

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 229
5404448

BETWEEN PAUL DOLHEGUY
 Applicant

A N D FLETCHER DISTRIBUTION
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Applicant in person
 Rachael Keenan, Counsel for the Respondent

Investigation meeting: 2 August 2013 at Christchurch

Submissions Received At the investigation meeting from both parties and
 further information received 9 August 2013, 16 August,
 22 August and 30 August 2013

Date of Determination: 8 November 2013

DETERMINATION OF THE AUTHORITY

- A. Paul Dolheguy was not an employee; therefore his claim of unjustified dismissal against Fletcher Distribution Limited is dismissed for lack of jurisdiction.**
- B. The Authority cannot and does not need to determine whether Mr Dolheguy's delay in raising a personal grievance was occasioned by exceptional circumstances.**

Employment relationship problem

[1] Paul Dolheguy asks the Authority to determine that he was an employee of Fletcher Distribution Limited when he was engaged as the operator of a PlaceMakers

franchise in a joint venture arrangement. Mr Dolheguy says that he was unjustifiably dismissed by Fletcher Distribution Limited in June 2010.

[2] Fletcher Distribution Limited says that there was not an employment relationship between Mr Dolheguy and it. Instead, it says Mr Dolheguy was part of a business arrangement essentially working as an owner/operator in the commercial role of running a PlaceMakers franchise.

[3] In the alternative, Fletcher Distribution argues that if the Authority finds that Mr Dolheguy was an employee, he did not raise a personal grievance on time, it does not consent to him raising a personal grievance out of time and there were no exceptional circumstances meaning that he should be granted leave to raise his grievance out of time.

Issues

[4] The issues the Authority needs to determine are:

- (a) whether the Authority has jurisdiction; whether Mr Dolheguy was an employee of Fletcher Distribution Limited during the franchise arrangement; and
- (b) if Mr Dolheguy was an employee whether the two year delay in Mr Dolheguy raising a personal grievance was occasioned by exceptional circumstances and it is just to grant Mr Dolheguy leave to raise the grievance out of time;
- (c) Legal costs

Determination

Background

[5] In this case an examination of the background leading up to the franchise operation is important. Mr Dolheguy was a partner in a building supplies business started in 1989. He was the managing director and an employee. In August 2003 the business was sold to Fletcher Distribution Limited, which is wholly owned by Fletcher Building Holdings New Zealand Limited. At that date Mr Dolheguy was the only original shareholder/partner remaining.

[6] A Fletcher Distribution wholly owned company, Trade Mart Limited, and Mr Dolheguy set up a new joint venture company called Builders Hardware Company Limited. Mr Dolheguy owned 49.9% of the shares and Trade Mart Limited owned 50.1%.

[7] There was an interim joint venture agreement between Fletcher Distribution, Builders Hardware Company and Ryedale Holdings (Christchurch) Limited.

[8] Ryedale Holdings was incorporated in 1992 and Mr Dolheguy was the sole director. Builders Hardware Company contracted with Ryedale Holdings to engage Mr Dolheguy as the manager of the business. Mr Dolheguy invested capital in the business in excess of \$100,000. Fletcher Distribution says he ran the store as a joint venture owner operator, but not an employee.

[9] The arrangement was an interim one because all parties agreed that if Fletcher Distribution, through Trade Mart, decided to convert the business to a PlaceMakers franchise a new agreement would be entered into.

The joint venture to run a PlaceMakers store

[10] On 1 July 2008 the joint venture converted to a PlaceMakers franchise agreement. Prior to entering into the new agreements below Mr Dolheguy received advice from his lawyer, Richard Neave, of Duncan Cotterill lawyers.

[11] The following contracts were entered into on 27 August 2008:

- The Joint Venture Agreement between shareholders Trade Mart, Ryedale Holdings as the management company and Mr Dolheguy as the operator. This agreement resulted in Builders Hardware Company being the company to operate the joint venture.
- Mr Dolheguy was one of two directors of the joint venture company, the other being the Fletcher Distribution chief executive at the relevant time. The shares in Builders Hardware Company were owned by Ryedale Holdings (Christchurch) and Trade Mart.
- The Franchise Agreement between Fletcher Distribution as the franchisor, Builders Hardware Company as the franchisee, and Ryedale Holdings and Mr Dolheguy and Mrs Dolheguy as guarantors;

- The Registered User Agreement between Fletcher Distribution as the licensor and Builders Hardware Company as the user of the PlaceMakers trademarks; and
- The Management Agreement between Builders Hardware Company as the joint venture company, Ryedale Holdings as the management company and Mr Dolheguy as the operator of the PlaceMakers franchise store business.

[12] Clause 4 of Schedule 1 of the franchise agreement said that the term of the agreement was from 1 July 2008 until 30 June 2010. The franchise agreement was terminated as at that date against Mr Dolheguy's wishes. That led to the dissolution of the joint venture.

[13] Prior to the termination of the franchise agreement and the joint venture Mr Dolheguy received legal advice again from Mr Neave. On 29 June 2010 Mr Dolheguy signed a Termination Agreement and Agreement for the sale of shares in Builders Hardware Company to Trade Mart. Mr Dolheguy resigned as a director of Builders Hardware Company.

[14] There is an outstanding dispute between Fletcher Distribution and Ryedale Holdings about money Fletcher Distribution claims is owed to it by way of business debts incurred during the joint venture.

[15] Mr Dolheguy wrote a letter raising a personal grievance for unjustified dismissal with Fletcher Distribution on 8 May 2012. He lodged his Statement of Problem with the Authority on 7 March 2013.

[16] First, I need to determine whether Mr Dolheguy was an employee of Fletcher Distribution Limited. This is a threshold issue. If Mr Dolheguy was not an employee but instead engaged in business on his own account the Authority has no jurisdiction to determine any other issue between him and Fletcher Distribution.

[17] At the investigation meeting I heard sworn evidence from Mr Dolheguy and affirmed evidence from John Beveridge, who was the chief executive of Fletcher Distribution during 2010.

Was Mr Dolheguy an employee?

[18] It is Mr Dolheguy's view that ss.5 and 6 of the Employment Relations Act 2000 which define the concepts of *employer* and *employee* support the conclusion that he was an employee of Fletcher Distribution Limited.

[19] Section 5 of the Employment Relations Act 2000 (the Act) defines an *employer* as:

... a person employing any employee or employees; and includes a person engaging or employing a home-worker.

[20] The definition of *employer* is reliant on the definition of *employee* contained in s.6 of the Act which reads in part:

(2) In deciding ... whether a person is employed by another person under a contract of service¹, the ... Authority ... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2) 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.

[21] In *Bryson v. Three Foot Six Limited*² the Supreme Court said *all relevant matters* include:

- *The written and oral terms of the contract, including terms indicating the party's intentions,*
- *Any divergences from those terms in practice,*
- *The day-to-day implementation of the contract, and*
- *The tests of control and integration, and whether the contracted person is effectively working on his or her own account (the fundamental test).*

[22] Industry practice can also be relevant, although it is not determinative³. The ultimate decision about whether someone is an employee *depends upon the entire factual matrix*⁴.

¹ Rather than a contract for services or some other business arrangement.

² [2005] ERNZ 461

³ *Bryson v Three Foot Six Limited* [2003] 1 ERNZ 581 at paragraph [19] (Judge Shaw, Employment Court)

⁴ *Ibid* at paragraph [21]

[23] The definitions of the terms *employee* and *employer* in the Act do not assist Mr Dolheguy's argument that he was an employee. Instead s.6 sets out the kind of enquiry I need to undertake to decide whether or not he was an employee of Fletcher Distribution.

What do the contracts say?

[24] The starting point for considering whether the relationship between Mr Dolheguy and Fletcher Distribution was an employer/employee relationship is an examination of the contracts between the parties.

[25] There was no employment agreement entered into between Fletcher Distribution and Mr Dolheguy. The lack of an employment agreement in itself is not sufficient to conclude that there was no employment relationship.

[26] Two of the contracts name Mr Dolheguy personally. In the franchise agreement Mr Dolheguy is named as one of the guarantors of the contract, although not a contracting party. Fletcher Distribution is a party to the franchise agreement. However, this kind of contractual arrangement is not evidence of an employment relationship.

[27] In the management agreement Mr Dolheguy is named as the operator of the franchise to be engaged by Ryedale Holdings. Fletcher Distribution is not a party to that agreement.

[28] There is no direct contractual relationship between Fletcher Distribution and Mr Dolheguy. Fletcher Distribution says that if Mr Dolheguy was an employee, which it denies, then he could only ever have been an employee of Ryedale Holdings pursuant to the management agreement.

[29] Ryedale Holdings is a company with Mr Dolheguy as the sole director. There is no contractual relationship between Mr Dolheguy personally and Fletcher Distribution which points to an employment relationship.

What do the control and integration tests show?

[30] Mr Dolheguy submits that whatever the corporate structure was at the time of the joint venture the reality was that he personally was subject to control and

instructions coming directly from Fletcher Distribution, for example health and safety directives, rather than through the joint venture company. Mr Dolheguy says the corporate structure was set up to operate the commercial side of the franchise but does not stop him from being considered an employee.

[31] Mr Dolheguy also submits that Fletcher Distribution had authority and control which it exercised to hire him and fire him. He says that Fletcher Distribution wanted him, personally, to operate the franchise and the corporate structure allowed him to do that; he considers that to be evidence that he was an employee.

[32] The *control* test requires an enquiry into what kind of control the worker was subjected to by the alleged employer. It is often a useful exercise in determining whether there was a contract of service. Mr Dolheguy argues that Fletcher Distribution retained control over him and the operation of the franchise. For example, he was directed to and had to implement the health and safety policy. He contends that meant he was an employee.

[33] The *integration test* requires an examination of whether the work performed by Mr Dolheguy was an integral part of the business and whether he was “part and parcel of the organisation”.

[34] However, these are not the most useful tests when there is a franchise being run by the applicant. That is because requirements to follow the procedures and processes of the PlaceMakers brand, mean significant control is exerted and there is some significant integration into the franchisor’s business. In a franchise control and integration factors are as much evidence of a business relationship between a franchisor and a franchisee as they might be of an employee/employer relationship.

What does the fundamental test show?

[35] The most useful enquiry is the *fundamental* or *economic reality* test. That is the most likely to assist me to identify the *real nature of the relationship* as required under s.6 of the Act. The fundamental test asks whether the person performing the services is doing so as a person in business on his or her own account⁵.

[36] The nature of the contracts entered into between the parties is strong evidence that Mr Dolheguy personally was not an employee of Fletcher Distribution or any

⁵ *Curlew v Harvey Norman Stores (NZ) OTY Ltd* [2002] 1 ERNZ 114, at paragraph 81.

other Fletcher owned or controlled company. However, the business relationships between the entities require further examination to test this view.

[37] Ryedale Holdings, the management company, invoiced Builders Hardware Company (the joint venture company) monthly and was paid monthly amounts which included GST. Any payments made to Mr Dolheguy arising out of the franchise operation would have been made by Ryedale Holdings. Mr Dolheguy says that Ryedale Holdings did GST returns. Mr Dolheguy did not pay PAYE. These aspects point to an arm's length business arrangement, rather than an employer/employee relationship.

[38] Mr Dolheguy says that Fletcher Distribution offered him the franchise opportunity personally⁶ and that the fact that he was personally engaged as the operator of the franchise through Ryedale Holdings means that the relationship between him and Fletcher's was a personal one of employment. I disagree. The letter of offer is addressed to *Paul Dolheguy, Builders Hardware*. Builders Hardware was at that time a company in a joint venture with a Fletcher Distribution wholly owned company (Trade Mart). Mr Dolheguy was already engaged as the manager of that joint venture store. His engagement was through a company, Ryedale Holdings, rather than directly with him. Mr Dolheguy may have been employed by Ryedale Holdings, although there was no objective evidence of that provided. Even before the franchise agreements were entered into Mr Dolheguy was not in an employee/employer relationship with Fletcher Distribution.

[39] Mr Dolheguy argues that the contractual or business arrangements entered into between the parties are not relevant because he considers he was an employee. In essence, he considers that Fletcher Distribution hired him and fired him. To back that up he offers as an example that he had to let Fletcher Distribution know if he intended to take leave.

[40] Clause 2.2A of the Management Agreement provides:

Personnel: The personnel to be provided by Management Co to perform the Management Services will include but not be limited to:

(a) *Operator:* the full time services of the Operator [Mr Dolheguy] which will be provided by Management Co to JVC [joint venture company, Builders Hardware Company] on such terms as the

⁶ Letter dated 25 July 2008 from David Edwards, Chef Executive, Fletcher Distribution Ltd.

Directors will prescribe from time to time for the general management of the Business, subject only to unavailability for four weeks in each full year period, such period not to be taken as a single period without both Directors' agreement.

[41] In Mr Beveridge's evidence he referred to the requirement that Mr Dolheguy seek leave to take all four weeks of time off at one time as a courtesy. Clearly it was a requirement. However, Mr Dolheguy also seemed to consider that he needed to notify the other director when he intended to take any time off. That was not a contractual requirement, but was clearly a courtesy.

[42] I note that Mr Dolheguy was not paid for annual leave or sick leave, rather all income he received would have been via payments made to him by Ryedale Holdings. No payments were made to Mr Dolheguy personally by the joint venture company, Builders Hardware or by Fletcher Distribution. Clause 2.2A of the Management Agreement is not evidence that Mr Dolheguy was an employee of Fletcher Distribution.

[43] It is common for a franchisor to want to guarantee the personal involvement of an operator or operators in the day to day management of a franchise. That does not mean that the operator of a franchise becomes an employee of the franchisor.

[44] Mr Dolheguy says that the kinds of meetings required of companies were not held for Builders Hardware Company and so the company structures and contractual arrangements were essentially a cover for Fletcher Distribution directly exerting control over Mr Dolheguy's personal operation of the PlaceMakers store. However, Ms Keenan has supplied copies of Builders Hardware Company's resolutions of shareholders and directors and Annual General Meeting minutes for 2003, 2004, 2005, 2006, 2007, 2008 and 2009. Mr Dolheguy signed 21 of those documents. That is sufficient evidence to conclude that Builders Hardware Company operated as a company with the purpose of running the joint venture of a PlaceMakers franchise.

[45] Mr Dolheguy submits that when he signed the agreements establishing the franchise operation in 2008 he was not aware and did not understand that in so doing he would not be considered an employee. He says that:

Legal advice at the time was that by signing the agreements, I was not signing away my human rights nor my rights to be treated fairly under all of NZ Governing Laws [sic]. That included the ERA.

[46] Mr Dolheguy has not produced any objective evidence of that apparent legal advice. I consider it highly unlikely that in 2008 his lawyer addressed any advice to Mr Dolheguy's personal rights and obligations as an employee, whether of Fletcher Distribution or of Ryedale Holdings, under the proposed franchise arrangements because no employment relationship was envisaged or planned. If Mr Dolheguy was advised that the Employment Relations Act would apply to render him an employee of Fletcher Distribution that advice was simply wrong. However, the fact that no employment relationship problem was raised in 2010 at the end of the franchise agreement, when Mr Dolheguy also received legal advice from the same senior and experienced solicitor, strongly adds to my view that his legal advisor did not consider that an employee/employer relationship existed during the franchise arrangement between Mr Dolheguy and Fletcher Distribution.

The real nature of the relationship

[47] At the time of entering into the franchise arrangement Mr Dolheguy was already an experienced businessman. From 1989 he had been operating a hardware business. In 2003 he sold that business to Fletcher Distribution and entered into a joint venture arrangement which saw him managing the business. In 2008 he entered into the PlaceMakers franchise agreement, also putting money into that joint venture. By doing so Mr Dolheguy stood to make significantly more money than if he had been an employed manager of a PlaceMakers store owned wholly by Fletcher Distribution. That was an attraction of the arrangement for him as a businessman. However, he also took on business risk that the joint venture franchise may not succeed in the long term. He took legal advice on the contractual arrangements proposed by Fletcher Distribution which included the possibility of the franchise being terminated in 2010. Mr Dolheguy entered into the franchise arrangement with his eyes wide open taking advantage of the financial structure that he had been a part of setting up, which included tax advantages to him through his engagement by Ryedale Holdings.

Conclusion

[48] The real nature of the relationship between Fletcher Distribution and Mr Dolheguy was as business partners, at arm's length, to the joint venture of operating a PlaceMakers store. It is not now open to Mr Dolheguy to claim that he was an employee.

[49] Mr Dolheguy was not an employee; therefore his claim of unjustified dismissal against Fletcher Distribution Limited is dismissed for lack of jurisdiction. For that reason, the Authority does not need to determine whether Mr Dolheguy's delay in raising a personal grievance was occasioned by exceptional circumstances and so should be granted leave to raise his personal grievance out of time

Costs

[50] Costs are reserved. The investigation meeting took less than half a day. The parties indicated that they were likely to be able to agree costs between themselves and Ms Keenan indicated that if Fletcher Distribution was successful, as it has been, that it was likely to seek limited costs, probably only for the cost of her travel from Auckland for the investigation meeting. However, if the parties are not able to agree on costs Fletcher Distribution has 28 days to make a written application for costs and Mr Dolheguy has a further 14 days to respond.

Christine Hickey
Member of the Employment Relations Authority