

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 544
3125094

BETWEEN YASHAR ABDOLLAH
ZADEH
Applicant

AND HAMID REZA JEIHANI
Respondent

Member of Authority: Peter Fuiava

Representatives: William Fussey, counsel for the Applicant
Jenni-Maree Trotman, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further information received: 14 April 2022 and 25 July 2022 from the Applicant
3, 13 June 2022 from the Respondent

Determination: 25 October 2022

DETERMINATION OF THE AUTHORITY

- A. Yashar Abdollah Zadeh (Mr Zadeh) was not an employee of Hamid Reza Jeihani (Mr Jeihani). The Authority has no jurisdiction to consider Mr Zadeh's claim.**
- B. Costs are reserved. A timetable is set for lodging memoranda if an Authority determination on costs is required.**

Employment Relationship Problem

[1] Mr Zadeh claims he was unjustifiably dismissed and unjustifiably disadvantaged by Mr Jeihani his employer. He seeks wage arrears, holiday pay arrears, lost wages, compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and a declaration that

he was an employee of Mr Jeihani (as store manager of a kebab shop) from 25 February 2010 to 16 July 2020.

[2] Mr Jeihani denies that he was in an employment relationship during the above period with Mr Zadeh and says that the Authority has no jurisdiction to determine his claims. Even if an employment relationship was found to exist during the period in question, Mr Jeihani states that Mr Zadeh's personal grievance is out of time and Mr Jeihani does not consent to the grievance being raised now.

[3] This determination deals only with the issue of Mr Zadeh's employment status. If he is found to have been an employee of Mr Jeihani, the Authority will investigate Mr Zadeh's claims further. However, if he is found not to have been an employee, the Authority will dismiss Mr Zadeh's application for lack of jurisdiction.

Background facts

[4] Along a 1.05 kilometre shop-lined road in the leafy suburb of Milford lies a kebab retail business that was once owned by Hamid Reza Jeihani, a migrant from Esfahan, Iran. Mr Jeihani came to New Zealand in his mid-to-late 20's in December 1995 for a better life. The 1988 war between his home country and neighbouring Iraq had so devastated the local economy that Mr Jeihani no longer saw a future for himself in Iran. After living and working long hours in Japan for two-and-a-half years, Mr Jeihani came to New Zealand to study English. Through hard work and personal savings, he established a chain of Kebab Serai stores which were situated at Karanagahape Road, Remuera, Browns Bay, Birkenhead, and Milford. Most of these stores, including the Milford shop have since been sold. In 2003, Mr Jeihani obtained New Zealand residence under the Business Entrepreneur category.

[5] In or about 2001, Mr Jeihani met Mr Zadeh for the first time at a friend's house. Mr Zadeh is also a former citizen of Iran who was born in Tehran in the mid-1980s. In August 2001, Mr Zadeh arrived in Auckland as a teenager with his father and in 2008 obtained residence after being granted refugee status. The father was not so recognised and for reasons that are not known, he was later required to depart New Zealand. The father is understood to be living in Iran.

[6] After meeting Mr Zadeh, Mr Jeihani offered him employment in one of his Kebab Serai stores from 2001 to 2003. Mr Jeihani states that he dismissed Mr Zadeh after two years because he was causing his business to suffer due to his relaxed working attitude at that time and him being irresponsible.

[7] In or about 2007, Mr Jeihani signed the lease for the Milford Kebab Serai shop which he later gave to his brother to manage on his behalf. In or about 2009, the brother and Mr Zadeh had a conversation regarding Mr Zadeh who Mr Jeihani stated had expressed an interest to work at the Milford store.

[8] Mr Zadeh says that in late 2009, the brother wished to return to Iran to get married and asked him to manage the business for three months. Mr Zadeh stated that he initially turned down the role because of the work and stress involved. However, he eventually accepted in January 2010 after the brother stated that he would lose a lot of money if he was not able to attend his wedding on time.

[9] It was further alleged that after Mr Zadeh had accepted the role, Mr Jeihani had called him and offered him a salary in the range of \$55,000 to \$60,000 per annum. The two men reached an oral agreement about Mr Zadeh's position of store manager. No employment agreement was provided.

[10] Mr Jeihani's perspective is somewhat different. He says that Mr Zadeh approached his brother to rent the Milford shop but there is no direct evidence of this. There was no written agreement between the parties nor any sublease. It was agreed that Mr Zadeh would pay Mr Jeihani \$1,100 per week with \$700 paid into one account and \$400 into another. This was against an alleged representation by the brother that turnover for the Milford store was \$6,500 per week. However, Mr Zadeh says the representation was incorrect and that the actual turnover was closer to \$4,200 per week.

[11] In 2013, Mr Zadeh married Mr Jeihani's brother's sister-in-law and consequently the two men became related to each other through marriage.

The Authority's investigation

[12] For the Authority's investigation affirmed written witness statements were lodged from Mr Zadeh and Mr Jeihani. Although not initially required, leave was

granted for Mr Zadeh to file a written statement in reply which was affirmed by me by telephone on 25 July 2022. Mr Fussey and Ms Trotman have also filed helpful written submissions to the Authority.

[13] As agreed with the representatives and as recorded by minute of 1 March 2022, this preliminary matter has been determined on the papers. As permitted by s 174E of 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.

The issues

[14] The issues requiring investigation and determination are:

- (a) The status of Mr Zadeh’s employment relationship with Mr Jeihani (if any);
- (b) Whether Mr Zadeh’s personal grievances were raised within the 90-day period and whether leave should be granted by the Authority to consider them now; and
- (c) Whether the Authority has jurisdiction to hear Mr Zadeh’s claims for wage arrears, unpaid holiday pay, and penalties for breach of good faith given the effluxion of time.

Relevant law

[15] The first step is for the Authority to determine whether Mr Zadeh was an “employee” as defined by s 6 the Act which relevantly states (emphasis added):

6 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.

[16] The Supreme Court’s decision in *Bryson v Three Foot Six Limited (No.2)* addressed what “all relevant matters” in s 6(3)(a) meant:¹

“All relevant matters” certainly include 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 the 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 at common law.

[17] Briefly stated, the Supreme Court held in *Bryson* that “all relevant matters” included the written and oral terms of the contract between the parties and the way it operated in practice. It required 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).

Discussion

Previous inconsistent statements

[18] The difficulty for Mr Zadeh in establishing his claim of employment is that he has previously argued something else altogether. In June 2020, Mr Zadeh applied for an interim injunction in the High Court to restrain Mr Jeihani from acting on two notices under the Property Law Act 2007, each having the effect of terminating an alleged

¹ *Bryson v Three Foot Six Limited (No.2)* [2005] ERNZ 372 at [32].

subtenancy between Mr Jeihani as sublessor and Mr Zadeh as sublessee; and evicting Mr Zadeh from the Milford Kebab Serai shop other than on reasonable notice.

[19] It should be made clear that Mr Zadeh was represented by different counsel and not Mr Fussey at the High Court hearing which was held before Muir J on 3 July 2020. Mr Zadeh's lawyer had argued before the judge that the relationship between the parties was that of an unincorporated joint venture:²

[16] The applicant [Mr Zadeh] argues that there is a serious question in terms of whether the PLA procedures invoked by the respondent [Mr Jeihani] are appropriate to their relationship. He [Mr Zadeh] says that it is strongly arguable that the parties are in fact not in a sublessor/sublessee relationship but are parties to an unincorporated joint venture whereby the respondent provided the premises, business branding and initial business chattels and consumables, the applicant made a payment for such chattels and consumables and then applied his skill and labour to growing the business to a point where it could sustain not only a weekly payment to the respondent of \$900, but a reasonable return to himself.

[17] The applicant acknowledges that the weekly payments made to the respondent were reflected in his accounts as "rent" or "franchise fees" but says that this was an incorrect characterisation by his accountant and the payments were in fact in the nature of distribution of profit (when possible) from the unincorporated joint venture.

End of year financial reports

[20] Mention by the judge of "accounts", "rent", and "franchise fees" is a reference to Mr Zadeh's end of year financial reports for the financial years ending 31 March 2018 and 31 March 2019 which were provided to the High Court. The Authority observes that these reports (prepared by a chartered accountant) record Mr Zadeh as trading as Kebabs Serai as a sole trader and who was engaged in the business of a kebab shop. There is no mention of Mr Zadeh being an employee. In fact, the financial end of year reports indicate that he was in business of his own account because his income came exclusively from trading income from sales and his expenses included accident compensation levy, franchise expenses, rates, and rent.

² *Yashar Abdollah Zadeh v Hamid Reza Jeihani* [2020] NZHC 1577.

[21] The Authority further observes that in support of his application for an interim injunction against Mr Jeihani, Mr Zadeh deposed in an affidavit that he and Mr Jeihani operated the Milford kebab store together as an unincorporated joint venture.³ At [30] of his affidavit, Mr Zadeh further attested:

Hamid's [Mr Jeihani's] role

- 30.1 Hamid provides the premises, the brand, the start-up equipment, and pays some of the fixed costs;
- 30.2 Hamid benefits from a share of the profits, when the business does well enough to allow this, and also benefits from the increase in value of the business due to my efforts.

My role

- 30.3 I operate the Shop, pay all operating expenses (other than the rent and rates), paid for the initial stock, and provide my own equipment to use when the original equipment wears out.
- 30.4 I get the balance of the profit when there is one.

Further information provided

[22] In my minute of 1 March 2022, I requested pursuant to s 160 of the Act further information from Mr Zadeh notably his GST returns, Inland Revenue (IR) correspondence, other end of year financial reports, and copies of his ACC returns, for the period from 2010 to 2020.

[23] In response, the Authority was provided with Mr Zadeh's individual income tax returns from 2015 to 2020. These show that for the 2015 and 2016 tax years, Mr Zadeh's income came exclusively from self-employment — his net self-employment income was \$60,998.09 in 2015 and \$51,270 in 2016.

[24] The Authority was also provided with ACC Cover Plus statements for Mr Zadeh from 2014 to 2020. ACC Cover Plus is an optional cover product that allows self-

³ Affidavit of Mr Zadeh in support of interlocutory application at [3].

employed persons to choose how much of their income they wish to be covered for in the event of an accident.

[25] Also provided to the Authority were Mr Zadeh's GST returns from April 2017 to May 2020 which were electronically filed with IR and a GST summary from 31 March 2010 to 31 March 2020.

Mr Zadeh's explanation implausible

[26] In his witness statement to the Authority received on 14 April 2022, Mr Zadeh alleged that he had been asked by Mr Jeihani to run the Milford shop with the business account under his name. Mr Zadeh claimed that he did what Mr Jeihani asked because he trusted him but did not know that this would lead him to having tax liabilities with IR.

[27] For the Authority to find Mr Zadeh's explanation credible, it would have to discount Mr Zadeh's previous statement to the High Court, the end-of-year financial reports, IR tax returns, GST returns and ACC documents which, when individually and cumulatively considered, demonstrate that Mr Zadeh was not an employee of Mr Jeihani from 2010 to 2020.

[28] Mr Zadeh alleged that Mr Jeihani had advised him to open a new bank account for the business through which all the business expenses including GST, cost of purchases, staff wages and PAYE would go through. Mr Zadeh further alleged that he was only 23 at the time and that he did not have experience managing a store and was reliant on Mr Jeihani regarding how and why he was set up a bank account for the payment of the above expenses.

[29] The Authority finds the above explanation neither credible nor plausible. The bank account thesis does not adequately explain why Mr Zadeh had to register for GST, file GST receipts, pay ACC levies for himself, or engage a third-party accountant if all he was doing was to run store-related expenses through a separate bank account. Moreover, Mr Zadeh argues that Mr Jeihani continued to have organisation and control of the day-to-day operations of the Millbrook store. However, if that were the case, and it is not, there would be independent evidence of Mr Jeihani being a signatory or an authorised person of Mr Zadeh's business bank account.

[30] A far more logical explanation than the one offered by Mr Zadeh is one that is supported by all the documentary evidence before the Authority — that he was in business on his own account as a sole trader and not as an employee of Mr Jeihani. Mr Zadeh is both entrepreneurial and has a nous for business. This is borne out by an observation made by Muir J:⁴

The applicant [Mr Zadeh] has interests in another kebab business in Albert Street, Auckland which was not disclosed in his affidavit. His wife is the sole director and there is evidence of the applicant working in the premises. In addition, he has other employment in the construction industry but does not disclose his income. The respondent [Mr Jeihani] says it is \$80,000 per annum based on the applicant's advice to him. Again, the applicant does not seek to deny that. In my assessment the applicant's overall position is not therefore as vulnerable as he suggests it would be if he is required to exist the business without extended notice.

Whether Mr Zadeh was provided with an employment agreement

[31] Mr Zadeh submits that he was provided with a letter from Mr Jeihani (17 October 2013) which establishes the fact of his employment. The letter states:

I Hamid Jeihani director of the kebab Serais cafe store in Remuera, Birkenhead, Browns Bay and Milford confirm that I employ Yashar Abdollah Zadeh in my 188 Kitchener Road Milford Branch.

Yashar holds the position of Manager and has all the responsibility's as I'm not involved in day to day running of the business and I do other business in Iran.

His salary is \$68,016 per annum.

[32] The above letter must be approached with caution for several reasons. First, s 6(3)(b) of the Act states that the court or the Authority is “not to treat as a determining matter any statement by the persons that describes the nature of their relationship. Second, it is Mr Jeihani's evidence that it was Mr Zadeh who drafted the letter because he wished to have Mr Jeihani's support for his application to sponsor his father's application for residence. Third, the letter is in direct conflict with what Mr Zadeh has attested in a declared witness statement to the Authority which was that he simply

⁴ Ibid n 2 at [34](c).

followed Mr Jeihani's instructions on a day-to-day basis. The inconsistency between the letter above and Mr Jeihani's statement to the Authority cannot be reconciled. For the above reasons, I do not regard the letter as determinative of the real nature of the parties' relationship.

Other matters

Control test

[33] As noted above, Mr Zadeh has at different times stated that he retained day-to-day control of the Milford shop and at other times such as the present that Mr Jeihani was responsible. One prime example of an earlier occasion where Mr Zadeh has changed his position seemingly at will on this point is in his previous counsel's submissions to the High Court whose memorandum of submissions (29 June 2020) records the following concession (emphasis added):

19. It may be useful to consider common alternative business relationships, and assess whether any of these is a better explanation for the parties' relationship:
 - a. Employer/employee or contracting – There is *no* employment or contracting agreement and the plaintiff is *not* subject to any control or direction by the defendant. The plaintiff [Mr Zadeh] *is* in business on his own account and is entitled to profit from the business.

[34] The control test looks at the degree of control or supervision exercised by the employer over an employee's work. Given the concession above and the above letter of 17 October 2013 (assuming its contents to be true), it is clear that Mr Jeihani did not exercise any control or direction from Mr Zadeh whose autonomy was such that he could add pizza to the Milford store's menu without Mr Jeihani's knowledge notwithstanding that he had gone to considerable effort and expense to establish a business that primarily sold kebabs and other related foods.

Integration test

[35] The integration test entails examining factors such as whether the person was performing a role that was part and parcel of the business or whether it was more of an

adjunct to the business. Where the person is performing the former type of role they are more likely to be considered to be an employee.

[36] The test does not advance my inquiry a great deal because the real issue is whether Mr Zadeh was integrated into his own business or not. It cannot be discounted that he could have still worn a uniform and be recognised by others such as the landlord or suppliers of the store as the store manager whilst still being in business for himself. Even cumulatively considered, these traits or indicators are not determinative in this case.

Fundamental or economic reality test

[37] This test examines whether Mr Zadeh performed work as someone in business on his own account or not. It was submitted that Mr Jeihani retained full access to the business bank account that Mr Zadeh set up. However, it has not been established that Mr Jeihani had any authority or was a signatory to the bank account. This is evidence that could have been provided by Mr Zadeh's bank the absence of which is telling. The evidence that Mr Zadeh was in business for himself is overwhelming. This includes the financial returns that show he was a sole trader, the findings of the High Court that rather than being in an unincorporated joint venture, Mr Zadeh made his own profit which he did not share with Mr Jeihani,⁵ that Mr Zadeh was GST registered and that GST was payable by him (and not his employer), and the affidavit evidence and the submissions that was provided to the High Court which call into question Mr Zadeh's credibility in this forum.

Conclusion

[38] I acknowledge that if I find against Mr Zadeh that his claim against Mr Jeihani ends here for want of jurisdiction. However, be that as it may, the present claim has in some respects already been determined by Muir J in the High Court. If Mr Zadeh was dissatisfied with the outcome of that application, the proper course is for him to appeal that decision rather than to reinvent matters in the Authority. I find that Yashar Abdollah Zadeh was not an employee of Hamid Reza Jeihani and consequently the Authority has no jurisdiction to consider his claim further.

⁵ Ibid n 2, at [31](d).

[39] Given the outcome of this determination, it is not necessary that I consider the remaining issues as to whether Mr Zadeh's personal grievances were raised within the 90-day period because only an employee, which Mr Zadeh is not, can raise a personal grievance.

Costs

[40] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[41] If they are not able to do so and an Authority determination on costs is needed Mr Jeihani may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Zadeh would then have 21 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[42] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Peter Fuiava
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108]. See also www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.