

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2011] NZERA Auckland 383  
5334903**

BETWEEN YUE YANG  
Applicant

AND WEILU HAO  
First Respondent  
and  
YES CONSTRUCTION LIMITED  
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person  
Weilu Hao for the Respondents

Investigation Meeting: On the papers

Submissions received: 8 and 11 August 2011 from Applicant  
8 and 15 August 2011 from Respondent

Determination: 5 September 2011

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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**Employment Relationship Problem**

[1] This determination addresses the preliminary issue of whether the Applicant, Mr Yue Yang, was an employee of the Second Respondent, Yes Construction Limited (“YCL”), or was a shareholder who worked as an independent contractor whilst involved in a construction project for a property identified as Lot 19 Briden Drive, Tikipunga, Whangarei (“Lot 19”).

[2] Specifically, Mr Yang claims that during the period 8 February 2010 until 5 November 2010 he was employed by YCL as Project Manager for Lot 19. Mr Yang claims that Mr Weilu Hao, the First Respondent, acting on behalf of YCL, agreed to pay him \$800.00 per week in respect of this employment. However Mr Yang claims that no remuneration payment in respect of the period 8 February 2010 until 5 November 2010 had been made.

[3] Mr WeiLu Hao and YCL were both shareholders in the Lot 19 project, and claim that Mr Yang was an independent contractor whilst working on the Lot 19 project.

[4] Mr Hao and YCL claim that it was agreed between Mr Yang, Mr Hao and YCL that they would each make a financial investment in Lot 19, however because Mr Yang did not have the financial ability to make a cash investment it was agreed that his contribution would in fact constitute the project management of Lot 19. Mr Hao and YCL claim that it was mutually agreed between themselves and Mr Yang that when the net profit after tax was realised on Lot 19, it would be divided by the percentage of shares held by each of the shareholders, with the profit share to Mr Yang being 40 of the overall net profit after tax.

[5] The parties agreed to the Authority determining this issue based on the Statements of Problem and in Reply and on submissions from the parties.

#### **Issue for determination**

[6] The issue for determination is whether Mr Yang was an employee of TCL or an independent contractor during the period 8 February 2010 until 5 November 2010 when he was working on the Lot 19 project.

#### **Background Facts**

[7] Mr Yang stated that Mr Hao employed him as Project Manager for Lot 19. Mr Yang said that Mr Hao agreed to pay him \$800.00 per week.

[8] Mr Hao stated that Mr Yang approached him on or about late 2008 and invited him to join in the Lot 19 project, the object of which involved the construction of a house on the site at Briden Drive, Tikipunga, Whangarei. Mr Hao said that he in turn had approached the director of YCL, Mr Jia Lin Yang, and invited him to invest alongside Mr Hao in the project. Mr Hao explained that as Mr Yue Yang was not able to invest money in the project, Mr Yang had proposed, and it was agreed, that his investment would take the form of undertaking the project management of the construction of the Lot 19 house.

[9] It was agreed that Mr Yue Yang would receive 40% of the profit after tax on the Lot 19 project, on the basis of his standing as a 'technical shareholder'.

[10] Mr Hao stated that at the same time as Mr Yang was project managing the Lot 19 project, he was also project managing Lots 21 and 65, which had completely separate investors.

[11] Mr Ken Vincent, Director of Northland Property Concepts, was the landlord (“the landlord”) for the Lot 19 project. Mr Hao said that there were problems with the project, and it became difficult to complete the project on Lot 19 and sell the house to the landlord’s requirements. Mr Hao said it had become necessary for him to step in to manage the completion of the Lot 19 project, and to accede to a discount of 5% of the total payment due to be paid by Mr Vincent in order to be able to sell the property and realise the investment made by himself and TCL.

[12] Mr Hao said that Mr Yang had not agreed with this course of action, and had wanted to take legal action against Mr Vincent; however YCL and Mr Hao had over-ruled Mr Yang and proceeded with the discounted offer to the landlord.

[13] Mr Hao stated that the Lot 19 project had not realised any profit after receiving a reduced sales price less deductions for costs and expenses and the cost of delay in completing the project. Consequently there had been no share of the profits payment to Mr Yang.

### **Determination**

[14] Mr Yang clarified in an email dated 15 February 2011 addressed to the Authority his claim that he was an employee working for YCL during the period 8 February 2010 until 5 November 2010, and therefore able to bring a personal grievance under s 103 (1)(b) of the Employment Relations Act 2000 (“the Act”).

[15] In deciding whether Mr Yang was employed by YCL as an employee, I apply s.6 of the Act which provides:

*“s.6 Meaning of employee:*

*1. 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.*

*(3) For the purposes of subsection (2)... or the Authority-*

*(a) must consider all relevant matters, including any matters that indicate the intention of the parties*

*(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*

[16] In *Bryson v Three Foot Six Limited (No2)*<sup>1</sup> the Supreme Court stated the following:

*“‘All relevant’ matters certainly includes 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. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.*

#### *Contractual basis*

[17] Mr Yang was not issued with an offer letter or an employment agreement by YCL. In *Cunningham v TNT Express Worldwide (NZ) Ltd*<sup>2</sup> the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship. This broad approach in *Cunningham* was held by Chief Judge Goddard in *Muollo v Rotaru*<sup>3</sup> to apply to orally agreed terms, in that the relevant intention could be inferred from words or conduct at the time the contract was formed or subsequently varied.

[18] In the supporting documentation supplied by the parties, there are no documents which make reference to Mr Yang having employment status. There are no payslips indicating PAYE had been deducted from any payments made to Mr Yang, and indeed there

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<sup>1</sup> [2005] 1 ERNZ 372

<sup>2</sup> [1993] 1 ERNZ 695

<sup>3</sup> [1995] 2 ERNZ 414 (WEC64/95)

are no documents which substantiate any payments, whether in the nature of remuneration or otherwise, having been made to Mr Yang personally by YCL or Mr Hao.

[19] There is no evidence of any orally agreed terms or conduct such as to establish that the nature of the relationship between Mr Yang and YCL was that of employer/employee.

[20] I now turn to the way in which the relationship operated in practice by having regard to the features of control and integration, and to the fundamental test of whether Mr Yang was working on his own account.

#### *Control and Integration*

[21] Mr Yang submitted that as Project Manager for Lot 19, he was under the control of YCL and that he interacted with the landlord on instructions from YCL.

[22] There is no documentation supporting the appointment of Mr Yang as the project manager employed by YCL, however the parties agree that Mr Yang did project manage Lot 19 as his contribution to the shareholder arrangements. I find no supporting evidence that YCL operated control over Mr Yang in respect of his conduct of the project until towards the end of the project when it had encountered difficulties, and Mr Hao had taken over the negotiations with Mr Vincent. Throughout the majority of the period between 8 February 2010 and 5 November 2010, there are no progress reports, no emails from YCL or Mr Hao containing instructions to Mr Yang, and no indications that there were meetings held between the parties to discuss the project management.

[23] In summary, I do not find evidence that Mr Yang was subject to the control of YCL in the provision of services, or that his position was integral to the operation at YCL.

#### *The Fundamental Test*

[24] Mr Yang was the Director and sole shareholder of Concast Construction Limited. Mr Hao provided in the way of evidence a brochure which he stated Mr Yang had used to initiate the Lot 19 project with him and YCL.

[25] The wording of the brochure is set out in both English and Chinese and concerns a building project in Tikipunga, Whangarei. The brochure refers to 17 Titles at Stage 4, and 19 Titles at Stage 5. The brochure is headed, and has a logo which refers to, Concast Group Ltd, a company which is not registered on the NZ Companies Office register, and to Buildone Construction Limited, a company of which Mr Yang was the Director and sole shareholder

prior to the company being struck off the NZ Companies Office Register on 14 December 2008.

[26] Mr Yang submits that the brochure was produced in 2008 in respect of sections not related to the Lot 19 project. Although not determinative of the claim in respect of Lot 19, I find that the brochure appears to be intended to attract potential investors into the building projects specified, and establishes that Mr Yang was an experienced business man, specialising in the area of building construction projects. Further the brochure supports Mr Hao's evidence that he was approached as a prospective investor by Mr Yang on or about late 2008 in respect of the Lot 19 project.

[27] Provided in evidence were emails between Mr Yang and his wife (referred to as 'Sam' and 'Ping' in the emails) and Mr Vincent. These emails further substantiate the conclusion that Mr Yang was in business of his own account, referring to various building projects, and add additional support to Mr Hao's evidence regarding his having been approached by Mr Yang with a view to investing in the Lot 19 project. An email to Ping Yang from Mr Vincent dated 10 August 2009 states:

*Attached is the document and proposals for settlement presented by Sam at the meeting on the 6<sup>th</sup> Nov 2009.*

*The proposal was to settle five sections at a time, paying \$20,000 further deposit on each section being a total of \$100,000 five days after the issue of title. At this time the titles would be transferred to you, with a mortgage back to us for the balance owing. You were to build five houses, and full payment for each section would be on completion of each house. This was YOUR offer.*

[28] An email dated 23 November 2009 from Ms Yang to Mr Vincent referring to "Our investors" provides further support for Mr Hao's contention that YCL was an investor in the Lot 19 project instigated by Mr Yang rather than Mr Yang's employer.

[29] Mr Yang's claim is that he had received no remuneration during the period 8 February 2010 to 5 November 2010. It is therefore not surprising that there are no records proving that PAYE was paid in respect of Mr Yang by YCL.

[30] However there are invoices during this period, these being dated 24 February 2010, 14 March 2010, 3 June 2010, 5 June 2010, and 1 September 2010. These invoices are specified as being in relation to 'Construction work', 'painting job' 'roof tiles', 'foundation work', and 'building materials and labour' respectively. All the invoices are addressed to YCL and all are from Concast Construction Limited, a company listed on the NZ Companies

Office Register of which Mr Yang was the Director and sole shareholder. I find this evidence supportive of the conclusion that in regards to Lot 19, Mr Yang was in business on his own account through his company Concast Construction Limited.

[31] Although not determinative of the matter, I find the fact that Mr Yang, who claims to have been an employee of YCL from 8 February 2010 until 5 November 2010, has produced no evidence that he had approached YCL to discuss the non-payment of his wages over what was a 9 month period. I find this to be indicative of the fact that Mr Yang knew himself to be an investor in the building project Lot 19 to which his contribution as project manager was of a non-financial nature, and any financial reward was to be realised at the conclusion of the project and realisation of the net profits after tax.

[32] In summary, I find that there is sufficient evidence to indicate that Mr Yang was an independent contractor project managing the Lot 19 project, and that he was in business on his own account.

[33] I determine that Mr Yang was an independent contractor and not an employee during the period 8 February 2010 until 5 November 2010. I can assist Mr Yang no further.

#### **Costs**

[34] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**