

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Andries Hendrik Jooste (Applicant)

**AND** Denis John Fetherston (First Respondent)  
**AND** Anna Maria Bernadina Fetherston (Second Respondent)  
**AND** Risk Management Holdings Limited (Third Respondent)  
**AND** BBBHL Limited (Formerly Hasieman Holdings Limited)  
(Fourth Respondent)  
**AND** Automated Maintenance Holdings Limited (Fifth Respondent)

**REPRESENTATIVES** Robin Arthur, Counsel for Applicant  
Benn Andrews, Counsel for Respondents

**MEMBER OF AUTHORITY** Y S Oldfield

**INVESTIGATION  
MEETINGS** 13 September 2004, 30 September 2004, 1 October 2004,  
13 October 2004

**SUBMISSIONS** 20 October, 5 November, 10 November 2004

**DATE OF DETERMINATION** 4 March 2005

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

**Employment Relationship Problem**

The problem Mr Jooste wishes the Authority to resolve concerns an alleged unjustified dismissal and arrears of wages claim. It is his case that he was employed in August 2002 by Mr Fetherston, and/or his wife Mrs 'Ans' Fetherston and/or one or more of a group of entities in which Mr Fetherston and/or his wife held a proprietary or beneficial interest. Those entities are the other respondents to this matter. Mr Jooste says that his employment continued until he was dismissed in 2004.

None of the respondents concedes to having ever employed Mr Jooste at all and it falls to me to determine, as a preliminary matter going to jurisdiction, whether Mr Jooste was party to an employment agreement with one or more of the respondents. The investigation into the preliminary matter took place over two full days and two half days. I was also provided with a considerable volume of documentary evidence in relation to this matter. All of it has been very carefully considered however for reasons of economy I have restricted myself here to a brief summary of the factual background.

I note that where there has been a difference between the witnesses I have tended to prefer the evidence of Mr Jooste. My reason for this is that Mr Fetherston has not presented as a reliable witness. In particular his evidence has been marked by inconsistencies and an apparent unwillingness to give direct answers to questions put by the Authority.

**Chronology of events.**

1. In August 2002 Mr Fetherston approached a recruitment consultant, Andrew Brownlee of Crown Recruitment and told him that he was seeking a General Manager. The two worked together to prepare the specifications for the role. At that time, Mr Brownlee understood that any successful candidate would be placed with a company called Risk Management Services Ltd. Later Mr Fetherston told him that the candidate would be placed with Hasieman Holdings Ltd, which Mr Brownlee understood to be the parent company to Risk Management Services Ltd.
2. Mr Brownlee put forward several candidates before Mr Fetherston advised that his preference was to take on someone who wished to invest in his business. None of the existing candidates were in a position to do this so Mr Brownlee looked further and identified Mr Jooste, with whom he himself had business dealings, as a suitable contender.
3. At this time Mr Jooste was a relatively recent immigrant to New Zealand and working at senior executive level for a company in the Shell Group. His work involved extensive travel to Australia and Mr Brownlee knew that Mr Jooste might be interested in another position if it meant less time spent away from his family.
4. Mr Brownlee offered candidates' names to Mr Fetherston on the basis that whoever was successful could expect an offer of employment on favourable terms. He had been given an indication that the annual salary would be between \$150,000.00 and \$200,000.00. All the candidates were already in secure well paid employment at or near this level and would not have responded to being "shoulder tapped" for anything less.
5. Normally, Mr Brownlee's practice was to negotiate a fee for his services as a percentage of the salary package to be agreed by a candidate. In this case, Mr Brownlee disclosed to Mr Fetherston that he had a potential conflict of interest because Mr Jooste had an interest in Crown Recruitment. In recognition of this, Mr Fetherston agreed that if Mr Jooste was offered and accepted a position with him, Mr Brownlee would receive a flat fee of \$15,000.00 instead of a percentage based commission.
6. Mr Jooste met with Mr Fetherston to discuss his business venture and requirements. Each was favourably impressed with what the other had to say and Mr Fetherston invited Mr Jooste to come and work with him on a salary of \$15,000.00 per month. Mr Fetherston advised that he was waiting for Mr Brownlee to prepare a contract which would be available in due course. Mr Jooste accepted and started work on that basis.
7. At Mr Fetherston's request Mr Brownlee did supply three alternative draft contracts as templates for any agreement reached between Mr Fetherston and Mr Jooste. In putting forward Mr Jooste's name, Mr Brownlee's perception was that he was introducing a prospective employee since that is what he is in the business of doing. However he conceded that of the draft contracts he supplied, two were contracts of employment and one was for services.
8. Mr Brownlee did not take part in the discussions between Mr Jooste and Mr Fetherston and has no first hand knowledge of what they may have agreed. Mr Fetherston did not pay the fee for Mr Jooste's placement. Crown Recruitment eventually took action to recover this fee and a further outstanding fee for another individual who had been placed with Mr Fetherston. Mr Fetherston told me that:

“the relationship began to focus around the applicant investing and becoming a director of AMHL and so the contract was not required.

Crown Recruitment sought a finder’s fee from me, for the fact that they introduced the applicant. This request was rejected by myself and the applicant because an employment agreement was not reached.”

9. Mr Fetherston told me that he was opposed in principle to employing anyone and that he rarely does so.
10. On 17 October 2002 Mr Fetherston wrote to a potential investor confirming:

“We have appointed Andre Jooste to lead the marketing and commercialisation of the business.”
11. Mr Jooste told me that he had been an employee in every position he had held in the past and it was his assumption that this time would be no exception. His job at Shell was very secure and he had no interest in giving it up except for equally secure employment at a similar level.
12. However, Mr Jooste does not dispute that within a few weeks of meeting Mr Fetherston he also agreed to invest \$100,000.00 in the enterprise. He told me he saw nothing unusual in this as he had been accustomed to participating in employee share schemes in the past.
13. The principal asset of Mr Fetherston’s group of companies was intellectual property in the form of exclusive New Zealand rights to certain software used for risk management. At the time Mr Jooste and Mr Fetherston first met, Hasieman Holdings Limited owned the rights to this software. In October 2002 Mr Jooste received a written agreement (signed by both Mr and Mrs Fetherston) for the transfer to him of shares in Hasieman Holdings Limited.
14. In December 2002, however, Mr Jooste learnt that ownership of the crucial intellectual property had been passed to another company owned by Mr Fetherston, Automated Maintenance Holdings Limited. At his request therefore the original agreement for sale and purchase of shares was replaced in early January 2003 by a further document, recording terms for sale and purchase of shares in Automated Maintenance Holdings Limited. Mrs Ans Fetherston signed this document on behalf of Automated Maintenance Holdings Limited. The agreement provided that Mr Jooste would pay a share price of \$100,000.00 cash plus a contribution of “time, commitment and sales and contracts brought into the company.”
15. Between October 2002 and August 2004 Mr Jooste made payments to the business totalling \$122,278.00. Mr Jooste says these payments constituted consideration for the agreement for sale and purchase of shares. However, the payments were not all made to Automated Maintenance Holdings Limited; indeed they were deployed to a range of purposes within Mr Fetherston’s enterprise.
16. Mr Jooste was appointed a director of Automated Maintenance Holdings Limited in May 2003. In July of that year he received a document stating that he and his wife owned a 5.1% shareholding in Automated Maintenance Holdings Limited. Despite this, it appears no shares in either Hasieman Holdings Limited or Automated Maintenance Holdings Limited were ever transferred to Mr Jooste and his wife.
17. Mr Jooste began work on 7 October 2002. For the first year he worked with Mr Fetherston and others out of offices in Takapuna. In November 2003 the business was evicted from these premises and thereafter Mr Jooste conducted his work from either his own home office or from an office at Mr Fetherston’s home. At all times, Mr Jooste worked under the direction of Mr Fetherston, maintaining daily contact with him and using the business’s equipment. Where he engaged staff it was not on his own account, but on behalf of the business.

18. In the documentary evidence provided to me, Mr Jooste was variously described as General Manager, Managing Director, Sales Director and Marketing Director. Two sets of business cards were printed for him. One described him as Managing Director of Risk Management Holdings Limited (RMH) the other as Marketing Director of RMH. In practice, his responsibilities proved to be wide-ranging. These included sales and marketing, preparation of marketing material, recruiting and managing sales and marketing staff, securing new investment, and establishing the operation of the business overseas. In all this work he liaised closely with Mr Fetherston, speaking with him at least daily.
19. In short, Mr Jooste was held out to potential investors and others as having been appointed as a part of the business's management team to lead the marketing and commercialisation of the business.
20. Apart from the agreement for sale and purchase of shares no written contract of any sort was executed between Mr Jooste and any of the respondents. Mr Jooste told me that he had asked repeatedly for a written employment agreement to no avail.
21. However, Mr Fetherston did supply Mr Jooste with letters confirming his remuneration for the information of his bank. Mr Jooste resigned himself to making do with these letters in lieu of a proper contract. He relies on them as evidence that he entered into an employment agreement either with Mr Fetherston or with one or more of the other respondents through his agency.
22. The first letter (dated 25 November 2002) is over Mr Fetherston's signature as "Chairman and Technical Director" of Risk Management Holdings Ltd and is addressed to the National Bank in Auckland. It reads:

**"Andre Jooste**

This is to confirm that Andre has been appointed Managing Director of Risk Management Holdings Limited. He receives a salary of \$15,000.00 per month, plus \$1,000.00 car allowance and bonus payments when key performance criteria's [sic] are met."

23. The second (dated 29 January 2003) is a similar letter addressed to Strata Funding and reads:

"Andre Jooste

This is to confirm that Andre has joined Risk Management Holdings Limited as Managing Director. He receives a salary of \$15,000.00 per month plus performance bonuses. He also receives a car allowance of \$1,000.00 per month. He is also entitled to purchase a shareholding in the company."

24. Finally Mr Jooste referred me to correspondence dated 30 May 2003 from Mr Fetherston, on behalf of Hasieman Holdings Limited to employee Mr Terry Freidrichs. This contained an offer to employ Mr Freidrichs and read:

"This letter is confirmation of our offer of employment to you as Global Business and Product Development Director- Banking and Insurance.

**Terms and conditions will be commensurate with those applying to Andre Jooste which is a package amounting to \$15,000.00 per month plus \$1,000.00 car allowance.**

... this letter is formal confirmation of our offer.

(Emphasis added by the Authority.)

25. At various times between January 2003 and February 2004, Mr Jooste received payments totalling \$98,000.00 from “RMHL”, “HHL” “Risk Management” and “Automated Maint.” Some were in instalments of \$15,000.00 whereas others were for differing amounts and tagged as expenses. The payments were not all made to the same account and some were made to the account of a company called Peninsula Consulting Company Limited, of which Mr Jooste and his wife were the directors and shareholders.
26. Budget documents for the business include a reference to “drawings” for Mr Jooste. Elsewhere correspondence between Mr Jooste and Mr Fetherston refers to “salary” payments owed. In his evidence to me, Mr Fetherston described these payments as “advances to recover costs incurred while working alongside the company.”
27. No tax was deducted from these payments at source and Mr Jooste has not paid tax on any of them. He told me he has advised the Inland Revenue department of these proceedings and it has agreed that he may wait for this determination, and identification of his status, before being required to meet his outstanding obligations in respect of tax.
28. As early as February 2003 Mr Jooste was becoming concerned about non-payment of his salary. Notes of a meeting at that time between him and Mr Fetherston indicate that he expressed his concern that Mr Fetherston had not honoured his commitments and that he had not initially been given an accurate picture of the business’s position. On 7 August 2003 he presented Mr Fetherston with a spreadsheet setting out the monies he had paid into the business, the payments he had received from it, and the monthly salary payments which had fallen into arrears. Mr Jooste followed this up with an email on 11 August in which he noted:

“It was also part of the contract that I would be paid a salary of \$15 000 per month as well as a car allowance of \$1000 per month...

...

**I would like to clarify the issue once and for all and summarise that the position at the end of July 2003 is as follows:**

<b>Cash invested into the company</b>	<b>\$96 000</b>
<b>Salary outstanding as at the end of July 2003</b>	<b>\$131 000”</b>

29. Mr Jooste told me that he received repeated assurances from Mr Fetherston that he would be paid the arrears once further investment was secured however this did not happen. Mr Fetherston concedes that Mr Jooste requested payment of salary on more than one occasion.
30. In February 2004 Mr Fetherston presented Mr Jooste with a draft agreement to provide services as an independent contractor however Mr Jooste declined to sign it. The relationship between him and Mr Fetherston finally broke down on 5 May 2004.

### **Determination**

31. Well before the investigation meeting concluded it had become clear that at all material times Mr Fetherston was the active personality with whom Mr Jooste had dealt, and that if Mr Jooste was employed by any of the other respondents, it was through the agency of Mr Fetherston. As I indicated to the parties then, this determination will address only the issue of whether Mr Jooste and Mr Fetherston entered into an employment agreement. With one exception, it does not address the question whether any such agreement was entered into by Mr Fetherston on his own behalf or on behalf of one of the other entities. For simplicity I have used the terms “the

business” or “the enterprise” when referring to the entity or entities for which Mr Jooste worked.

32. The one exception is in relation to the second respondent. In the application to the Authority the second respondent was cited in the following manner:

“Anna Maria Bernadina (Ans) Fetherston in her personal capacity as well as in her capacity as trustee of the Fetherston Family Trust.”

33. I record now (as advised to the parties at the meeting) that I accept that Mrs Fetherston did not employ Mr Jooste in her personal capacity. However I reserve my conclusions as to whether the Fetherston Family Trust might have any liability towards the applicant and for this reason, decline to strike out Mrs Fetherston as respondent. I note also that Mr Andrews has no instructions from the Fetherston Family Trust.

34. Still on the subject of the identity of the respondents, I note that Hasieman Holdings Limited was incorporated on 23 August 2002 but on 6 October 2004 changed its name to ‘BBBHL Limited.’ The intituling of this matter has been amended accordingly.

35. I also record a further finding which was communicated to the parties at the investigation meeting. This relates to an initial defence offered by Mr Fetherston that Mr Jooste’s services were engaged by Hasieman Holdings Ltd through a contract for services with a company called Peninsula Consulting Company Ltd. I record here that I reject that assertion, for the following reasons.

36. Mr Jooste agreed that he had incorporated such an entity but denied that it had ever traded or had any dealings with Mr Fetherston or the enterprise. Mr Fetherston conceded that Peninsula Consulting Company did not invoice Hasieman Holdings Ltd or any of the other respondents for services rendered by Mr Jooste or for anything else. However he drew my attention to the fact that on a total of six separate occasions between July 2003 and February 2004 payments were made by one or another of the respondents to the bank account of Peninsula Consulting Company Ltd.

37. During and prior to this time a comparable number of payments were also made from the same sources to Mr Jooste’s personal bank account. I do not therefore consider the fact that there were payments to Peninsula Consulting Company Ltd sufficient, on balance, to prove Mr Fetherston’s contention.

38. Nothing else I have heard supports Mr Fetherston’s contention. Indeed, his own evidence of how he met Mr Jooste makes no mention of Peninsula Consulting Company Ltd. Instead he confirms that he was introduced to Mr Jooste by a recruitment agency. I therefore reject the proposition that Mr Fetherston entered into a contract for services with Peninsula Consulting Company Ltd.

39. I also note that I have considered, and rejected, the possibility that Mr Jooste was nothing other than a working partner in the enterprise.

40. My first reason for this is that this scenario seems inherently improbable given the circumstances. Mr Jooste did not put money into the business immediately upon commencing work. Even when he did invest, he remained very much a minority investor and there is no evidence that shares in any of the respondents were ever transferred to him. He was not appointed director of any of the respondent companies until May 2003. Finally, he did not have any significant level of control within the business.

41. The second reason is Mr Fetherston's evidence that he contracted with Peninsula Consulting Company Ltd for provision of services to be rendered by Mr Jooste. A concession that the two men entered into a contract (whatever its type) relating to the work Mr Jooste performed is inconsistent with an alternative defence that he worked only in the capacity of part owner of the enterprise.
42. In summary, I have concluded that Mr Jooste personally entered into a contract with Mr Fetherston and/or one or more of the other respondents. It now remains to be considered whether that engagement was pursuant to a contract for services or pursuant to a contract of service.
43. The Employment Relations Act 2000 provides as follows:
- “(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;
- ...
- (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 purpose 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.”
44. It is of course common ground that there is no written agreement between the parties (other than the agreements for sale and purchase of shares.) This is not therefore a case where I am required to determine whether the real nature of the relationship is different from that set out in express terms.
45. Rather it is one where I must identify the nature of the agreement between the parties from their conduct and from associated documentary material.
46. Frequently, such relationships contain a mix of characteristics and arguably may be capable of being classified in either way. I do not consider this to be such a case. There is in my view little or no evidence in support of the proposition that Mr Jooste was a contractor. The evidence is limited to the following:
- (i) The fact that some payments were made to his company, Peninsula Consulting Company Ltd, which point has already been disposed of;
  - (ii) Mr Fetherston's evidence and submissions that Mr Jooste was “an investor and a contractor” and nothing else, and his assertion that he “never employs anyone” if it can be avoided. However, as we have already seen, Mr Fetherston had very limited credibility with the Authority;
  - (iii) The fact that Mr Jooste carried a degree of financial risk. However, this arose out of the arguably separate relationship of investor, and in any event, given that shares were not transferred to him, it remains unclear whether he also stood to profit from his endeavours.
47. Set against these, the factors that indicate that the relationship was one of employment include the following:
- (i) Mr Jooste's expressed intention to enter into an employment relationship, consistent with his prior history. This is supported by his plausible assertion that he would not have

resigned from a secure position with Shell to become a contractor wholly engaged by one client;

- (ii) The circumstances surrounding Mr Jooste's introduction to Mr Fetherston in particular the fact that he was approached by a recruitment agency;
- (iii) His integration into all aspects of the business, as represented to investors and others and the holding out of him to others as the agent of the business;
- (iv) References to the fact of his employment and employment terms in supporting documentation provided for him to the National Bank and Strata Funding;
- (v) The reference to a salaried employment relationship in correspondence between Mr Fetherston and Mr Friedrichs;
- (vi) Mr Jooste's use of the word "salary" to describe his unpaid remuneration, which went uncorrected by Mr Fetherston;
- (vii) The fact that no invoices were furnished;
- (viii) The fact that Mr Jooste worked at all times under the direction of Mr Fetherston, using the business's equipment and in association with staff of the business;
- (ix) The fact that Mr Fetherston had in his possession an independent contractor's form of agreement as early as October 2002 but did not seek to have Mr Jooste sign any such document until 2004.

**48. I have concluded that the evidence clearly supports Mr Jooste's contention that he was engaged by Mr Fetherston pursuant to a contract of employment.**

49. It follows that the Authority has jurisdiction to investigate Mr Jooste's employment relationship problem.

**50. However, to my knowledge the parties have not yet been to mediation and this must be the next step in resolving the employment relationship problem. The parties are directed to attend mediation no later than 28 days from the date of this determination.**

51. If the problem cannot be resolved through mediation the Authority will resume its investigation into the substantive matters.

### **Costs**

52. Costs are reserved pending the completion of investigation into the substantive matters.

Y S Oldfield  
Member of Employment Relations Authority