms Dong featured in a large number of advertisements promoting products. Mr Mao made contact with Ms Dong who was a salesperson for Buyrite Appliances. Mr Mao met

with Ms Dong to discuss an opportunity for her with Kitchen Master. At the time of the meeting, Ms Dong was a commission only salesperson for Buyrite. Mr Mao says he discussed a full-time position for Ms Dong at Kitchen Master. Ms Dong says she understood from Mr Mao that she was to be employed by Kitchen Master on a full-time basis as the Marketing Director.

Ms Dong's engagement by Kitchen Master

[15] It became apparent during the course of the Authority's investigation meeting that following Mr Mao's approach to her, Ms Dong sought the agreement of the owner of Buyrite Appliances to enter into an arrangement with Kitchen Master whereby Kitchen Master would purchase its appliances from Buyrite and Ms Dong would introduce customers to Kitchen Master.

[16] The arrangement initially was that Ms Dong would be paid a commission of 3% by Kitchen Master on all customers successfully introduced by her to Kitchen Master.

[17] Mr Mao was the person with whom Ms Dong primarily dealt. She says she had almost no interactions with Ms Liang. Mr Mao says he had authority to recruit Ms Dong on behalf of Kitchen Master. Ms Liang denies this and says, even if he did, the relationship between Kitchen Master and Ms Dong was never that of employment.

[18] Ms Dong says she was promised a salary of \$100,000 per annum by Mr Mao and that this arrangement began in February 2017. However, during the course of the Authority's investigation, Mr Mao and Ms Dong say the \$100,000 salary was not discussed until May 2017. Up until that time Ms Dong earned a commission only.

[19] Ms Dong was not paid a salary of \$100,000. This, she says, was because Kitchen Master, being a new company, was struggling financially.

KMaster Appliance Limited

[20] Ms Dong says Mr Mao asked that she establish her own company to sell appliances to customers of Kitchen Master. Ms Dong agreed and on 8 May 2017 KMaster Appliance Limited (KMaster Appliance) was incorporated. Ms Dong is the sole director and shareholder.

[21] From late May 2017, KMaster Appliance made cash deposits into Kitchen Master's bank account, totalling \$61,000. Ms Dong says the payments were made by KMaster Appliance at Mr Mao's request because of Kitchen Master's cash flow crisis. Mr Mao says Kitchen Master was suffering a cash flow crisis at the time and was having difficulty paying debts such as rent. Mr Mao says he asked Ms Dong and Mr Duan for the cash advances so Kitchen Master could pay debts such as rent.

[22] Ms Dong, Mr Duan and Mr Mao say the payments to Kitchen Master were to help it with its cash flow problems at the time. Ms Dong and Mr Duan say they trusted Mr Mao and believed they would be paid back very soon after making the cash advances. The cash advances were not repaid.

[23] For the 6 month period from March 2017 until the end of August 2017, Ms Dong, Mr Duan and K Master Appliance had made cash advances to Kitchen Master totalling \$115,000.

[24] When questioned about why cash advances continued over this length of time, Mr Duan, said that Mr Mao promised that the moneys advanced to Kitchen Master would be an investment by them in a new company he was establishing, KMaster Panel Limited.

KMaster Panel Limited (now NZDMG Limited)

[25] KMaster Panel Limited was incorporated on 5 September 2017. Ms Dong is the sole director and shareholder. Mr Mao is not a shareholder or director, but he was responsible for the filing of the documents in the company's office.

[26] Ms Dong and her husband both said that they trusted Mr Mao and that is why they loaned Kitchen Master the funds personally and advanced the funds from KMaster Appliance.

[27] It became apparent during the course of the investigation meeting that the cash advances were in return for an investment in the new company. Unfortunately, the loans have not been repaid to Ms Dong and her husband, nor to KMaster Appliance.

[28] From the evidence, it is apparent that Ms Liang, her husband Mr Chen, Ms Dong and her husband, Mr Duan, and Mr Mao were in business together.

[29] The following companies were set up by these individuals during the relevant time. They are:

- Kitchen Master, incorporated on 24 October 2016. Ms Liang is the sole director and shareholder.
- KMaster Appliance incorporated on 8 May 2017. Ms Dong was the sole director and shareholder. On 24 November 2017, the shareholders changed to KMaster Panel and Ms Dong, each with one share. KMaster Appliance changed its name to NZDMG Appliance on 22 February 2018 and its shareholdings changed to NZDMG Limited and KMaster Panel Limited.
- KMaster Panel Limited incorporated on 5 September 2017. KMaster Panel Limited was renamed NZDMG Limited on 22 February 2018. Ms Dong is the sole director and shareholder.
- KMaster Kitchen Limited incorporated on 24 October 2017. Ms Liang is the sole director and shareholder.
- KMaster Group Limited incorporated on 18 December 2017. Ms Liang is the sole director and shareholder.
- KMaster Building Supply Limited incorporated on 2 November 2017. Mr Wenyuan Xie is the sole director and shareholder.

Discussions concerning Ms Dong's working arrangements

[30] Ms Dong and Mr Mao never discussed the payment of PAYE or Kiwisaver in respect of Ms Dong. There was no discussion about holidays or sick leave, or any other such entitlements that one would expect to be discussed if the relationship between Ms Dong and Kitchen Master was that of employment.

[31] Ms Dong says she was paid salary by Kitchen Master from which PAYE was deducted on 21 September 2017 and that proves, in her view, that she was an employee.

[32] Ms Liang disputes this and says that Ms Dong asked that Kitchen Master be seen to be paying her PAYE so that from the bank's point of view she and her

husband would be able to show the bank they had a stable income flow in order to purchase a house. Ms Liang says she agreed to help Ms Dong but that this did not mean that Ms Dong was an employee. In hindsight, Ms Liang says she should not have made that payment. I prefer the evidence of Ms Liang on that matter.

The law

[33] Section 6 of the Act states:

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...

...

(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.

[34] The leading case on s.6 of the Act is the Supreme Court decision of *Bryson v Three Foot Six Limited*¹. Chief Judge Colgan in *Singh v Eric James & Associates Limited*² states at para [16] that the inquiry in each case involving s.6 of the Act, is “intensely factual” and at para [17] sets out a number of principles derived from the *Bryson* decision.

[35] The Employment Court in *Poulter v Antipodean Growers Limited*³ summarised the applicable principles derived from *Bryson* and earlier judicial decisions as follows:

- (1) The Court must determine the real nature of the relationship.
- (2) The intention of the parties is still relevant but no longer decisive.

¹ [2005] 3 NZLR 721

² [2010] NZEmpC 1

³ [2010] NZEmpC 77, 17 June 2010 at para [20]

- (3) Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- (4) The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the “fundamental” test.
- (5) The fundamental test examines whether a person performing the service is doing so on their own account.
- (6) Another matter which may assist in the determination of the issue is industry practice although this is far from being determinative of the primary question.

[36] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessary to be taken under s.6 is for the Authority, or the Court, to gain an overall impression of the underlying and true nature of the relationship between the parties.

Financial arrangements

[37] Ms Dong was paid a commission on sales made for Kitchen Master. Ms Dong did not receive a salary. Ms Dong says this was because Kitchen Master was undergoing financial difficulties and that she trusted Mr Mao to pay her when Kitchen Master was able to do so. Ms Dong did not seek payment of a salary during the time she says she was employed by Kitchen Master. This claim was made after the business relationship with Ms Liang soured.

[38] Ms Dong and her husband, at the request of Mr Mao, personally advanced cash to Kitchen Master to assist in its cash flow. Mr Duan said payments were made to pay debts such as Kitchen Master’s factory rental.

[39] Mr Mao, when asked about the payments, told the Authority that the payments were used by Kitchen Master so it could purchase equipment and pay rental and other debts. Mr Mao requested that Ms Dong set up KMaster Appliance to assist Kitchen Master with its cash flow crisis. Mr Mao says that he and Ms Dong agreed that KMaster Appliance would be a joint venture with Kitchen Master.

[40] Mr Duan said that they continued to make the payments over a 6 month period because Mr Mao promised that he and Ms Dong would have an investment in the new joint venture, KMaster Panel Limited.

Control test

[41] I do not consider there was any control exerted by Kitchen Master over Ms Dong. There was no employment agreement and there was no discussion of any other of the employment related entitlements that apply to an employment relationship. Ms Dong introduced customers to Kitchen Master and was paid a commission. Ms Dong then set up her own company which sold kitchen appliances to Kitchen Master customers. Further companies have been established subsequently to carry on the business.

[42] Ms Dong says that all her emails were as Marketing Director for Kitchen Master. In my view these emails do not determine the nature of the relationship. Ms Dong sent them in her capacity as an independent contractor on behalf of Kitchen Master.

Overall impression

[43] There were far more features, in my view, of an independent contract relationship between the parties than an employment relationship.

[44] From the evidence, the overall impression gained by the Authority of the underlying and true nature of the relationship between Ms Dong and Kitchen Master was that it was one of a contract for services.

[45] It must follow that the Authority has no jurisdiction to investigate the claims brought by Ms Dong which appear, from the evidence, to be claims relating to the breakdown in a commercial relationship.

Costs

[46] Costs are reserved. Kitchen Master and Ms Liang have 14 days from the date of this Determination to file submissions as to costs. Ms Dong has 14 days from receipt of the submissions as to costs in which to file her response.

Anna Fitzgibbon
Member of the Employment Relations Authority