IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 261/07
5047470

	BETWEEN	WENDY FAITH Applicant
	AND	TAONGA IMPORTS LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	John Schoolz, Counsel for Applicant Bruce Stainton, Counsel for Respondent
Investigation Meeting:	24 and 25 July 2007
Submissions received:	3 August 2007 from Applicant 3 August 2007 from Respondent
Determination:	28 August 2007

DETERMINATION OF THE AUTHORITY AS TO PRELIMINARY ISSUES

Employment Relationship Problem

[1] Wendy Faith and Susan Dobson are relatives with a friendship of long standing. In March 2004 they embarked on a project to set up a café and art gallery north of Auckland with an associated importing, retailing and wholesaling business. To this end Taonga Imports Limited ("TIL") was established. Ms Dobson is the sole director and shareholder of TIL. For a short period in late 2004/early 2005 Ms Faith was appointed a director. There is no dispute that this directorship was held for the purposes of obtaining a liquor license for the café.

[2] Ms Faith and Ms Dobson's relationship has broken down and they are now engaged in a process of identifying their interests in the business and analysing what went wrong with a view to apportioning liability. Ms Faith says she was an employee

and 50% shareholder of TIL. She says the employment relationship ended when she was constructively dismissed.

[3] TIL says Ms Faith was a partner in the business. TIL says the Authority does not have jurisdiction to investigate Ms Faith's asserted employment relationship problem because she was not an employee and in any event her personal grievance was not raised within the statutory 90-day period.

[4] The employment relationship problem before the Authority concerns the following questions:

(i) what was Ms Faith's status, was she an employee?
(ii) did Ms Faith raise her employment relationship problem within the statutory 90 days?

[5] If these preliminary issues are resolved in Ms Faith's favour then the substantive issues between the parties, as they relate to employment matters, may be determined by the Authority. The shareholding issue is to be resolved in another forum.

The real nature of the relationship – employment or partnership?

[6] Section 6 of the Employment Relations Act provides the meaning of employee and requires the Authority to determine the real nature of the relationship between the parties[1]. The Authority must consider whether the evidence establishes the existence of a contract of or for services having viewed that evidence in its totality.[2]

[7] The tests applicable to a consideration of the real nature of the relationship include[3]:

- analysis of the terms and conditions agreed by the parties
- the intention of the parties (though not decisive)
- analysis of the historical control, integration and fundamental tests

[1] Section 6(2) Employment Relations Act 2000
[2] *Smith v Practical Plastics Ltd* [1998] 1 ERNZ 323

(i) Terms and conditions agreed by the parties

[8] There was no written agreement between TIL and Ms Faith or Ms Faith and Ms Dobson. Early in the relationship they attended a meeting with an accountant who, during the course of the meeting, sketched a diagram of how their business would be structured. Ms Faith and Ms Dobson agree this diagram accurately records the broad detail of the business structure they envisioned. The diagram includes that:

- a company (nominally "Honey Limited") would purchase land and buildings to develop;
- "Honey Limited" would include a "residential renter" and a "business";
- the "business" would employ Ms Faith as the manager.

[9] The diagram records that the money to fund this venture would be lent to "Honey Limited" and would come from three sources:

- the bank
- Ms Dobson's family trust, Toanga Trust; and
- Ms Dobson

[10] The nominal entity "Honey Limited" was realised as TIL.

[11] Ms Faith says that at this meeting it was discussed and agreed that she would draw wages from March 2004 but that the exact salary would not be decided until after consultation with the lawyer and accountant. She says she took drawings from March 2004 on advice of the accountant and that advice was given in full knowledge of the agreement between the parties that she was an employee.

[12] TIL says the drawings Ms Faith took were partner drawings from funds made available to TIL by Ms Dobson and that Ms Faith was responsible for paying her own tax on the salary she received from early 2005.

---

[3] *Bryson v Three Foot Six* [2005] 3 ERNZ 729 (SC)

[13] I accept that in the development period of the business Ms Faith followed the advice of the accountant and that the personal expenses she drew down from the funds provided to TIL were tagged as "drawings" and that after TIL's income stream was developed ie, the café and gallery were opened, she drew a "salary" on a monthly basis. There is no evidence that Ms Faith took steps to maximise tax benefits in relation to her status. I find the tax issue is not conclusive.

[14] Ms Faith arranged that she received holiday pay at the end of employment relationship. There was no evidence that Ms Faith took or sought sick leave or holiday leave or that she was paid for working public holidays during the course of the relationship. Again this issue is not conclusive. What it demonstrates is the uncertainty between the parties as to Ms Faith's status.

[15] The next relevant event occurred in October 2004 when Ms Faith and Ms Dobson attended a meeting with TIL's solicitors. Ms Faith's status was discussed. Ms Faith says it was accepted that she was employed to manage the business and that an employment agreement on appropriate terms would be drafted by Henry Chellew, TIL's solicitor. Mr Chellew and Ms Dobson say that the discussion about Ms Faith's employment was not firm, that there was talk of an employment agreement for Ms Faith but that firm instructions were never given because the terms were never agreed.

[16] The employment agreement was never drafted.

[17] The café and gallery opened on 2 December 2005. The day to day running of the café and gallery was Ms Faith's domain for which she received no direction from TIL. This was entirely consistent with the original business plan; Ms Faith was to manage the business. There was some friction between Ms Faith and Ms Dobson regarding Ms Faith's communications to Ms Dobson about her work in the gallery. Given Ms Faith was managing the business it was appropriate that she direct Ms Dobson's work.

[18] Ms Faith and Ms Dobson agreed that from January 2005 Ms Faith would be paid $5000 per month.

Integration test

[19] With this test the question for the Authority is whether Ms Faith was employed as part of the business and whether her work was an integral part of the business compared with a contract for services where the work is not integrated but accessory to it.

[20] The evidence points strongly to Ms Faith's work being an integral part of the business. This is not determinative of the question because it is what would be expected of a working partner.

Fundamental test

[21] The fundamental test asks the question – is this person in business on their own account[4]? Ms Faith developed and managed the business owned by TIL. She had no say in the funds invested in that business. Her investment was time and expertise. The funds needed to develop the business were controlled by Ms Dobson. The investment of funds ceased when Ms Dobson determined she would not invest anymore. Ms Faith had no say in that decision.

[22] Ms Faith says the parties agreed she would be employed to develop and manage the business. TIL says the employment never crystallised; that there was no agreed terms of employment and that the primary relationship was one of a business partnership.

[23] The intention of the parties was recorded at the outset of the relationship; Ms Faith would be employed to manage the business. I am not satisfied that any business existed to manage until the café and gallery opened in late 2004. I find that she was an employee from that point. This finding is entirely consistent with the parties' meeting in October 2004 to discuss what Ms Faith's terms of employment would be, which was held in anticipation of the imminent opening of the business. That this meeting appears to have coincided with the beginning of the end of the relationship between Ms Faith and Ms Dobson is not relevant to whether the employment relationship existed.

[24] Ms Faith agreed to invest her time and expertise into the start up phase of the business in, I find, the knowledge she would have a position with that business when it was up and running. That occurred on 2 December 2004 and she was an employee of TIL from that time on until the employment relationship ended.

The 90-day issue

[25] On 18 September 2005[5] Ms Faith wrote to Ms Dobson:

> *"Dear Sue*
>
> *This letter is to advise that I am taking a claim against Taonga Imports Limited for an employment related grievance as follows.*
>
> *Constructive dismissal*
> *Loss of wages and benefits*
> *Humiliation*
> *Defamation*
> *Breach of promise in relation to shares*
> *Stress in the workplace*
>
> *I am open to mediation or to direct application to the Employment Relations Authority. You have by law, 14 days to respond.*
>
> *I am not seeking reinstatement – your actions have made it impossible for that option to be considered. I am seeking a payment relative to the seriousness of the claim.*
>
> *I can be contacted via*
> …
>
> *This claim must be made within 90 days of cessation of employment which expires Monday 19th September 2005. You have fourteen days to respond.*
>
> *Yours faithfully*
>
> …"

[26] Ms Dobson said when she received Ms Faith's personal grievance letter she had no idea what the factual basis of the headings in that letter were. She said that was why TIL's solicitors wrote to Ms Faith on 23 September 2005 including:

> "…
> *We advise that before the employer can respond to any employment grievance, a valid notice needs to include detail of the circumstances that are alleged as giving rise to a claim of constructive dismissal. Our client is not aware of any.*

---

[4] *Market Investigations Ltd v Minister of Social Security* [1968] 3 All ER 732 Cooke J, pg 737
[5] The letter was incorrectly dated 18 September 2004

> *If you wish the employer to respond to a grievance notice it must provide sufficient detail of acts, events, people involved, and the dates to allow the employer to understand the substance of such a grievance.*
>
> *Yours faithfully*
> *…"*

[27] Ms Faith then instructed a representative who replied to TIL solicitor's letter. This letter was wrongly addressed and was never received. The next TIL knew of Ms Faith's personal grievance was when it was lodged in the Employment Relations Authority on 10 August 2006.

[28] Subsections 114(1) and (2) Employment Relations Act 2000 provide:

> ***114 Raising personal grievance***
>
> *(1)* *Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.*
>
> *(2)* *For the purposes of subsection (1), a* grievance *is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*

[29] A personal grievance must be sufficiently specified to enable the employer to address it[6]:

> *"So it is insufficient, and therefore not raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment…As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address."*

[30] In *Foster v Chief Executive, Dept of Corrections* 1/3/06, Y S Oldfield (member), AA57/06, the Authority considered that a letter from the applicant's solicitors advising that he had instructed them to pursue a personal grievance on his behalf did not amount to the proper raising of a grievance "as there was absolutely no clue as to what it might have related to"[7].

---

[6] *Creedy v Commissioner of Police* [2006] 1 ERNZ 517, 529
[7] *paras 17-21*

[31] Did the letter of 18 September 2004 raise Ms Faith's personal grievance with sufficient specificity as to enable TIL to address her concerns? Applying the test in *Creedy* to the letter of 18 September 2005 I am not satisfied that it was sufficient to have raised a personal grievance. The letter raised the fact of a personal grievance, the type of grievance, the remedial headings and invited resolution but did not advise what was to be addressed.

[32] Ms Faith may apply to the Authority for leave to raise her personal grievance after the expiration of the 90-day period. The parties have foreshadowed such an application in their submissions. Mr Schoolz has submitted that the grounds of exceptional circumstances would be that:

(i) Ms Faith made reasonable arrangements to have the grievance raised on her behalf by her advocate[8];
(ii) She was not provided with a written employment agreement referencing the 90 day period[9];
(iii) It is just to do so.

[34] Mr Stainton has submitted that these grounds are not made out on the evidence.

[35] In relation to the grounds asserted I record the evidence is that Ms Faith took steps to raise her grievance within the 90-day period and her instructions to her representative were after the expiry of that statutory time line.

Costs

[36] Costs are reserved. If further application is to be made then it may be appropriate that costs are determined when that matter is disposed of.

Marija Urlich
Member of the Employment Relations Authority

[8] section 115(b)
[9] Section 115(c)