

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Sam Koia (Applicant)  
**AND** Carlyon Holdings Limited (Respondent)  
**REPRESENTATIVES** Jim Down, Advocate for Applicant  
Paul Wicks, Counsel for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 20 April 2001  
**DATE OF DETERMINATION** 24 April 2001

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

Mr Koia contracted to Carlyon Holdings Limited (“Carlyon Holdings”) to distribute its “Mother Earth” and “Rosedale” products to supermarkets and dairies. He challenges the circumstances in which the contract was terminated, while Carlyon Holdings says that the parties’ relationship was not one of employer and employee. This determination addresses the existence of an employment relationship.

**Background**

Mr Koia’s association with Carlyon Holdings began in 1994 after he answered a newspaper advertisement placed by his predecessor. The advertiser was offering for sale a distributorship covering the Takapuna/North Shore area. As he was not permitted to part with possession of the distributorship without the approval of Carlyon Holdings, the advertiser arranged for Mr Koia to meet with Rick Carlyon, a director of the company, and another manager. It seems the necessary approval was obtained because Mr Koia paid \$40,000 to the advertiser as the purchase price for the distributorship, and began working for Carlyon Holdings. He also purchased a delivery vehicle.

A written contract was prepared in respect of the arrangement, but not signed by either party. However the entitling describes Carlyon Holdings as “the Principal” and “Sam and Debbie Koia” as “the Agent”. Mr Koia confirmed that his wife, Debbie, assisted him in that she completed all paperwork including invoicing and tax documentation, although she did not receive any remuneration for this. In addition she assisted Mr Koia from time to time with his calls.

There was no real dispute that between 1994 and 1998 the parties’ arrangements were as follows:

- (a) Mr Koia had the right to be the sole distributor of the company’s cake and bread products to supermarkets and dairies in the geographical area set out in the contract;

- (b) Mr Koia purchased from the company the products he distributed, although he was obliged to on-sell them at not less than the wholesale prices provided by the company;
- (c) The company had the sole right to set wholesale prices;
- (d) Mr Koia could sell other products with the approval of the company, although he never sought to do so;
- (e) Mr Koia was obliged to provide the company with lists of the customers to whom he sold its product, and to observe the call cycle set by the company;
- (f) Goods which Mr Koia purchased were invoiced to him weekly, and he was obliged to make payment on those invoices by the 20<sup>th</sup> of the month following delivery of the invoice;
- (g) Mr Koia provided his own delivery vehicle, but it had to be signwritten and conform to approved standards of appearance, maintenance and hygiene;
- (h) Mr Koia purchased a computer and printer for the purpose of invoicing goods in the approved manner;
- (i) Mr Koia was responsible for the purchase and care of any uniform required; and
- (j) No transfer, assignation, subletting or other parting with possession of the business was permissible without the company's approval.

In 1998 Mr Koia and Carlyon Holdings signed a replacement agreement which followed the same general structure as the above outline. In other words the nature of the relationship in the sense being addressed in this claim did not change, although the following changes of detail were made:

- (a) 'Chilled products' was added to the list of those Mr Koia could sell;
- (b) Because of demographic changes in the North Harbour area, the area covered by Mr Koia's distributorship was changed;
- (c) Mr Koia was obliged always to sell products at the wholesale prices provided by the company;
- (d) The arrangements for returns and samples were loosened, and there was a variation to the arrangement under which the company invoiced Mr Koia for product he purchased;
- (e) Instead of purchasing a computer and printer, Mr Koia leased these; and
- (f) A provision was added stating that the agreement was not intended to create a contract of employment between the parties.

In August 2000 the company became concerned about a practice into which Mr Koia and a colleague had entered, where each man would cover the distributorship of the other in the case of absence by way of illness or holiday. Mr Koia said their respective families also helped out. The company's concern was not that someone else was undertaking the work of the distributorship, but that full coverage by one person would be difficult when that person had a distributorship of his own to maintain. In Mr Koia's case the company was not satisfied with the arrangement. It made suggestions to the distributors about how the problem of coverage might be dealt with, including on one occasion a suggestion that all distributors share the workload when one person was absent.

On 8 September 2000 Carlyon Holdings gave Mr Koia the required one month's notice of termination of the contract. The letter of termination referred to the obligation to seek the consent of the company before transferring the distributorship to a new person, and said the writer or a colleague would be available to meet with any candidate Mr Koia may wish to propose.

Mr Koia advertised the distributorship in the New Zealand Herald, in the 'Businesses for Sale' section. He received some expressions of interest, but by 3 October 2000 had not passed any firm details to the company. By an email of that date he was offered an extension of two weeks on his notice period in order to assist him to find a suitable candidate, and was advised that if no candidate had been found by 22 October then the company would take over responsibility for finding a replacement. On Saturday 7 October at 6.41 pm he sent an email message to the company's

marketing manager at the company's email address, in which he sought a meeting, but he could not reasonably expect the manager to receive and act upon the message before Monday 9 October.

In any event, his advocate declined the offer of an extension to the notice period by facsimile dated 9 October 2000. Mr Koia's contract therefore ended, and he lost the opportunity to sell his business.

### **Determination**

If the law under the Employment Relations Act 2000 in respect of the existence of an employment relationship is still as set out in **TNT Express Worldwide (NZ) Limited v Cunningham** [1993] 1 ERNZ 965, then an application of the principles set out in that case leads to a conclusion that the present contract is not one of employment. The document says so, and on the oral evidence that is obviously what the parties intended. For example Mr Koia referred all the way through the investigation meeting to his 'business' and the way in which he spoke of his activities did not indicate to any degree that he considered himself an employee.

In addition, a number of the terms of the contract are inconsistent with the existence of an employment relationship including the right to assign the agreement, the passage of ownership of the product, and the requirements to provide a vehicle and to lease computer equipment. In practice Mr Koia was in his own business for tax purposes, and did not seek sick pay or holiday pay but rather made his own arrangements to ensure the necessary work was covered in his absence.

If the effect of the coming into force of the Employment Relations Act is a move away from the contract-based approach in the **TNT** case, I have no doubt that, from 1994, the real nature of the arrangement between Mr Koia and Carlyon Holdings was that of principal and contractor. It could not be clearer that Mr Koia was in business for himself – he even purchased his distributorship from his predecessor, rather than being appointed by Carlyon Holdings. I do not regard the right of approval reserved by the company as amounting to an act of appointment by it.

Similarly Mr Koia attempted to sell his distributorship on the termination of his contract, without the company seeking to anything more than exercise its right of approval of the purchaser. Moreover there was nothing inappropriate in the way the company took over the appointment of a replacement distributor once Mr Koia's contract had terminated. By then Mr Koia had attempted to sell his business, but once the contract ended in effect he had nothing to sell. He was offered the opportunity to defer the termination date for two weeks, which would assist him to obtain a purchaser, but he declined.

I accept that present in the parties' arrangement there was some degree of control by Carlyon Holdings. Mr Koia had no real ability to set the price he charged for product he on-sold, to the extent that Mr Carlyon referred to the remuneration arrangement as one of a commission payment. Mr Koia was also obliged to adhere to a call cycle, although he could chose his calling times within this cycle, was required to have his vehicle signwritten and to drive only an approved type of vehicle, provide lists of customers purchasing the company's goods, invoice in the approved form and maintain a uniform if required.

However the mere existence of an element of control is not sufficient to characterise an arrangement as that of employer and employee. Leading authorities prior to the **TNT** case, and cited in it, recognised that:

“The most that can be said is that control will no doubt always have to be considered, although it may no longer be the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial

risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task ..." (quoted at pp 713 – 714).

Ultimately the question is one of fact and degree. There is some acceptance in the case law that the principal in a contracting arrangement is entitled to set the standard of work it requires of a contractor, and to require the contractor to behave and present in a way that maintains the image of the company. That is what Carlyon Holdings was doing in respect of Mr Koia's distributorship. However on the present facts, I do not believe that the element of control outweighs the indicia of the existence of a principal and contractor relationship.

As there was no employment relationship, the Authority has no jurisdiction to investigate the matter any further.

### **Costs**

Costs are reserved.

The parties are invited to agree on the matter themselves. If they are unable to do so they shall have 14 days from the date of this determination in which to file and serve memoranda on the matter. If either wishes to reply to anything in the memorandum of the other, there shall be a further three days from the date of receipt of the relevant memorandum in which to file and serve such reply.

**R A Monaghan**  
**Member, Employment Relations Authority**