

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 117
5635728

BETWEEN ROSE CHRISTIAN
Applicant

AND PLATINUM CHAUFFEUR
DRIVE 2012 LIMITED
Respondent

5635738

BETWEEN KEVIN CHRISTIAN
Applicant

AND PLATINUM CHAUFFEUR
DRIVE 2012 LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Andrew Swan for Applicants
Angela Evans for Respondents

Investigation Meeting: 9 February 2017

Submissions Received: 22 February 2017 from Applicants
24 February 2017 from Respondent

Determination: 19 April 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

**A. Mr and Mrs Christian were not employees of Platinum Chauffeur
Drive 2012 Limited.**

B. Costs are reserved.

Employment relationship problem

[1] Mrs Rose Christian and Mr Kevin Christian claim they were employed by Platinum Chauffeur Drive 2012 Limited (Platinum) on or around 13 July 2015. Mr and Mrs Christian claim they were unjustifiably dismissed and are owed arrears of wages.

[2] Platinum denies the claims and says the Authority has no jurisdiction because neither Mr nor Mrs Christian was an employee.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mrs Christian, Mr Christian and Platinum but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[4] The two matters 5635728 and 5635738 have been heard and determined together by the consent of the parties because they both involve similar facts.

Background

[5] Mr and Mrs Christian and Ms Carol Morgan, a director and major shareholder of Platinum were close friends. Platinum operates a chauffeur and limousine service.

[6] On 9 May 2015 Mr and Mrs Christian met Ms Morgan for dinner where Mr and Mrs Christian expressed their intention to move back to New Zealand from Australia where they were resident. When the topic of what Mr Christian would do for work came up Ms Morgan suggested the possibility of Mr and Mrs Christian purchasing shares in Platinum.

[7] Ms Morgan then offered the Christian's the opportunity to purchase 80% of the shares in the Platinum business. If the sale went ahead it was intended that Mr and Mrs Christian would take over the day-to-day running of the company and Ms Morgan would mentor them.

[8] Mr and Mrs Christian met with Ms Morgan in June 2015 to further discuss the sale and purchase of the shares. Ms Morgan exchanged financial and other information relating to the business with the Christian's in May and then July 2015.

[9] Initially the sale and purchase was to have been concluded by 1 September 2015. Mr Christian sent Ms Morgan an email on 7 August 2015 to which he attached a sale and purchase agreement which he had drafted. He invited Ms Morgan to review the agreement and add or remove anything as she saw fit. The draft agreement reflected the agreed price for the sale and purchase of the shares.

[10] In anticipation of an agreement being reached the Christians were appointed directors of the company on 1 September 2015.

[11] On 10 September 2015 Mr and Mrs Christian paid a deposit of \$10,000 on the sale price. This deposit was paid into a newly established bank account on which Mr Christian had full authority as a signatory. The documents completed for the establishment of the bank account noted that Mrs Christian was to become a signatory at a later date. The newly established bank account was used for all sales from that point onwards to distinguish between the company under Ms Morgan's majority shareholding and the new arrangements where the Christian's would hold the majority shareholding.

[12] The sale and purchase of the shares did not eventuate. The negotiations broke down in December 2015 and the relationship ended on 17 December 2015.

Issues

[13] The issues for determination are whether:

- a) Mr and Mrs Christian were employees;
- b) If they were employees, whether they were unjustifiably dismissed, and if so what, if any, remedies should be awarded; and
- c) Whether either or both Mrs Christian and Mr Christian are owed any arrears of wages.

Were the applicant's employees

[14] The onus of establishing whether Mr and Mrs Christian were employees rests with them on the balance of probabilities. The starting point for the Authority is Section 6(1) of the Employment Relations Act ("the Act") which states:

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.

[15] Section 6(3) states:

For the purposes of subsection (2), the court of 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 the relationship.

[16] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd.*¹

[17] The Employment Court in *Poulter v Antipodean Growers Limited* summarised the following applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:²

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analyzing the tests that have been historically applied such as control, integration, and the “fundamental” test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[18] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice then to apply the three tests known as the control, integration and fundamental or economic reality test.

¹ [2005] ERNZ 372.

² [2010] NZEmpC 77 at [20].

[19] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.³

[20] The Court in *Atkinson v Phonenix Commercial Cleaners Ltd* noted:⁴

Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties' common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine with Mrs Atkinson was Phoenix's employee.

Intention of the parties

[21] There was no written documentation signed by the parties to demonstrate their intention at the time arrangements were entered into. Ms Morgan says the Christian's wanted to become acquainted with the business and booking systems while the share agreement was being worked through and they did this by undertaking various tasks within the business.

[22] I am satisfied that from the outset the intention of all parties was for Mr and Mrs Christian to take 80% ownership of the business. An announcement to that effect was made to all staff at a function at Ms Morgan's home in August 2015.

[23] The sale and purchase agreement drafted by Mr Christian and provided to Ms Morgan on 7 August 2015 does not provide for Mr and Mrs Christian to be employed by the company but is clear that the Christians were to become owners of the business.

[24] Mr and Mrs Christian became Directors of the company on 1 September 2015. Mr Christian undertook duties as a Director including signing banking forms giving him authorisation on the company's newly established bank account and also on a lease agreement for new office space.

[25] Mr and Mrs Christian told me Ms Morgan offered and they accepted employment on the basis that Mr Christian would be paid \$120,000 per annum and Mrs Christian would be paid \$90,000 per annum.

³ Ibid at [21].

⁴ [2015] NZEmpC 19 at [58].

[26] The evidence shows there were discussions about payments for Mr and Mrs Christian. The parties discussed how Mr and Mrs Christian could maintain an income after the purchase of shares was concluded. Ms Morgan explained that the business could only sustain \$100,000 which equated to two existing employee salaries and that two roles would have to be disestablished after the purchase had been completed to enable Mr and Mrs Christian to receive an income.

[27] I am satisfied that the discussions related to what Mr and Mrs Christian could expect to take out of the business as owner/operators once they were operating the business as majority owners and did not constitute an offer of employment or a promise of salary payments. It is notable that both employees whose roles were discussed continued to be employed by Platinum during the time Mr and Mrs Christian say they were employees.

[28] I am supported in my findings by Mr Christian's own evidence where he told me that in June 2015 he told Ms Morgan that if the business were to employ him he would expect a starting salary of \$120,000. Mr Christian told me this offer was accepted, this was denied by Ms Morgan.

[29] Mr Christian has not established to my satisfaction that his expectation of a salary was ever accepted by Ms Morgan. Even if I am wrong about that I find it difficult to understand why, during their relationship between July and December 2015 Mr Christian did not raise any questions with Ms Morgan regarding lack of payment of the salary.

[30] On 18 August 2015 Mr Christian emailed Ms Morgan requesting further information regarding the vehicles owned by the business so that he could work out the company's fixed monthly costs for cash-flow purposes and raised concerns about the way some clients were doing business with the company. He sought Ms Morgan's thoughts about this over the next few days. The email demonstrates that Mr Christian was working towards ownership of the business and making arrangements in that regard. The content of the email is not what I would expect to see from an employee seeking instructions from their employer, but rather, the words used in the email reflect a relationship of partners or equals.

[31] Ms Morgan told me that the only work Mr Christian was offered was as a driver for the business. Mr Christian did undertake work as a contract driver, after he

received his passenger licence on 30 October 2015. All drivers engaged by Platinum were engaged as independent contractors. Mr Christian was treated in the same way and was paid a contract rate for each driving assignment he undertook.

[32] Mrs Christian told me that she was offered a parental leave contract as an employee and that her salary was to be \$90,000. That Mrs Christian replaced an employee who was temporarily on parental leave is not disputed. Ms Morgan told me that when she asked Mrs Christian how she wished to be paid while undertaking the parental leave contract Mrs Christian advised that she wished to be paid as a contractor.

[33] I am satisfied the intention of the parties at the time they entered into the relationship was that Mr and Mrs Christian would work in the business undertaking due diligence and learn how the business operated so that they could take over as owner/operators once the sale and purchase of the shares had been completed.

The control test

[34] This test examines the extent to which the activities of Mr and Mrs Christian were controlled by Platinum.

[35] Mrs Christian was trained in the reservation system by the employee who took a period of parental leave from 1 August 2015. I find there were two reasons for Mrs Christian to be trained in the system. The first was so that she was competent in using the system when she and Mr Christian took over the business and the second was so that she could undertake the work while the employee was absent on parental leave.

[36] During the period July to November 2015 Mrs Christian returned to Australia an/or took time away from the business on three separate occasions. One week in July 2015, the entire month of September 2015 and a week in November 2015. There is no evidence that Mrs Christian was required to seek permission to take this time away from the business.

[37] On 22 November 2015 Mrs Christian advised Ms Morgan that she did not intend to work from the office but would work from home from that day onward.

[38] I am satisfied that Mrs Christian, herself, exercised control over the office work being undertaken. By way of example on 2 October 2015 when she returned

from a month in Australia, the payroll and accounts administrator emailed Mrs Christian and advised her that she had completed more than her normal hours of work in Mrs Christian's absence to help out and asked if she could not be involved in quoting but leave that task to Mrs Christian. This request is more akin to seeking permission from a manager and is not the type of communication one would expect to see between subordinates.

[39] Further, the payroll and accounts administrator gave uncontested evidence that payments made by Platinum to Mrs Christian in October and November were made after receiving instructions from Mrs Christian to make the payments. The payroll and accounts administrator acted on Mrs Christian's instructions because she was aware that Mr and Mrs Christian were to be the new owners of the business.

[40] On 22 November 2015 Mrs Christian emailed Ms Morgan in relation to VIP clients and the transporting of them to events that weekend. In this email Mrs Christian stated:

[Ms Morgan] we should not have to ask you about every decision we make. I am sorry but this is no Partnership/ownership arrangement. You have all the control and make all the decisions. It seems we can't do anything right when you are here, it all ran very well while you were away. I give up, you take care of it all then.

[41] Clearly at the time this email was sent Mrs Christian continued to consider herself an owner in the business and not an employee. The complaint that Ms Morgan had all the control was in relation to business decisions being made, which, if Mrs Christian was an employee, she would have no expectation of making.

[42] On 7 August 2015 Mr Christian emailed Ms Morgan advising her that he had been speaking to an old friend regarding vehicle maintenance and minor repairs for vehicles not covered by warranty. Mr Christian was then involved in researching for new premises and made a recommendation to Ms Morgan which was acted on. The lease for the new premises was signed by both Ms Morgan and Mr Christian in their capacity as directors of Platinum.

[43] Ms Morgan's uncontested evidence is that she did not know what Mr Christian was working on from day to day unless he advised her. She did not supervise his activities and he was free to work when and how he wished.

[44] I find it is more likely than not that Mr Christian undertook a number of preparatory tasks in anticipation of them taking over the business. Mr Christian did undertake driving duties but his own evidence is that he was free to accept or reject jobs as he wished.

[45] I have concluded that Mr and Mrs Christian undertook tasks for the business with little or no supervision and acted as if they were the operators of the business by making day to day decisions and showing their disapproval when they felt their decisions were being overruled by Ms Morgan. I find on balance that the tasks undertaken by Mr and Mrs Christian were completed in anticipation of them becoming owner/operators of the business.

Integration test

[46] This test examines the extent to which Mr and Mrs Christian were integrated into Platinum's business. That is whether the work undertaken by Mr and Mrs Christian was integral to the business and whether Mr and Mrs Christian had become part and parcel of the business.

[47] The work undertaken by Mr and Mrs Christian could have been undertaken by employees and indeed the work undertaken by Mrs Christian was work that had been undertaken by an employee. I am satisfied that in the beginning this was by way of training Mrs Christian into the procedures of the business and then as a result of Mrs Christian undertaking work as if she were already an owner of the business in the absence of an employee on parental leave.

[48] I consider the work performed by Mr and Mrs Christian was an integral part of Platinum's business because they undertook all of the duties and responsibilities that ensured the business was operational. Without this work being done Platinum would not have a service for its clients. I am satisfied it is more likely than not that they undertook this work as if they were already the owners of the business and in anticipation that the formal aspects of sale and purchase agreement would be concluded, and not as employees of the business.

[49] In his email to Ms Morgan on 7 August 2015 Mr Christian refers to the vehicles as "our vehicles". This is strongly indicative that he was acting as if he was already, or would soon become, an owner of the vehicles.

Fundamental test

[50] This test examines the extent to which Mr and Mrs Christian took on financial risk themselves in providing their services to Platinum including whether they were in business for themselves.

[51] Mr and Mrs Christian were appointed as Directors for the company on 1 September 2015. They had paid a deposit as part payment for their 80% shareholding. At the time they completed their work for Platinum they did so under the apprehension that they would own a significant portion of the business.

[52] Mr Christian undertook driving duties from 30 October 2015 and was paid for those duties in the same way that other drivers undertaking the driving work were also paid. This was on a contract rate.

[53] At the time they undertook the work for Platinum Mr and Mrs Christian were not in business for themselves. They were undertaking the work in the apprehension that they would be in business with Ms Morgan once the formalities of the sale and purchase of the shareholding had been completed.

[54] Mrs Christian was paid drawings for the work she completed, again on the apprehension that the sale and purchase of the shareholding would be completed and on her instructions. At the time of the payments of drawings Mrs Christian was a Director of the company.

[55] I have accepted Ms Morgan's evidence that she discussed with Mrs Christian how she wished to be remunerated for her work while an employee was on parental leave and that Mrs Christian advised she wished to be paid as an independent contractor.

[56] The fundamental test has elements of both an employment relationship and a contracting relationship.

Industry practice

[57] There was little evidence as to the industry practice. Ms Morgan's evidence is that all drivers were engaged on an independent contracting arrangement with some being registered for GST and others not.

Overall impression

[58] The overall impression from all of the facts in this case of the underlying and true nature of the relationship between Mr and Mrs Christian and Platinum is not that of employer and employee but rather business partners working on the business as part owners.

[59] The evidence shows that on balance it is more likely than not that Mr and Mrs Christian were not employees. Except for the paid work Mr Christian undertook as a contract driver and the payments of drawings Mrs Christian received in October and November 2015 there was no evidence to support a finding that there was any mutual intention to enter into a wage/work bargain. The Authority has no jurisdiction to investigate Mr and Mrs Christian's claim that they were unjustifiably dismissed or that they are owed arrears of wages.

Costs

[60] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Platinum shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr and Mrs Christian shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[61] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority