

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 182A/07
5052650

BETWEEN LYDIA YANG
Applicant
AND TEGAN ALLEN
First Respondent

Member of Authority: Vicki Campbell
Representatives: Danny Jacobson for Applicant
Rohan Bignall for Respondent
Submissions Received: 13 November 2007 from Applicant
8 November 2007 from Respondent
Determination on the papers: 21 November 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application to reopen an investigation into the employment relationship problem which has already been the subject of a determination of the Authority in *Allen v Lydia Yang*, 19 June 2007, AA 182/07. Ms Allen opposes reopening the application.

[2] I was the Authority member who conducted the investigation originally and I consider it appropriate in the circumstances of this case that I also deal with the application to reopen the investigation.

[3] My determination, dated 19 June 2007, followed an investigation meeting conducted on 24 May 2007 at Tauranga at which both Ms Allen and Ms Yang were present. The result of Ms Allen's application was a finding that she had been unjustifiably dismissed. The Authority ordered Ms Yang to reimburse Ms Allen for lost wages in the sum of \$1,182.00 nett, holiday pay in the sum of \$36.67, as well as compensation for injury to Ms Allen's feelings resulting from her dismissal in the sum of \$1,125.00 plus contribute to Ms Allen's costs in the sum of \$750.00.

[4] On 5 October 2007 Ms Yang applied to have the investigation reopened and claimed that the respondent was not her personally but a company called Lydia Sea Limited. Ms Yang had attended the May investigation meeting personally and provided evidence on oath. Ms Yang now says that she personally was not Ms Allen's employer, rather Ms Allen was employed by a company called Lydia Sea Limited. In support of her application, Ms Yang says she has an extremely poor grasp of English language and that this resulted in her not communicating effectively with the Authority concerning who the actual employer was. Effectively Ms Yang is saying there should be a change in the name of the respondent in the original determination to Lydia Sea Limited.

[5] With the consent of the parties I have determined this matter on the papers I have in front of me.

Application for reopening

[6] The power to order the reopening of an investigation is contained in the second schedule to the Employment Relations Act 2000 at clause 4(1):

The Authority may order an investigation to be reopened upon such terms as it thinks reasonable.

[7] As with any discretionary power the Authority must not use its discretion arbitrarily. It is well established that the main criterion in determining whether a rehearing should be granted is whether there has been a miscarriage of justice (*Waterfront Workers Union v Ports of Auckland* [1994] 1 ERNZ 604.

[8] The Authority must balance the importance of certainty in investigating and determining an employment relationship problem with the rights of Ms Allen to enjoy the fruits of a determination which is in her favour.

[9] The companies office register shows Lydia Sea Limited has one named shareholder and Director, Dan Yang. Having reviewed the documents produced in respect of this application I am satisfied that Ms Yang's full name is Lydia (Dan) Yang and that she is the sole shareholder/director of Lydia Sea Limited.

[10] At no time prior to the investigation did Ms Yang suggest to either Ms Allen or to the Authority that she was not Ms Allen's employer. The Authority held telephone conference calls with Ms Yang and as already stated, Ms Yang attended

the investigation meeting. Ms Yang was assisted at all times with the help of an interpreter provided by the Department of Labour.

[11] Ms Yang submitted that Ms Allen would or ought to have been well aware as to the identity of her employer from her own bank statements and from the Council's Registration of Premises Certificate which must be prominently displayed in the café premises.

[12] The Authority requested a copy of the Registration of Premises certificate but that document is not available. Instead Ms Yang has provided a copy of the Application for Transfer of Registration of Premises. That document shows the applicant as being Lydia (Dan) Yang on behalf of Lydia Sea Limited, however, the new occupier is stated to be Lydia (Dan) Young and not Lydia Sea Limited. Further, an extract of the Tauranga City Council Audit Report for the premises occupied by the café has been provided which shows the premises proprietor and primary contact as being Lydia Sea Limited.

[13] In support of her application Ms Yang also provided copies of various invoices for goods and services all made out in the name of Lydia Sea Limited, together with IRD records relating to PAYE and a parental leave form completed in the name of Lydia Sea Limited on 23 July 2006. The parental leave application completed by Ms Yang and signed in July 2006 states that the employee concerned had been in her employ for more than 1 year – which given that Ms Yang or her company took over the business in July 2006, was not possible. I find those documents to be of limited probative value as there is no conclusive evidence that Ms Allen had access to any of these documents during her short tenure of employment with Ms Yang.

[14] At the time Ms Yang took over the café Ms Allen had been working at the café for 3 years. Before Ms Yang took over the café, it had been operated by Ms Terri Ewart. Ms Allen says that she received a written employment agreement from Ms Yang during the first week of her employment with her that identified the employer as being Ms Yang in person and did not make mention of a company. Ms Allen says she returned the signed agreement to Ms Yang.

[15] It was submitted on behalf of Ms Yang that her poor grasp of English resulted in her not communicating effectively with the Authority. I do not accept that submission. The Authority arranged for the services of an interpreter who assisted Ms Yang throughout the investigation meeting. A specific area of scrutiny during the investigation related to the employment agreement. Ms Yang was

unequivocal in her evidence that she had provided a copy of an employment agreement to Ms Allen and Ms Allen had signed it and returned it. Ms Yang told me she did not want to sign the employment agreement with Ms Allen because she was dissatisfied with her performance. Ms Yang's own evidence was that she threw the employment agreement in the rubbish.

[16] In New Zealand a company is regarded in law as a separate legal entity to its directors and shareholders. Having regard to the submissions of the parties and to the documentation provided to the Authority, I cannot rule out the possibility of a miscarriage of justice if the investigation is not reopened on the narrow but obviously important question of the identity of Ms Allen's employer. I do note that Ms Yang has put Ms Allen to considerable trouble and expense through her own inaction in this matter to date.

[17] A support officer from the Authority will contact the parties in the near future to arrange a telephone conference call with a view to investigating the matter as reopened, as expeditiously as possible.

Costs

[18] Costs are reserved.

Vicki Campbell
Member of Employment Relations Authority