

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 55
3022722

BETWEEN TORRELL PRICE
Applicant

AND OPTIMUM IMPORTS
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Ken Nicolson, Counsel for the Applicant
David Edginton, Agent for the Respondent

Investigation Meeting: 7 and 14 June 2018

Submissions received: 9 August and 5 November 2018 from the Applicant
16 July, 29 August and 5 November 2018 from the
Respondent

Date of determination: 5 February 2019

DETERMINATION OF THE AUTHORITY

- A. Optimum Imports Limited was not Torrell Price’s employer. Mr Price therefore cannot pursue his claim against Optimum Imports Limited.**
- B. Costs are reserved.**

Employment relationship problem

[1] Torrell Price was involved with a shop in Panmure, Auckland, which traded as Paylessupplements, sometimes referred to as Payless Supplements. The shop supplied health, body-building and weight loss supplements, such as protein powders.

[2] Mr Price claims that he had been in largely unpaid employment at the shop from when he started on 16 March 2015 until finishing on 20 October 2017. He says that he was promised many things including an employment agreement, payment for work and paid holidays, but that these did not eventuate. He says that he was emotionally manipulated and bullied.

[3] Mr Price's statement of problem initially referred to "Optimum Imports (Payless Supplements)" as the respondent but he amended this to Optimum Imports Ltd (which I refer to as Optimum Imports or the company). Optimum Imports responded via its director David (Dave) Edginton, saying that it supplied products to the shop, along with other shops, but that the dispute should be between Mr Price and the store owner, Marven Yacoub. Mention was also made of Mr Yacoub's company My Training Ltd. Optimum Imports says that at the time when Mr Price was at the shop, it was not operating the shop's business.

Investigation process

[4] On 26 January 2018 a case management conference was held in Mr Price's claim against Optimum Imports (file number 3022722). The Authority set a timetable for the parties to file evidence and submissions about whether Mr Yacoub and/or his company My Training Limited should be joined as respondent parties to the 3022722 proceeding and Optimum Imports Ltd struck out.

[5] Some correspondence and documentation were received. There was an indication that Optimum Imports had further documentation available.

[6] Mr Price then filed a second claim (number 3024513), this time against Mr Yacoub and My Training Ltd. The statement of problem in that proceeding has been served on Mr Yacoub and on the registered office of My Training Ltd. No statement in reply has been filed or other contact made with the Authority by Mr Yacoub or My Training Ltd. Attempts by the Authority to contact Mr Yacoub at an email address and cell-phone number were unsuccessful with those seemingly no longer operational.

[7] The Authority considered whether to deal with these two claims together as they both related to the same alleged employment. However, both Mr Price and Mr Edginton understand that Mr Yacoub has left New Zealand and is living in Australia. Mr Price was asked to consider whether he wished to pursue the claim against Mr Yacoub. Given the lack of contact from Mr Yacoub or My Training Ltd and Optimum Import's defence, the preliminary issue in the claim against Optimum Imports, namely whether that company was Mr Price's employer, was investigated.

[8] An investigation meeting commenced on 7 June 2018. At this stage Mr Price was represented by a family member. At the meeting Optimum Imports filed new documents and some time was allowed for Mr Price and his representative to consider them. Mr Price then began giving evidence but part way through, his representative sought an adjournment to another day in order to further examine the documents. The adjournment application was granted by consent.

[9] The investigation meeting resumed on 14 June 2018. At this time Mr Price was represented by another family member. I heard evidence from Mr Price and Mr Edginton. A timetable was set for the filing of further documents and submissions. Prior to the completion of that timetable Mr Price instructed counsel. The timetable was vacated and a case management conference arranged.

[10] The parties were given the opportunity to make further submissions. Further submissions were received on behalf of Optimum Imports along with unsworn evidence from new witnesses, which was objected to by Mr Nicolson on Mr Price's behalf. Another case management conference was held and the parties agreed to the statements filed by Optimum Imports being set aside.

[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 on issues necessary to dispose of the matter, and specified orders made as a result.

Employment relationship

[12] Under s 6(2) of the Act in deciding whether Mr Price was employed by Optimum Imports I must determine the real nature of the relationship between them. I will look firstly at the witnesses' evidence and then at documentary evidence.

Mr Price's evidence

[13] Mr Price was a young bodybuilder and became a customer of the Paylessupplements Panmure shop. He got to know Mr Yacoub who was working there.

[14] Mr Yacoub said to him "you can work in my store". Mr Price says that he and Mr Yacoub agreed that he would work seven days a week with the daily hours sometimes changing. Sometimes he worked a lesser number of days per week.

[15] Mr Price says that he repeatedly asked for an employment agreement but Mr Yacoub kept postponing it, with no written agreement ever provided.

[16] Mr Price says that Mr Yacoub employed him and was his employer for the shop. However, he also says that he thought there was a Payless Supplements company which owned the shop. He says that Mr Yacoub told him he was in business with Mr Edginton. However, Mr Price accepted that Mr Yacoub "speaks a big game", saying that he owned this and that.

[17] In many cases payments and who they are made by are indicative of an employment relationship and who the employer is. However, Mr Price says that he was almost entirely unpaid. He says Mr Yacoub talked about paying him various sums such as \$100 or \$120 a day but payment did not eventuate. Mr Price received no payslips. He was told by Mr Yacoub once or twice a week to take \$20 from the shop till for himself. He also noted in a text referred to below about receiving products or other things from Mr Yacoub.

[18] Mr Price was asked about why he continued working when he was not being paid regularly. He says that promises were made to him by Mr Yacoub about future expansion of the business and the prospect of Mr Price having a share in it. Mr Price was a young man, turning 16 in 2015. He had left school in 2014 to undertake a personal training course and his work at the Panmure shop was his first job.

[19] Mr Price thought that he probably had not met Mr Edginton before Mr Price started working in the shop, but may have seen him. Once working, Mr Price says he saw Mr Edginton once every two to three weeks when he dropped stock off. Mr Yacoub told Mr Price that Mr Edginton was his business partner, mentor and a second father, however, Mr Price did not give evidence of Mr Edginton having involvement in the operation of the shop, other than dropping off stock. Mr Price was not aware of Optimum Imports Ltd. He discovered this name post-employment by looking at a newspaper article.

[20] Mr Price saw mail coming to the shop occasionally for My Training Ltd, which he thought was Mr Yacoub's personal training business, which had a Facebook page selling fitness plans.

[21] Although Mr Price says that he was not aware of Payless Supplements being a franchise, he knew that there were other Payless Supplements stores. He knew that Mr Edginton owned the Manukau store, which was with his gym, but was not sure about the other stores.

Mr Edginton's evidence

[22] Mr Edginton says that Paylessupplements Ltd was set up formally as a company by Mr Edginton's father-in law although Mr Edginton was involved in the founding of the business. The business was an on-line seller and distributor of supplements to Paylessupplements stores as well as other gyms. Mr Edginton says the company was later de-registered but Paylessupplements continued to be used as a brand name.

[23] Mr Edginton acknowledged ownership through one of his companies of two Paylessupplements shops, including one at a gym which his company runs. There were other stores which Mr Edginton says were operated by other people on a franchise basis. The tenor of Mr Price's evidence was consistent with this although he did not know about formal franchise agreements.

[24] In about late 2012 Mr Yacoub, who was a customer at Mr Edginton's gym, approached him about supplying products. Mr Edginton says that Mr Yacoub was having problems finding premises but found the shop in Panmure which was for sale. Mr Edginton's family trust bought the building, got it up to leasable standard and then leased the shop to Mr Yacoub.

[25] Mr Edginton says a handwritten agreement was made that Mr Yacoub could use the Payless Supplements name. Later, when a business in Tauranga gained a Payless Supplements franchise, a more formal approach was taken which was also used with Mr Yacoub. Mr Edginton acknowledged that the more formal franchise agreement was adapted by him or on his instructions from a document he had sourced elsewhere, without a lawyer involved.

[26] Mr Edginton saw himself as the supplier of products and landlord of the Panmure business but was not involved in how that business was run. He says that he had no involvement in Mr Price's appointment and Mr Price did not approach him about getting paid.

[27] In terms of payments for goods supplied, Mr Edginton's recall was that these were firstly received from Mr Yacoub personally and from 2016 from My Training Ltd. Mr Edginton denied being involved in the setting up of My Training Ltd.

[28] Mr Edginton says Optimum Imports Ltd imports health food supplements. He says that his gym operates under Edginton Resources Ltd and his staff there all have employment agreements and get payslips, unlike Mr Price. He says that he assumed Mr Price had been being paid by Mr Yacoub and was aghast, when Mr Price said after finishing, that he had not been paid.

[29] Mr Edginton says that sometime after Mr Price finished at the shop, Mr Yacoub attempted to sell the Panmure business but the possible deal fell through. Mr Yacoub left the premises on short notice. Mr Edginton took back the premises, finding what a large number of documents, including some which he provided to the Authority. He decided to operate the Panmure store himself.

Companies Office documents

[30] According to Companies Office documents Optimum Imports Ltd has been in existence since 2004. It currently has its registered office in the same road as the Panmure shop, although there are some numbers distant from each other. Mr Edginton and one other person are the shareholders of the company.

[31] A company called Paylessupplements Limited was incorporated in 2010. The sole director/shareholder is not named as Mr Edginton. The form for the director's

consent has a fax header referring to Optimum Imports. Payless Supplements Ltd was removed from the Register in 2013.

[32] My Training Limited's registered office was at the shop address in Panmure. Mr Yacoub was the sole director and shareholder. My Training Limited was removed from the Companies Office Register from 23 November 2018.

Letter of verification of employment

[33] A letter of 26 September 2017 from Mr Yacoub as "Payless Supplements – Director" on Payless Supplements letter head was filed. The letter is headed "Letter of Verification of Employment for house application/renting house" and includes:

Torrell has been an employee of Payless supplements for 2 almost 3 years, and is currently the full time store manager and team leader. His salary is \$41,000 per year. He has been nothing but an on time reliant worker and always gets the job done and our company has never had any complaints with him working full time.

[34] Mr Price says that he was try to rent a property and needed confirmation of employment. He says that the \$41,000 was probably an estimation of what he was supposed to be getting paid, but there was no "proper" money going through.

Messages

[35] Mr Price filed text messages between himself and Mr Yacoub, including Mr Price asking for a payslip. Mr Price reported to Mr Yacoub on occasions that he could not make it in (to the shop) as he was sick. In another text Mr Price informs Mr Yacoub that he quit.

[36] Facebook Messenger messages between Mr Yacoub and Mr Price were filed, including Mr Yacoub asking Mr Price to go into the shop and Mr Price messaging a couple of months later that he was opening up today. The two also message about marketing, the website and predicted business growth. Mr Price reports what happening at the store and Mr Yacoub says "make sure you build good report (*sic*) with customers" like one Mr Price referred to. The communications are not of a formal business nature in tone, but do indicate both men are involved in the shop business.

[37] Texts between Mr Price and Mr Edginton from October 2017 were provided. On 23 October 2017 Mr Price texts Mr Edginton:

I didn't want to bother you but thought I'll give you the heads up if you haven't heard yet. I quit from the store – it was just too much stress, pressure, confrontation and demands and no appreciation and him not even realising he hadn't paid me for the last 3 years me working in his store. I also wanted to ask you for your advice. Like Marven did pay for some things like Comp Registrations, tans, some supplements but nothing that amounts to the hours and years I worked in the store. Does he pay me out? Give me anything? Nothing?

[38] Mr Price explained that the reference to registrations was to the fees for bodybuilding competitions with Mr Yacoub occasionally paid \$50 or \$100 as Mr Price's entry fee. In a later text Mr Price refers to Mr Yacoub's response to the prospect of Mr Price going to the IRD to complain about not being paid for two to three years.

Franchise Agreement

[39] On the first day of the investigation meeting Mr Edginton provided a franchise agreement. The cover page of the agreement referred to Edginton Resources Ltd "t/a Paylessupplements". That company is named in the agreement as the franchisor. The Schedule referred to My Training Ltd as the franchisee and Mr Yacoub as the shareholder.

[40] There were some difficulties with this document. There are handwritten entries which appear to be written over other handwriting. The commencement date in the schedule appeared in handwriting as 21st April 2016, however the year was written over something else. Not all of the expected entries have been completed on the signature page. The schedule was witnessed by someone who Mr Edginton says he employs but she did not initial the other pages of the agreement. It appears that Mr Edginton and Mr Yacoub initialled each page.

[41] The state of the document is in keeping with Mr Edginton's evidence that he took an agreement from different outside organisation and adapted it himself for us in his business without getting legal advice.

Shop premises

[42] Mr Edginton provided pages from a lease agreement dated 1 April between a landlord trust, which he identifies as his family trust, and Mr Yacoub as tenant and guarantor. There are also some difficulties with this document. The address of the premises in the first schedule is somewhere else in Auckland and has been crossed off and the Panmure address handwritten, without being initialled. However, most of the details on that page are entered by hand and changes are not initialled.

[43] An account showing a payment of “rent” from My Training Ltd was filed. The amount paid is the same as the rent specified in the first schedule of the lease.

[44] Mr Edginton supplied an email from an insurance broker who stated that the insurance for Payless Supplements Panmure was requested by and arranged for Marven Yacoub as the owner of the Payless Supplements Panmure store. Further, the insurance was active under his instructions from February 2013 and renewed each year until February 2018. Mr Edginton says that was insurance for the shop contents.

Other documents

[45] Mr Edginton showed the Authority at the investigation meeting unopened envelopes addressed to “Payless Supplements” at the Panmure address, including one from a bank. Envelopes from the IRD and New Zealand Post to My Training Ltd were sent to the Panmure address. A photo of a courier post item to My Training Ltd trading as Payless was also provided.

[46] Mr Edginton also supplied phone bills to “Marven Yacoub T/A Payless Supplements” at the Panmure address.

[47] Optimum Imports’ bank statements show payments received from My Training Ltd, along with other credits from what appear to be other supplements and gym businesses.

[48] Optimum Imports filed an email from Mr Price to Mr Yacoub with the subject “Stock”, containing a list of products. Mr Yacoub then forwarded the email to Mr Edginton. An invoice from Optimum Imports shows product supplied to Payless Supplements Panmure Ltd, although there is no such company.

[49] Mr Price filed an article from the NZ Herald in 2015 which refers to Mr Edginton as the founder of the Payless Supplements' chain. The article reports Mr Edginton saying that he did not employ Mr Yacoub but permitted him to use the brand's name and sold him stock.

Facebook posts

[50] Mr Price filed pages from Facebook. This included Mr Yacoub identifying himself as "Director at Payless Supplements". Mr Edginton also filed some Facebook entries but says that he was not on Facebook or other social media and did not see Mr Yacoub's entries at the time. The evidence he provided was accessed through a family member's Facebook account.

[51] Mr Yacoub wrote on his timeline on 10 February 2014 that his dream was finally turning into a reality, with the "One of the Biggest Grand Opening Sales" Pictures of the Panmure store were attached. In a similar entry on 16 February 2014 Mr Yacoub states that it was his dream to own his own supplements store. :

1 year ago Payless Supplements [w]as started being only 21 at the time I opened my first store...I would of never have thought I would be where I am now after 1 year, with my new store currently in the process of opening and Payless Supplements [e]xpanding and growing.

[52] Shortly after Mr Yacoub posted pictures saying "[m]y stores looking nice and full just finished stocking up". He notes that his older brother will be running the store for a week while Mr Yacoub is preparing, presumably for a bodybuilding event.

[53] In July 2014 Mr Yacoub posts some text and a picture from a fitness expo. The vehicle in the picture has a Payless Supplements logo and the Panmure address on it. Someone asked Mr Yacoub if that was Mr Edginton in the picture. Mr Yacoub replies that it is.

[54] In December 2014 Mr Yacoub post a picture with text describing a Christmas Dinner "with the Payless Supplements Family". He goes on to say it has been an awesome first year "for us", with five stores, including Panmure and refers to Mr Edginton (pictured) as his mentor. Another photo of "Payless Supplements Family" includes Mr Yacoub and Mr Edginton. Mr Edginton says that other people in the photos are people who hold Payless Supplements franchises out of Auckland. This seemed to accord with Mr Price's evidence.

[55] In February 2015 Mr Yacoub is pictured with Mr Edginton in front of stock and says that Mr Edginton:

...is not only a mentor to me but a second father figure...he is not only the owner of ...[a gym] but my business partner in Payless Supplements, we have a lot of big plans for this year agreed and can't wait to push forward to make them a reality."

[56] In 2015 Mr Yacoub posts a picture of a ute truck with the Payless Supplements logo on it parked outside what appears to be the Panmure shop.

[57] In 2016 Mr Yacoub posts that he's at the store on a Sunday:

"doing emails/ sorting out stock... sorting out last minute posters and signage for the New Payless Supplements store in Wairua Park opening next weekend. When you want to be successful [t]heres no such thing as 9-5. It's 24 hours 7 days a week."

[58] In 2017 Mr Yacoub referred to driving to "my Panmure store" and reports an interaction where he told someone he was the landlord "this is my property".

[59] On 20 October 2017, the day which Mr Price says he resigned, Mr Yacoub posted that he was looking for someone wanting to work for him in "one of my Payless Supplements retail stores". Anyone interested is asked to email him and he will "take it from there".

[60] Mr Edginton filed a Facebook post from 1 March 2014 where a woman posted that she visited her friend Marven Yacoub:

"...at the grand opening of his supp store, Payless Supplements in Panmure. After talking about owning a store for so long, it's awesome to see it become a reality for him.

Submissions for Mr Price

[61] On Mr Price's behalf it was submitted that he was employed by Optimum Imports which used "a trading as" entity called Payless Supplements. The franchise agreement was described as a mock up rather than a genuine document, produced in an amateur and unprofessional way. It was submitted that it was intended to create an illusion that Payless Supplements that employed Mr Price was a stand-alone, sole operation and nothing to do with Mr Edginton or Optimum Import. Mr Edginton is said to have a responsibility under Optimum Imports because he was tied to Mr Yacoub and Payless Supplements.

[62] Mr Nicolson suggested that there were two owners or partners in the business known as Payless Supplements, namely Mr Edginton and Mr Yacoub. Evidence for this was Mr Edginton having taken over the shop on Mr Yacoub's departure.

[63] Submissions for Mr Price suggested that Mr Edginton's failure to respond to the Facebook entries by Mr Yacoub was significant.

[64] The submissions contained a number of matters which Mr Price was said to say or would say, but of which there is no evidence before the Authority. I must disregard those.

[65] The submissions conclude that Mr Price was employed by both Mr Yacoub and Mr Edginton and suggests that Mr Edginton should remain "on file". However, Mr Edginton is not a party to this proceeding.

Submissions for Optimum Imports

[66] Optimum Imports relies on the letter verifying employment as well as information showing Mr Yacoub having charge of the Panmure shop. Mr Edginton is said not to have been involved in the shop's operation.

[67] The submissions for Optimum Imports also contained some material that was not in evidence. That will be disregarded.

Conclusion

[68] Was Mr Price in an employment relationship with Optimum Imports? Did Optimum Imports own and operate the Panmure store's business?

[69] Both Mr Price and Mr Edginton were credible witnesses. Their evidence, where it overlapped, was consistent.

[70] Although Mr Price named Optimum Imports in his statement of problem in this case, he also filed another claim regarding Mr Yacoub and My Training Ltd. His evidence at the investigation meeting was predominantly that he saw Mr Yacoub as his employer. Mr Price only says that he found out about Mr Edginton after he started working at the shop and he only saw Mr Edginton every few weeks when he dropped off stock.

[71] There is evidence that Mr Yacoub and Mr Edginton were connected, and some of this was volunteered by Mr Edginton. This included that his family trust bought and leased the shop premises to Mr Yacoub. However, there is little to support that they were in partnership together. In any event Optimum Imports is the respondent and is identified in some parts of the submissions for Mr Price as the employer, rather than Mr Edginton personally.

[72] I found Mr Edginton's evidence that he was not on Facebook, and did not see the postings saying that he was in business with Mr Yacoub, until they were filed by Mr Price, to be credible. None of the Facebook entries filed had Mr Edginton tagged in. Nothing can be taken from Mr Edginton's failure to dispute these entries at the time.

[73] It was clear from Mr Price's evidence that most of his dealings regarding the shop were with Mr Yacoub. Mr Yacoub alone talked to him about working in the shop. Mr Yacoub was running the shop's business and there was an absence of reliable evidence of Mr Edginton being involved in the operations. Mr Price reported his absences to Mr Yacoub. It was Mr Yacoub that he asked for an employment agreement, for payslips and for payment.

[74] Despite Mr Price's evidence that he worked at the shop for two and a half years almost entirely unpaid, there was no evidence that he approached Mr Edginton about a wage issue during that time. This suggests he did not consider Mr Edginton, or his companies presumably, to be his employer.

[75] It was suggested that Mr Yacoub may have exaggerated his involvement in or ownership of businesses. Regardless of whether that was the case, the evidence regarding Optimum Imports' involvement in the Panmure shop was limited, being restricted to supplying goods.

[76] The franchise agreement was with another company, albeit a company which Mr Edginton is the sole director of. Even setting that agreement aside, there is little to connect with Optimum Imports. The lease is with Mr Edginton's family trust.

[77] The evidence was that Mr Yacoub arranged the insurance for the Panmure shop. The phone account was in Mr Yacoub's name. His messages suggested that he had his own accountant.

[78] Standing back and considering the evidence overall, I find that Mr Price was not in an employment relationship with Optimum Imports Ltd. Mr Price therefore cannot pursue his claim against Optimum Imports Ltd. I make no finding at this point as to whether Mr Price was employed by Mr Yacoub, his company My Training Ltd or neither.

Costs

[79] Costs are reserved. As Optimum Imports was not independently represented it may be difficult for it to establish that it incurred costs which are claimable.

Nicola Craig

Member of the Employment Relations Authority