

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 165
5640395

BETWEEN

RYUICHI SAKAGUCHI

Applicant

AND

GANBASAKA LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Charles Ganbaatar for the Respondent

Investigation Meeting: 6 June 2017

Determination: 7 June 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ryuichi Sakaguchi applied to the Authority for an order requiring Ganbasaka Limited to pay him for fifty hours work done between 1 and 5 August 2016. Mr Sakaguchi said he worked as a chef at the Ganba Burger and Sushi Bar in Anzac Avenue on those dates but Ganbasaka Limited director Charles Ganbaatar refused to pay him for the work. The wages claimed were \$762.50, calculated on the minimum hourly rate applicable in August 2016. With the addition of holiday pay, the claim totalled \$823.50.

[2] Mr Ganbaatar denied Mr Sakaguchi worked as an employee for Ganbasaka Limited. Rather he said Mr Sakaguchi was working as his business partner. They had made plans to operate a restaurant at the Anzac Avenue premises.

[3] The lease for the premises was held by Japanese Delivering Service (NZ) Limited (JDSNZL), a company in which Mr Sakaguchi was sole director and a shareholder. He had previously operated a restaurant there but it was closed in August 2015.

[4] In May 2016 Mr Ganbaatar registered Ganbasaka Limited, named by combining the first part of his name with that of Mr Sakaguchi. Its shareholding was registered as being 80 per cent held by Mr Ganbaatar and 20 per cent held by Mr Sakaguchi. Their proposed arrangement for the business also included a provision that, if it were later sold, any proceeds would be split 50:50 as Mr Sakaguchi was bringing his business assets in to the company.

[5] Both parties arranged for lawyers to work on the legal arrangements for Ganbasaka Limited to buy Mr Sakaguchi's business assets and an assignment of the lease. They opened the restaurant for business on 1 August before the associated paperwork was finalised and signed. The landlord had consented to the business operating from the premises but not finalised arrangements on rent.

[6] In the week of 1 to 5 August Mr Sakaguchi and Mr Ganbaatar both worked at the restaurant along with two Japanese serving staff they hired. Mr Sakaguchi cooked rice, made sushi and did vegetable and meat preparation work.

[7] After the first week of business Mr Ganbaatar decided not to go ahead with the business. He told the two serving staff that the restaurant was closing temporarily.

[8] Mr Ganbaatar identified two factors leading to his decision. Firstly, in response to a request from Mr Ganbaatar's lawyer, the landlord had advised two months' rent were due for July and August, totalling \$13,455. The landlord also wanted Ganbasaka Limited to pay a bond of three months' rent. Secondly, Mr Ganbaatar's personal circumstances changed in late July when his personal partner died.

[9] Mr Sakaguchi was upset at the failure of the arrangements for the new business. In an email sent to the landlord's manager on 14 August Mr Sakaguchi referred to Mr Ganbaatar as "my business partner" and blamed the landlord for Mr Ganbaatar withdrawing from the business. Mr Sakaguchi described the landlord as having "wrecked" the negotiations both for this partnership and previous attempts Mr Sakaguchi had made to sell the business. He said Mr Ganbaatar had "become afraid" of what the landlord would do next.

[10] Although Mr Sakaguchi hoped to persuade Mr Ganbaatar to continue with the business, attempts to discuss the matter in following weeks did not change the situation. By text on 24 August Mr Ganbaatar told Mr Sakaguchi “our partnership is finished”.

[11] In late August Mr Sakaguchi’s shares in Ganbasaka Limited were transferred to Mr Ganbaatar. Soon after Mr Sakaguchi lodged his claim to be paid for the hours worked at the restaurant between 1 and 5 August. The parties were directed to mediation but the matter was not resolved and the Authority needed to determine the matter.

[12] The issue for resolution was whether Mr Sakaguchi’s work was done as an employee, for which he should be paid at least the minimum wage, or as a business partner, with no expectation of pay for it.

The Authority’s investigation

[13] Mr Sakaguchi and Mr Ganbaatar both attended the investigation meeting and answered questions from me. Mr Sakaguchi had the assistance of an interpreter of the Japanese language provided by the Authority. Both men had provided background documents about their dealings and had the opportunity to sum up their arguments about what determination the Authority should make.

[14] This determination confirms the oral indication of preliminary findings given at the end of the investigation meeting.¹ As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made. It has not recorded all evidence and submissions received.

Who is an employee?

[15] An employee is a person employed by an employer to do any work for hire or reward under a contract of service.²

¹ Employment Relations Act 2000, s 174B.

² Employment Relations Act 2000 s 6(1)(a).

[16] In deciding whether a person is employed by another person under a contract of service, the Authority must determine the real nature of the relationship between them. This assessment must consider all relevant matters, including any indications of the intentions of the persons but not treat what they say about the nature of the relationship as necessarily determining the matter.³

Was Mr Sakaguchi employed by Ganbasaka Limited?

[17] Exchanges between the parties and their lawyers during June and July 2016 had not finalised arrangements for the purchase and operation of the business.

[18] The Authority's only concern with those discussions was whether, among them, the parties confirmed any intention that Mr Sakaguchi would be an employee of Ganbasaka Limited as well as a part owner of the business. This had to be determined from an assessment of the documents provided for the investigation and what both men said in answer to questions at the Authority investigation meeting.

[19] Mr Ganbaatar produced a handwritten note that appeared to be signed by Mr Sakaguchi and indicated their business partnership was to be on the basis that neither would take a salary. He said he wrote the note, dated 2 June 2016, when they met in a food court to talk about their business plans. The note had this question written on it: "We are going into this business together or not, with no salary?" Below the question were the words yes and no. The word yes was circled and Mr Sakaguchi's signature was written beside it. Mr Sakaguchi agreed the signature was his but emphatically denied that, at the time of signing, the question was written on the note.

[20] Instead Mr Sakaguchi pointed to an email he sent on 9 June 2016 giving his response to a lawyer's summary of the proposal for Ganbasaka Limited to buy the business assets. Part of his email asked for those arrangements to include provision that he would "receive remuneration in the case where he works as a chef or under other related job time in the new company",

[21] Mr Sakaguchi said he understood from a later discussion Mr Ganbaatar agreed to his proposal for payment of a salary. There was no written or signed agreement he would be paid for work he did at the restaurant but Mr Sakaguchi said it was "verbally

³ Employment Relations Act 2000 s 6(2) and (3).

implied” he would get at least the minimum wage. Mr Ganbaatar denied he had agreed or accepted any such arrangement. He said he had talked with his lawyer about Mr Sakaguchi’s suggestion of a salary and she had suggested he should not agree to it.

[22] Employment can arise from an oral agreement alone. Whether this has occurred needs to be determined on the balance of probabilities and on the objective standard of how the arrangements between Mr Sakaguchi and Mr Ganbaatar would have appeared to a reasonable observer well-informed about the background.

[23] Mr Sakaguchi had indicated he wished to work under a salary arrangement if he was to carry out any work as a chef in the business. However even his own evidence did not point strongly to any agreement by Mr Ganbaatar, on Ganbasaka Limited’s behalf, to him working on that basis. Rather, an objective observer would, more likely than not, have seen Mr Sakaguchi working as a shareholder in his new business, not as someone working under a contract for service for hire or reward.

[24] This was not a situation where Mr Sakaguchi’s work generated any significant value or surplus Mr Ganbaatar was keeping for himself in an inequitable way. Mr Ganbaatar also worked similar hours at the restaurant and received no pay for it. Mr Sakaguchi accepted that after allowing outgoings for the weeklong operation of the restaurant, such as buying the ingredients for food made and sold, there was likely to have been little if any surplus. Business was not that good in that one week. And Mr Ganbaatar’s evidence was that a large part of the cost of those supplies had come from his own pocket anyway.

Determination

[25] Mr Sakaguchi was not an employee. His claim for wages and holiday pay for work done in the week of 1-5 August is declined.

Costs

[26] Costs are reserved. As indicated at the end of the investigation meeting this appeared to be a matter where any costs should lie where they fall. If there is any issue as to costs the parties are encouraged to resolve that matter between themselves. If they are not able to do so and an Authority determination is needed, Ganbasaka

Limited should lodge and serve a memorandum within 14 days of the date of this determination. Mr Sakaguchi would then have 14 days to lodge a memorandum in reply.

Robin Arthur
Member of the Employment Relations Authority