

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	John David Fisher (Applicant)
AND	Roy and Victoria Fisher (Respondent)
REPRESENTATIVES	Katie Ashby-Koppens, Counsel for Applicant Jo Tisch, Counsel for Respondent
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	11 April 2006 26 May 2006
SUBMISSIONS RECEIVED	2 and 16 June 2006
DATE OF DETERMINATION	22 August 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr John Fisher met and became friends with Mr Roy Fisher through a mutual interest in their local Filipino club (both men had married Filipino ladies and were members of the club). John had been a dairy farmer and Roy owned an orchard and operated a lemon juice processing business. The two men shared a love of the land. Both men were also involved in the Jaycees and Lions organisations and they had many mutual friends.

[2] In his statement of problem and initial witness statement filed in the Authority, John claims he was employed by Roy in October 1989 and worked in Roy's businesses until 2002. In an amended statement filed in the Authority after reading Roys statements, the date of employment was changed to October 1988. He claims arrears of wages, holiday pay and interest for the period October 1988 to 2002.

[3] Roy says he never employed John and does not owe him any money as an employee.

[4] In reaching my conclusions in this matter I must firstly be satisfied that John was an employee in terms of the Employment Relations Act 2000. If that issue is answered in the positive

then I must go on and determine whether the applicant is able to pursue his claim given the statutory bar of 6 years on claims for arrears of wages. Finally, if necessary, I will determine the quantum.

Was there an employment agreement?

[5] During the period of the Fisher's relationship the government repealed and enacted three statutes applicable to employment relationships: Labour Relations Act 1987; Employment Contracts Act 1990 and the Employment Relations Act 2000. I have considered the tests applicable under all three Acts. I consider it appropriate that I apply the tests applicable to establishing the real nature of the relationship pursuant to the Employment Relations Act 2000. This includes consideration of:

- analysis of the terms and conditions which the parties have agreed to;
- the intention of the parties – although this is not decisive;
- analysis of the historical control, integration tests and the fundamental test (which examines whether a person is performing the services on their own account); and
- industry practice.

(*Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114; and *Koia v Carlyon Holdings Ltd* [2001] 1 ERNZ 585; *Bryson v Three Foot Six* [2003] 1 ERNZ 581 (EC) and *Bryson v Three Foot Six*[2005] 3 NZLR 729 (SC))

[6] For the reasons outlined below I have found that Mr John Fisher was not an employee of Roy and Victoria Fisher. I have found that, for various periods of time, John did work for Roy on the following basis:

1988-1995 John assisted Roy on the orchard and in the lemon juice business as a friend and latterly as an interested partner in Roy's Delaroy Marketing business.

From 1989 John was engaged as a commission only sales person to promote the sale of the imported goods on behalf of Delaroy Marketing. It is not certain when this arrangement came to an end.

1991 The lemon juice business was assigned to John as part payment of the balance of a loan of \$87,000 of which \$25,055.20 had been repaid. John entered into an agreement to lease the premises used for the lemon juice business from Roy.

1993 In accordance with an agreement reached when John provided \$15,000 to purchase a container, John worked as a 1/3rd partner in the business in return for a promise that he would receive an equitable share of the distribution of profits when Delaroy Marketing/Golden Wok was sold. As set out below, it was agreed that none of the 3 partners would receive wages in return for their labour, however, as this was the only source of income for Roy and Victoria, they would make drawings of \$1,000 per month for living expenses.

1996 The intention to remain a partner in Delaroy Marketing was confirmed by John when he discussed the situation with Roy following receipt of a payment purportedly for interest on the \$15,000, which he returned.

The Orchard Work

[7] The Orchard was operated as a sole trading business under the name of RJ Fisher with 100% ownership vested in Roy. Roy also operated a lemon juice business in which he would purchase frozen lemon concentrate, produce ready to use lemon juice from the concentrate, bottle it and sell it to his customers. The production side of the lemon juice business was operated under RJ Fisher.

[8] Roy kept diaries of his daily activities throughout his time on the Orchard. The diaries for 1988, 1989 and 1991 have been produced to the Authority. The matters discussed in the diaries vary from the weather and temperature conditions, to work undertaken in the businesses operated by Roy and Victoria, information about who had visited the house, visits made by Roy and Victoria, health problems experienced by the Fishers etc.

[9] I am satisfied that while the diaries are not a complete record of the daily activities of the orchard, they do contain information on events and happenings Roy considered important within his business operations and daily life. The diaries are contemporaneous evidence and I have therefore, used the notations in the diaries to assist in reaching my conclusions.

[10] John says he was employed to work initially in the orchard business as a labourer and then in later times in the importing business. John told the Authority the employment arrangement came about when Roy came to his house in early October 1988 and asked him to work for him. Roy denies ever having any such discussion with John. Roy says John came along to the orchard and would give him a hand when he was working. Roy told the Authority that John would come along and have a cup of coffee with him in a social context and would offer to do some jobs around the orchard.

[11] John provided the Authority with a schedule of hours he claims he worked for Roy on the orchard which included an hourly rate which was extrapolated out to arrive at the amount he claims is owing to him as wages. John told me that he had estimated the hours he would have worked for Roy as no timesheets or other records were kept of the hours worked. John claims he worked for 50 weeks for 30 hours per week. However, this does not accord with other evidence given by John where he states the employment arrangement was: "...on a part time casual basis, and was as and when the respondent's needed me."

[12] In answer to questions at the investigation meeting John conceded that at no time was there any agreement about the payment of an hourly rate. He says Roy promised he would not be paid less than \$10.00 per hour. Roy denies having any discussions with John about an hourly rate.

[13] John also maintains that it was agreed that wages would accrue until Roy retired at which time "Roy would look after him". Roy agrees that he did have a conversation with John about John being looked after but says it happened much later in their business relationship and was in relation to a loan of \$15,000 which was a capital investment made by John as a partner in the business. Roy's evidence (which I accept) was that John had said it would be a good investment, and he [Roy] agreed that yes, he [John] would be well looked after.

[14] Roy's diaries for 1988 disclose very few entries referring John. When he was referred to it was in relation to social interactions such as attending his son's christening and having dinner. The later diaries record that John did assist Roy on the orchard on several occasions.

[15] In support of his claim for arrears of wages for the orchard work, John says that he undertook all the tractor repairs at the orchard. Roy told me that when he first met John, John had offered to look after the tractors for him and he learnt a lot from John, but when the tractors broke down he would bring in other people to fix them. Roy's evidence is supported by the diaries, which show that others were involved in the repair of orchard machinery. The business accounts produced by Roy for the same period also show that RJ Fisher paid for mechanical repairs to be undertaken.

[16] I am satisfied that the work John did around the orchard between 1988 and 1995 was as a result of his friendship with Roy and not as a result of an employment relationship. The situation is analogous to the situation described by Mr Robin Linder where he told the Authority that he helped John out from time to time and that he did this work for no remuneration.

[17] Mr Linder, who gave evidence on behalf of John, told me that John fed him and repaid him by teaching him how to use the computer. Mr Linder also gave evidence that he worked alongside John Fisher once the lemon juice business was in his ownership. He told me he would label the 2 litre bottles and that he would work there approximately every 2-3 weeks. Mr Linder was quite adamant that the arrangement he had with John was that he was a volunteer and there was never any expectation that he would get paid. They were friends and that's what friends did for each other.

[18] Given the types of events recorded in the diaries, I am satisfied that if Roy had offered John a job to work on his orchard it would have appeared as a notation in the diary. There is no such record.

[19] It was common ground at the investigation meeting that initially, John's interest in working with Roy was motivated by his desire to learn more about importing which Roy was doing in his other business interests. I find that it is more likely than not that initially it was John's interest in learning about importing and John's knowledge that Roy was looking to expand his importing business that attracted John to attend the orchard and provide assistance to Roy from time to time.

[20] I am satisfied that latterly, it was the interest in being involved directly with the importing business and John's ownership and operation of the lemon juice business that kept him providing assistance to his friend in the orchard.

Delaroy Marketing

[21] Delaroy Marketing was a 50/50 partnership between Roy and Victoria. Initially the produce from the orchard and lemon juice business were sold under the trading name of McCoy Orchards. The name was changed in 1989/1990 to Delaroy Marketing.

[22] In 1997 Delaroy Marketing and Sari Sari Store (a retail outlet for the goods imported by Delaroy Marketing and wholly owned by Victoria) were amalgamated into one entity known as The Golden Wok.

[23] Through Delaroy Marketing and then the Golden Wok, Roy and Victoria imported goods from the Philippines and sold them into stores and supermarkets as well as their own retail store. An entry in Roy's 1989 diary records that on Monday, 3 July, John asked Roy if he [John] could sell nuts and lemon juice on commission. Roy records in his diary that he offered John a commission only role on the basis of a payment of 10% of the wholesale price ex the store for all sales and that John would act as an agent and sell product from his van. John claims that this amount was agreed to, to cover his petrol costs only and seeks to recover wages for the period. There is no dispute that the 10% commission amounts were paid as agreed.

[24] I have had the benefit of receiving the profit and loss statements for Delaroy Marketing for the years 1988 onwards. The financial statements were compiled by a professional accountant, Mr Owen Dunning. The sales figures for 1988 and 1989 are comparable at \$76,119.55 and \$71,944.38

respectively while for the financial year ended 31 March 1990 the sales figure jumps to \$167,401.79. The statements for the year 31 March 1991 record an item for the costs of imports for the first time, being \$112,809.40. The accounts also show that wages were paid to Roy Fisher for 1988 through to 1990. The accounts show that Roy did not receive any wages from the Delaroy Marketing account from 1991 onwards.

[25] The sharp increase in sales for the period 31 March 1989 to 31 March 1990 coincides with John's engagement to act as a commission agent for the business.

[26] I find that between 1989 and 1991 John Fisher was working as a commission only sales person. He received payment of commission on sales of nuts and lemon juice in return for his work. I also find that in addition to the commission paid on his sales John Fisher received an additional payment on commission to account for his work in distributing product to other sales reps.

[27] It was common ground that John unloaded containers for the Golden Wok business and received remuneration for this work. There was also evidence before the Authority that John was able to, and did, take goods from the store from time to time, as he wished. Mr Linder confirmed this evidence.

\$87,000 Loan

[28] In 1990 an opportunity for Roy to import new lines opened up. At the time Roy did not have the necessary capital to buy a container. It was common ground that John provided the \$87,000 to make it happen. Initially the \$87,000 was a capital investment in the business, but that changed and was later recorded as a loan from John to the business and on which the business paid interest. A document setting out the terms of the loan was drafted and signed by both John and Roy.

[29] It was Roy's evidence (which I accept) that it was intended that if the extended range went well he and John would form a company to handle the product, in the meantime both men agreed to work in the business for no wages.

[30] It was common ground that by September 1991 Roy had paid back \$25,055.20 of the loan plus interest at the rate of \$3,000 per month. Roy determined that he was not going to be in a position to pay the balance of the loan and offered the lemon juice business to John as payment for

the outstanding amount. This offer was accepted and the lemon juice business was assigned to John in September 1991. There is also evidence that John leased the premises used for the lemon juice business from Roy.

\$15,000 loan

[31] In 1993 John provide a further \$15,000 to Roy's business, Delaroy Marketing, to assist with the importation of a container of goods. It was Roy's evidence that he borrowed the money in July and was to pay it back within three months. He says that in August he approached John who suggested the money stay in the business and they should look at shares or a partnership. At first Roy was uncomfortable with this suggestion. However, after considering it, and taking into account the fact that his health was not good, together with his desire to ensure the business continued to operate should he be unable to do it himself, he agreed that a partnership with John was attractive.

[32] Roy's evidence (which I accept) is that when he agreed to the partnership with John it was also agreed that Roy and Victoria would draw \$1,000 per month for living expenses, but that no wages would be paid to them. Likewise, John would receive no wages from the business. John was receiving income from other sources and so he was able to make ends meet without the need for any drawings. It was agreed that when the business sold they would divide the profits pro-rata.

[33] It was common ground that Victoria and John did not get along. Mrs Fisher told me John would come to their orchard and have coffee with them and he would sometimes go up to the warehouse when she was working there and they would argue.

[34] Mrs Fisher discovered that John had given Roy a cheque for \$15,000. When she made enquires about it, she was advised that it was capital investment. Mr Dunning confirmed Mrs Fisher's evidence that when the transaction became known to Mrs Fisher, she objected strongly and was clear that she did not want John to be a partner in their business. However, after discussions with Roy she agreed she would think about having John as a partner. Mrs Fisher's uncontested evidence was that she didn't really have a choice, they could not pay the \$15,000 back.

[35] In 1995 Roy suffered from a heart attack and convinced Victoria that they needed John to be a partner in the business. Victoria then relented and agreed.

[36] In 1996, Mrs Fisher sent John a cheque for \$1,800 as payment of interest on the \$15,000 in the hope that John would acknowledge the money was a loan. The cheque and its covering note

was returned by John with a notation on the note that the payment was “not acceptable”. It was confirmed at the investigation meeting that the notation was in John’s handwriting.

[37] After John received the cheque he spoke with Roy on the telephone and made it clear to Roy he considered himself a partner in the business and he intended to remain a partner. By that time Victoria had agreed to allow John to be a partner and Roy assured John they were now able to move forward.

[38] I have concluded that it was the intention of both men, in 1993, that they become partners in the importing business and that John’s \$15,000 was consideration for that agreement. I am supported in that conclusion by Mr Dunning’s evidence that he was required to undertake a valuation of the business was to ascertain how many shares the \$15,000 would buy of the business. Mr Dunning told me he valued the business 2 or 3 times and contacted John to work something out but was aware that nothing was ever recorded formally. This arrangement was confirmed by John in 1996 when he returned the cheque and told Roy he was a partner and intended to remain a partner.

Sale of the Golden Wok

[39] On 16 May 2003 both Roy and John met with Mr Richard Rhodes to discuss the sale of the Golden Wok. The minutes record that John was present as he was a partner in the business and he had a beneficial interest. These minutes were sent to John who has never disputed the accuracy of the record.

[40] John’s evidence is that he invested a lot of time and energy into developing the importing business and was committed to its success. He took no drawings out of the business, although Roy did. Roy drew \$1,000 out of the business for living expenses. At the investigation meeting John accepted that if the partnership agreement had been formalised things would have been very different. I have taken this to mean that if the partnership agreement had been formalised in writing then he would not be claiming wages for the period of time he worked as a partner in Delaroy Marketing/Golden Wok.

[41] The business was sold in 2003, but by then there was not a lot of equity left and the distribution to the shareholders was very low. The evidence shows that the sale of the Golden Wok resulted in a cash surplus of \$12,000. As a 1/3rd partner, John’s distribution would equate to \$4,000. John was disappointed with this result as he believed, when he first entered into the arrangement that he would be well looked after. Such is the reality of being in business.

Conclusions

[42] In deciding this matter I must determine the real nature of the relationship. To do that I have considered all relevant matters including the intention of the parties, and how the relationship worked in practice.

Analysis of the terms and conditions which the parties have agreed to

[43] It was common ground that there were no specific terms and conditions discussed or agreed by the men in 1988. I have found there was an agreement reached in 1989 that John would act as a commission only sales agent for Delaroy Marketing and that that agreement was adhered to. I have also found that there was an agreement in 1993 for the men to become partners in Delaroy Marketing, albeit no formal partnership agreement was ever drawn up. The agreement included the right for Roy and Victoria to take monthly drawings of \$1,000 and that none of the parties would receive any wages.

Intention of the parties

[44] It was John's evidence at the investigation meeting that the intention was for him to be a partner in the business. He told me that what should have happened is that a partnership agreement should have been written up, but it wasn't. Mr Linder also understood that John wanted a partnership or his money back.

[45] I am satisfied that the intention to include John as a partner was pursued when Roy asked Mr Dunning to undertake a valuation on Delaroy Marketing to ascertain the number of shares \$15,000 would purchase in Delaroy Marketing. Mr Dunning confirmed that he did 2 or 3 valuations but had received no specific instructions to draw up a partnership agreement, although he did provide the valuation figures to John.

[46] John's intention was confirmed in 1996 when he returned the cheque Victoria had written as payment of interest on the \$15,000 and told Roy that the cheque had been returned as he was a partner in the business and he intended to remain a partner. A view also shared and confirmed by Roy.

Control

[47] John carried out warehousing duties and did costings for produce as it was imported. The evidence shows that John was never required to undertake the costing, that was a task Roy would usually undertake. John told the Authority he wanted to learn how to do it, and he would do

costings on his computer at home. He also assisted the staff from time to time with information on how the costing spreadsheets worked.

[48] John was not required to be available at any particular time of the day. There was evidence that he was always easy to get hold of and, until the warehouse moved into the Tauranga premises, would despatch goods from the Warehouse in Katikati to the Tauranga shop.

[49] John was free to come and go as he pleased. It was John's evidence that he received income from looking after two lifestyle blocks, one from 1993 to 2004 and the other from 1995 to 2003. He told me he would visit the lifestyle blocks about six times per week. He also worked in his lemon juice business. I am satisfied that Roy and Victoria exercised very little, if any, control over John.

Integration test

[50] The question for the authority is whether John was employed as part of the business and his work is being done as an integral part of the business compared with contract for services where the work is not integrated but is only an accessory to it.

[51] I am satisfied that the evidence strongly points to John's work being an integral part of the business. However, that conclusion is not determinative and I would expect John's work for the business to be integral if he was a working partner.

Fundamental test

[52] It was not certain whether John's commission payments were subject to PAYE. While tax status can be an indication of what a person intends his contractual relationship to be, in John's case the evidence as to his tax status was not conclusive. There is evidence that John was operating a business on his own account by virtue of the income he received from his other sources including the lifestyle blocks, the lemon juice business and some commercial property investments.

Industry Practice

[53] The only evidence produced by the parties in relation to industry practice was that of Mr Linder who confirmed that it was common for friends to help each other out and to provide unpaid assistance.

[54] It is not uncommon for business partners to agree not to draw an income from a growing business until such time as the business has been established and is able to support a distribution of profits to the partners.

[55] Industry practice in this regard indicates that the arrangement between John and Roy was not uncommon.

Determination

[56] In light of the facts, measured against the established principles, I find the real nature of the relationship was not a contract of service, Mr John Fisher was not an employee of Roy and Victoria Fisher. I am unable to be of any further assistance to Mr John Fisher.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority