

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2018] NZERA Wellington 18  
5641653

BETWEEN	NANCY JEAN McCOURT First Applicant
A N D	GARY ANNAS Second Applicant
AND	THE BEAURAIN TRUST (JAMES ROBERT ANDREW AND MARIE HEATHER BUCKLEY (WHAIAPU) AS TRUSTEES) First Respondent
A N D	FRIDGE ON THE RIDGE LIMITED Second Respondent

Member of Authority:	Trish MacKinnon
Representatives:	David Oliver, Counsel for Applicants Bill Calver, Counsel for Respondents
Investigation Meeting:	25 and 26 October 2017 at Hastings
Submissions and Information Received:	13 November and 1 December 2017 from the Applicants 22 November from the Respondents
Determination:	28 February 2018

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Nancy McCourt and Gary Annas claim to have been unjustifiably dismissed by the respondents. Each also brings an action for recovery of wages under s.11 of the Minimum Wage Act 1983.

[2] Mr Annas also seeks the imposition of a penalty on the respondents for their failure to offer him, and retain a copy of, an intended employment agreement.

[3] The respondents deny employing either applicant. They say Ms McCourt was not an employee: she was a shareholder and director of the second respondent, Fridge on the Ridge Limited (FOTR). The Beaurain Trust was the owner of the property on which FOTR operated its business. The respondents say this is a dispute between shareholders, not an employment issue. With regard to Mr Annas they say that, if he was employed by anyone, it was by Ms McCourt not the respondents.

[4] The respondents also say that, even if one or both of the applicants succeed in their claims to have been employees, neither of them raised a personal grievance within the statutory 90 day time frame. The respondents do not agree to the late raising of the personal grievances.

[5] The Authority's investigation encompassed preliminary issues of whether the applicants were employees and, if so, whether they had raised personal grievances within 90 days. It also covered the substantive employment claims Ms McCourt and Mr Annas made against both respondents.

### **Background**

[6] James (Jim) Andrew and his partner Marie Whaiapu (also known as Marie Buckley) are trustees of the first respondent, the Beaurain Trust (the Trust). It was Mr Andrew's evidence that he and Ms Buckley purchased the Tarawera Tavern on the Napier-Taupo highway in 2008 and established the Trust to purchase the land. They set up a company (Jimar Tarawera Ltd) to own and operate that business which they ran as a café.

[7] Two years later the Trust purchased land and buildings at Te Haroto, also on the Napier-Taupo highway. Mr Andrew and Ms Whaiapu incorporated another company (Jimar Te Horoto Ltd) to operate the Kiosk café on the land, which was then known as the Summit café.

[8] For the nine months leading up to July 2015 the Summit café was operated by an Australian couple who had entered into a 50:50 partnership arrangement with Mr Andrew and Ms Whaiapu. Mr Andrew said the arrangement was successful but had ended due to the unexpected death of one of the Australian couple. The café had closed from that time until discussions between Mr Annas and Mr Andrew initially and, later, Mr Annas, Ms McCourt, Mr Andrew and Ms Whaiapu led to its opening under a new arrangement.

[9] The details of that arrangement were a matter of dispute between the parties. However, it was not in dispute that Ms McCourt was a director and shareholder of the second respondent, Fridge on the Ridge Limited (FOTR), the new company established to operate the café with Ms McCourt at the helm. Mr Andrew was the other director of FOTR. He, Ms McCourt and Ms Whaiapu each had a one-third shareholding in the company. Despite the shareholding situation, the agreement was for any profits from the café to be split on a 50:50 basis with Ms McCourt.

[10] Mr Annas was neither a director nor a shareholder of FOTR. Mr Andrew and Ms Whaiapu said they made it clear to Ms McCourt and Mr Annas they would not be entering into a business venture with Mr Annas. This occurred after Mr Andrew learned Mr Annas had been a patched gang member with criminal convictions.

[11] Ms McCourt's and Mr Annas' evidence was that, while they accepted Mr Annas would not be a director or shareholder in the joint venture, Mr Andrew and Ms Whaiapu were well aware Mr Annas would be helping Ms McCourt with the operation of the café. They were also aware Mr Annas, who is Ms McCourt's partner, would be living in the cottage with her.

[12] Ms McCourt was a cook by trade and, by her evidence, had always been an employee in the various positions she had held during her working life. She said she and Mr Annas left their jobs and their rented accommodation in Napier on or around 10 September 2015. They then moved into the cottage next to the Summit Café in accordance with an arrangement made with Mr Andrew and Ms Whaiapu.

[13] They spent the next four weeks cleaning and preparing the café and grounds before the café reopened on or about 10 October 2015. Ms McCourt signed an "Occupation Agreement" with the Beaurain Trust dated 10 October 2015 although, by all accounts, it was signed some days after that. I will return to this document shortly.

[14] Mr Andrew said he had some reservations about Ms McCourt's business acumen when, soon after the café's opening, he realised that the FOTR's trading account, which she used for stock purchases, was already in overdraft. He arranged for her to attend a banking seminar organised by the ANZ Bank on 14 October 2015. Mr Annas also attended at Ms McCourt's request.

[15] The arrangement between Ms McCourt, Mr Andrew and Ms Whaiapu did not thrive, with mutual suspicion and mistrust being a feature of the short period during

which the café operated. The following events illustrate the attitudes of the key players towards each other and their unwillingness to give the other the benefit of the doubt:

- a. Ms McCourt's evidence was that from the day the doors of the café opened Mr Andrew instructed her about what she should and should not do, and who should and should not be in the café. She said she intended to bake goods for sale in the café while Mr Andrew told her she should be buying in goods to sell. Mr Andrew's evidence was that he did not tell Ms McCourt not to bake goods, but advised her she needed to balance the time it took against the profit to be made.
- b. Ms McCourt was annoyed at what she considered to be dishonesty and a lack of transparency from Mr Andrew and Ms Whaiapu when \$2,000 was removed without prior consultation from FOTR's bank account. Mr Andrew's evidence was that he had advanced FOTR more than \$2,000 at the outset of the arrangement and was retrieving part of that advance. Ms McCourt accepted she had not had put any money into the business to get it established, but did not believe Mr Andrew had the right to remove his advance without any discussion.
- c. When, by Ms McCourt's evidence, the café's eft-pos machine broke down, she contacted the supplier and arranged for a new one without consulting Mr Andrew or Ms Whaiapu. They were suspicious and concerned about this, claiming the eft-pos machine worked perfectly up to, and after, its replacement. They were also concerned about Ms McCourt's facilitating Mr Annas' involvement in the purchasing of goods, and internet banking, for the café.

[16] In early November 2015 Mr Andrew said he talked to his business mentor, Ron Massey, about his concerns and on 9 November asked his accountant, Hamish Pringle, to provide a profit and loss report for FOTR. A meeting with Ms McCourt and Mr Annas, chaired by Mr Massey, took place on 10 November 2015.

[17] Mr Andrew said among the matters discussed was the less than 30% profit margin shown by the café in its first month of operation. He noted that the

Australians had achieved a 70% profit margin within their first month of operation. Mr Andrew said Ms McCourt had no explanation for the lower than anticipated result.

[18] It was agreed at the meeting that an independent stocktake would take place on 17 November 2015. However, the café's last day of trading was 15 November 2015. Ms McCourt said she had no choice over closing the doors as the bank account had been frozen that day which meant she could no longer order food. Mr Andrew denied freezing the account. It was his evidence that the bank account remained open until April 2016 after he had inadvertently used his eft-pos card to purchase petrol. Once aware of the error he ensured the account was closed.

[19] On 17 November 2015 Mr Andrew arrived at the café with Mr Pringle and another person from the same accounting firm. Mr Andrew's evidence was that he attended the café in his capacity as a director of FOTR and to introduce the accountant and his assistant to Ms McCourt. Ms McCourt was not in the café at the time. Mr Annas was present and refused to allow them to enter the café to undertake the stocktake on the grounds that Mr Pringle was not independent. No stocktake took place that day.

[20] On 19 November 2015 solicitors for the Beaurain Trust wrote to Ms McCourt setting out its client's view of their being an impasse between Ms McCourt and the Trust resulting in "otherwise avoidable expenses/losses to (FOTR)". Ms McCourt was advised of a number of steps that needed to be taken including the freezing of FOTR's bank accounts; the locking of the premises; and the return of keys to Mr Andrew or Ms Whaiapu.

[21] The letter informed Ms McCourt that, once those steps had been taken, the future viability of FOTR could be objectively assessed. In the meantime, Ms McCourt was advised to seek independent legal advice. She was put on notice that, if she did not cooperate fully with the Trust, the trustees would, pursuant to clause 4.1 of the Agreement, take formal steps to remove her from the premises. The "Agreement" referred to was the Occupation Agreement signed by Ms McCourt, Mr Andrew and Ms Whaiapu, and dated 10 October 2015.

[22] Ms McCourt and Mr Annas moved out of the cottage on 21 December 2015.

## **Issues**

[23] The issues for the Authority to determine are:

- a. whether Ms McCourt was an employee of the Beaurain Trust and/or Fridge on the Ridge Limited; and, if she was
- b. whether she raised a personal grievance within the statutory time frame; and, if so
- c. whether she was unjustifiably dismissed; and/or
- d. whether she is owed wages.
- e. whether Mr Annas was an employee of the Beaurain Trust and/or Fridge on the Ridge Limited; and, if he was
- f. whether he raised a personal grievance for unjustifiable dismissal within the statutory time frame; and, if so
- g. whether he was unjustifiably dismissed; and/or
- h. whether he is owed wages.

[24] If either or both of the applicants are found to have been employees, and to have raised their personal grievance within the statutory timeframe, and to have been unjustifiably dismissed, issues of remedies and contribution will arise.

### **Legal tests**

[25] To determine the claims of each of the applicants it is necessary to determine the "real nature of their relationship" as provided by s. 6(2) of the Employment Relations Act 2000 (the Act). That section provides the meaning of "employee" as "...any person of any age employed by an employer to do any work for hire or reward under a contract of service".<sup>1</sup> This includes "homeworker" or "a person intending to work"<sup>2</sup> but excludes a volunteer.<sup>3</sup>

[26] To determine the real nature of the relationship the Act provides that the Court or Authority<sup>4</sup>:

- a. Must consider all relevant matters, including any matters that indicate the intention of the persons; and

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<sup>1</sup> Section 6(1)(a) of the Act

<sup>2</sup> Section 6(1)(b)

<sup>3</sup> Section 6(1)(c)

<sup>4</sup> Section 6(3) of the Act

- b. Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[27] The Supreme Court in *Bryson v. Three Foot Six Ltd (No 2)*<sup>5</sup> held that “all relevant matters” included the written and oral terms of the contract between the parties which would usually contain indications of their common intention concerning the status of their relationship. It would also include any divergences from, or supplementation of, those terms and conditions which were apparent in the way in which the relationship operated in practice.

[28] It was important the Court or Authority should consider the way in which the parties had actually behaved in implementing their contract. How their relationship operated in practice was crucial to a determination of its real nature. “All relevant matters” also required the Court or Authority to:

...have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test)...<sup>6</sup>.

[29] However, as Perkins J noted in *Clark v Northland Hunt Inc*<sup>7</sup>, none of the tests individually will necessarily be conclusive. “*The weight to be placed on them respectively will depend on the overall factual matrix. A consideration of each of the tests in turn, will give the Court an overall feeling for the underlying nature of the relationship. In some cases the position will be patently obvious, in other cases there will be a fine balance.*”

[30] If I find either or both of the applicants to have been an employee I will need to determine on an objective basis whether they were was unjustifiably dismissed. The applicable test is set out at s. 103A of the Act and is whether what the employer did, and how it did it, was the action a fair and reasonable employer could have taken in all the circumstances at the time.

### **Was Ms McCourt an employee, either of the Beaurain Trust or FOTR?**

#### *The intention of the parties*

[31] Ms McCourt acknowledged there was no discussion between herself and Mr Andrew and Ms Whaiapu about her being an employee either before she and Mr

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<sup>5</sup> [2005] ERNZ 372

<sup>6</sup> n3 at [32]

<sup>7</sup> (2006) 4 NZELR 23 at [22]

Annas moved to the cottage next to the café or at any time before the café closed. She said she understood she would be a director and shareholder of FOTR.

[32] In answer to questions put to her in the investigation meeting she said there had been no discussion of wages with Mr Andrew and Ms Whaiapu and she had no expectation of being paid wages initially. She understood that it was to be a 50:50 partnership arrangement.

[33] Her evidence was that this understanding changed. Asked to define when it had changed, Ms McCourt said it was not a decision she had made, “just a feeling we might as well be employees”. This happened as it became clear to her she did not have the amount of control over the management of the café that she had been led to believe she would have. Ms McCourt said she had not raised this with Mr Andrew or Ms Whaiapu at the time.

[34] Mr Andrew and Ms Whaiapu were adamant there had never been any discussion of an employment relationship between Ms McCourt and them concerning either the Beaurain Trust or FOTR. While discussions were at a preliminary stage, and before Mr Andrew became aware of Mr Annas’ gang affiliation and criminal convictions, he had shown Ms McCourt and Mr Annas the financial statements for the café under the Australian couple.

[35] He said he had asked them if they understood profit and loss and had gone through the accounts with them. He suggested they talk to an accountant if they had any questions arising from the accounts which he left with them. He gave them the name of his accountant whom he wished to continue to use for the business. He also gave them the name of the business mentor whose professional guidance he believed had contributed to the success of the café under the previous partnership and whom he also wished to continue in that role.

[36] Mr Andrew was clear in his evidence that what had been discussed, and what was entered into, was the business model reflected in the directorship and 50:50 partnership arrangement Ms McCourt had signed up to. In his view nothing had changed during the short term of the business relationship.

[37] I find there is no disagreement among Ms McCourt, Mr Andrew and Ms Whaiapu that their intentions at the outset of their relationship were to create a joint venture business partnership and not an employment relationship.

*The written agreements*

[38] Apart from the registration of FOTR with the New Zealand Companies Office, there is one other document that could shed light on the intentions of Mr Andrew, Ms Whaiapu and Ms McCourt about the type of relationship they intended. I refer to the Occupation Agreement, also described as the Occupancy Agreement, entered into between Ms McCourt and the trustees of the Beaurain Trust.

[39] Counsel for the respondents submitted that to say this document was “a dog’s breakfast” was to considerably understate the position. I agree with that description. The document appears to be the product of cutting and pasting from a variety of other documents. It contains elements of commercial premises occupancy, business arrangements, hospitality industry obligations, accommodation/tenancy and employment provisions.

[40] The first clause of the Occupation Agreement (the Agreement) suggests it was formulated for another person or persons who, unlike Ms McCourt, were not New Zealand citizens. The clause provides that the Agreement is subject to Ms McCourt remaining lawfully entitled to work in New Zealand. Mr Andrew confirmed the document was adapted from the Agreement formulated for the Australian couple who had previously operated the café. It was not relevant to Ms McCourt as no question arose over her entitlement to work.

[41] The Agreement comprises three parts with an additional attachment. Clause 3 of the first part provides that the Agreement is “made up of the Individual Terms, General Terms, and any attached Schedules. Where there is any conflict, the Individual Terms shall prevail.” The first part concerns the occupancy of the premises and contains no suggestion of an employment relationship.

[42] The second part is headed “Schedule – General Terms” and is a confused mixture of occupation and employment obligations. The next document is headed “Additional Attachment”, signed by Ms McCourt, and consists of six numbered paragraphs containing information relating to diverse matters such as not selling petrol and oil, fire regulations, and the non-sale of venison in any form.

[43] The final part of the document is headed “Fridge on the Ridge Ltd, - Schedule B” and was signed by Mr Andrew and Ms McCourt. It contains a Manager’s Position Description, in which it states that the two directors, Mr Andrew and Ms McCourt,

have decided to appoint Ms McCourt to manage the day to day operations of the Fridge on the Ridge Ltd.

[44] Her management, administration and monitoring duties are specified as well as her attendance at monthly directors' meetings. A range of other matters are addressed in the document, including legal and ethical issues, fairness and respect among shareholders, and issues relating to legislative obligations in the hospitality industry.

[45] Despite several references to "employment" I do not discern from the documents that the Trust intended to enter into an employment relationship with Ms McCourt. I find it likely that those references resulted from a clumsy and inept attempt to adapt other documents, including an employment agreement, to one reflecting an arrangement to occupy business premises and accommodation, and to define the business relationship between Ms McCourt and the Trust.

*How the relationship worked in practice*

[46] Ms McCourt said she was not paid wages and had known from the outset that she would receive money once the business started making money. She agreed under cross examination she knew she was responsible for paying her own tax on the remuneration she received. She said she had obtained a personal bank loan to enable her to get by in the first weeks of the café's operation. She saw her part of the arrangement as running the café, ensuring it was profitable and growing.

[47] However, it was her evidence that from the outset Mr Andrew told her how she was to manage the café. Mr Andrew denied that. He said he knew from experience what worked and what did not but he did not tell Ms McCourt what to do or not to do: he gave her advice and it was up to her whether she took it.

[48] Ms McCourt gave as an example the issue of baked goods which I have referred to earlier in this determination. She said her vision for the café included selling both purchased goods and cakes and muffins that she would bake on the premises. She said Mr Andrew told her not to bake goods and directed the goods she should purchase. Under questioning Ms McCourt modified that and said Mr Andrew had not told her she could not bake: he had said the baking would not make money and she would not have time to do it.

[49] Another source of contention between Ms McCourt and Mr Andrew was the Vend till system which recorded sales according to their description and set price. Ms McCourt could not amend the set prices although they did not reflect changes to food items or prices that she wished to make. Mr Andrew had to make those changes but she was frustrated that he did not make the number of changes she wanted or at the times she wanted.

[50] I regard these and other examples cited by Ms McCourt as matters that could be expected to arise in the initial phases of a new project. She was understandably keen to introduce her vision of hospitality in the café. That represented a change in practice from how the café had operated more recently, which resulted in questioning by Mr Andrew and Ms Whaiapu who, as the other half of the partnership, had an interest in the efficacy of the changes and their effect on the café's profitability.

[51] It was obvious from Ms McCourt's evidence that she resented their questions and suggestions, such as charging for items Ms McCourt thought should be included with a product or meal. She regarded this as interference in her management of the café. I disagree. I do not find the interest from Mr Andrew and Ms Whaiapu in how Ms McCourt operated the café changed the business nature of their relationship.

[52] Mr Andrew's removal of \$2,000 from the café's bank account in early November 2015 damaged the relationship between Ms McCourt and her business partner. She spoke to Ms Whaiapu about this and accused Mr Andrew of dishonesty and a lack of transparency. She did not understand why he had done this, particularly without discussing the matter with her. Mr Andrew acknowledged under questioning that it may have been prudent to tell Ms McCourt that he intended retrieving the money he had advanced to the business.

[53] Despite the friction that developed between Ms McCourt and Mr Andrew and Ms Whaiapu, I find the relationship operated in practice how the parties agreed at the outset that it would. That was as a joint venture between Ms McCourt and Mr Andrew and his partner.

#### *Elements of control*

[54] Ms McCourt expressed her belief that the control over the café she believed she would have was non-existent in practice from the first day of operation. I find Ms McCourt has overstated the situation. I have already referred to her evidence over the

baking and her concession that Mr Andrew did not tell her she was not to bake goods for the café, although he advised against doing it on the grounds of the time it would take and the unprofitable nature of it. It was clear from Ms McCourt's evidence that she did not change her practice of baking goods for the café as a result of that discussion with Mr Andrew.

[55] Ms McCourt had an eft-pos card for the FOTR bank trading account as did Mr Andrew. His evidence was that he did not use his until inadvertently doing so for the purchase of petrol several months after the café had closed in November 2015. Ms McCourt was responsible for all decisions and purchases of stock for the café. She was also responsible for determining the hours the café was open. She knew when entering into the arrangement with Mr Andrew and Ms Whaiapu that travellers and truck drivers were an important part of the clientele. This was reflected in the hours of opening. It had been clear to Ms McCourt from discussions with Mr Andrew and Ms Whaiapu that the success of the café was in large part dependent upon the effort she was prepared to put into it.

[56] Ms McCourt gave evidence that she had started a Facebook page for the café on her own initiative, without consulting Mr Andrew and Ms Whaiapu; she also arranged the purchase of a new eft-pos machine with no prior consultation; and she closed the café when she needed to attend to other matters.

[57] These factors do not indicate the degree of supervision Ms McCourt alleged her joint venture partner exercised.

*Was the role integrated into the business?*

[58] This test entails factors such as whether the person was performing a role that was part and parcel of the business or whether the role was more of an adjunct to it. Where the person is performing the former type of role they are more likely to be considered to be an employee.

[59] In this instance the role Ms McCourt performed, that of operating and managing the café, monitoring its finances, and purchasing its stock could have been undertaken by an employee or someone in business on her own account. Her attendance at a business banking seminar could have been in either an employee or a business partner capacity.

*The fundamental test*

[60] This test looks at how the person engaged herself to perform the duties undertaken, and whether they did so as a person in business on their own account. The essential question here is whether Ms McCourt was in business for herself?

[61] She did not, during the brief period she operated the café, expect wages to be paid to her despite her expression of feeling that she “might as well be an employee”. She acknowledged her expectation was that once the café had sufficient takings she would receive 50% of those takings after expenses had been deducted.

[62] Ms McCourt acknowledged being aware it was her responsibility to arrange payment of tax on her share of the profits. She was also aware that the extent of her efforts could directly affect the profitability of the café and therefore affect the size of her half share of the monetary rewards.

*Conclusion*

[63] I consider the evidence and an application of the tests referred to above indicate Ms McCourt was not in an employment relationship with either the Trust or FOTR. She was in a profit-sharing business relationship with Mr Andrew and Ms Whaiapu through her directorship and shareholding in FOTR.

**Was Mr Annas an employee, either of the Beaurain Trust or FOTR?***The intention of the parties*

[64] Mr Annas’ view of his situation differs from that of Mr Andrew and Ms Whaiapu. He acknowledges they told him he would not be a director or shareholder of the company established to operate the café, FOTR. He says, however, they made it clear to him that he was just as much a part of the business as Ms McCourt, although his name would not be on any of the documentation.

[65] Mr Andrew and Ms Whaiapu’s evidence was that they wanted no form of relationship with Mr Annas once they became aware of his history. They say they made it clear to Ms McCourt he would have no legal standing and it was up to her what, if any, role he played. I prefer their evidence on this matter.

[66] Ms Whaiapu’s evidence was that she told Ms McCourt in a meeting she and Mr Andrew had with her and Mr Annas in early September 2015 that “You employ

him, have him as a housekeeper, call him what you like, we don't want to know". Mr Annas could not recall that part of the discussion.

[67] Mr Annas said he had no discussion with Mr Andrew or Ms Whaiapu at that time about being an employee or receiving wages or holiday pay or any other employment-related benefits. Nor did he have any expectation of receiving wages until November 2015 when it became apparent that Ms McCourt had lost all trust in Mr Andrew and Ms Whaiapu and they had lost all trust in her.

[68] From the evidence referred to above I conclude there was never an intention by Mr Annas or by Mr Andrew and Ms Whaiapu that he would be an employee of either the Trust or FOTR. That is not to say their intentions regarding his role were compatible.

[69] Mr Annas acknowledged his name would not be on any documentation but he regarded that as a formality. He believed his role would be just as much a part of the joint venture arrangement as Ms McCourt's although he was unclear about the mechanics of how that would work. Under questioning he said he had no agreement with Ms McCourt that he would receive half of her 50% of the café's profit but he said it would be their only income.

#### *How the relationship worked in practice*

[70] Mr Andrew and Ms Whaiapu were aware Mr Annas lived with Ms McCourt in the cottage next to the café at Te Haroto. They acknowledged they knew the part he played in the cleaning up of the café and surrounding grounds from the time he and Ms McCourt moved into the accommodation before the café opened. They knew, too, that he assisted his partner in the café after it had opened.

[71] There was no evidence they had any relationship with Mr Annas after the café opened. Their dealings over café business were with Ms McCourt.

[72] I accept Mr Andrew and Ms Whaiapu's evidence that they made it clear to Ms McCourt in early September the joint venture relationship was to be with her not with her and Mr Annas. Counsel for the respondents submitted that they tolerated him being on the premises and being involved in assisting Ms McCourt run the business. I find that to be a reasonable summary of how the relationship between Mr Annas and Mr Andrew and Ms Whaiapu operated. They would have known from past

experience that two people were required to operate the café and tacitly agreed to Mr Annas being that second person.

[73] I conclude the relationship between Mr Annas and Mr Andrew and Ms Whaiapu reflected Mr Andrew and Ms Whaiapu's intentions when they agreed to enter into a partnership/ joint venture arrangement with Ms McCourt. That is that their relationship would be with her and any role that Mr Annas might play was a decision for Ms McCourt to make.

*Elements of control*

[74] I conclude from the evidence, as referred to above, that there was no element of control over Mr Annas by the Trust. Mr Andrew and Ms Whaiapu communicated with Ms McCourt over café matters. They were aware that he assisted in the café but could not be said to have exerted any control over him. Ms McCourt, by virtue of her role as the manager of the day to day operations of FOTR, is the only person who could have exerted control over Mr Annas.

*Was the role integrated into the business?*

[75] Mr Annas' evidence, which was largely undisputed, was that after moving into the cottage with Ms McCourt he had worked on cleaning up the café and grounds and preparing for the café's opening. He undertook pruning, waterblasting, painting part of the building, clearing around the toilets, and cleaning up the deck. He had also tidied up the cottage's roof and guttering and the sheds that were on the property.

[76] Once the café opened he undertook front of house, cleaning, dishwashing and coffee-making duties as well as customer contact and administration, including counting the takings. Mr Annas said it was he who created the café's Facebook page. He did that of his own initiative without asking Ms McCourt who, he said, was very happy with the free advertising it brought the business.

[77] He received no payment for his work and, as noted earlier, he had not expected any until the relationship between Ms McCourt and Mr Andrew and Ms Whaiapu soured in November 2015.

[78] The duties Mr Annas performed indicate his role was integral to the reopening and running of the café.

*The fundamental test*

[79] There is no documentary evidence that Mr Annas was in business on his own account. He was neither a director nor shareholder of FOTR and was not a signatory to the Occupation Agreement. The evidence indicates that he aspired to be in business in the early discussions with Mr Andrew.

[80] Once it was made clear by Mr Andrew and Ms Whaiapu they were unwilling to enter any formal relationship with him, his evidence indicates he believed he would still be part of the business, although not formally recognised as Ms McCourt was.

[81] Mr Annas' expectation was that Ms McCourt's 50% of the café's profit would be their only income. In saying that he was reflecting his life partnership with Ms McCourt and not a business relationship.

**Conclusion**

[82] From the tests above I conclude Mr Annas was not in business on his own account. Nor was he an employee of the Trust. The trustees had made it clear they would have no business relationship with him and I have found no evidence that they intended, or initiated, an employment relationship with him.

[83] While the Trust benefitted from his work on the grounds around the café before it reopened in October 2015, I accept the submission of counsel for the respondents that it was "...a concomitant of the joint venture." It was work performed to enhance the appearance of the café which would assist his partner to make a success of the joint venture she had agreed with Mr Andrew and Ms Whaiapu.

[84] I have considered but reject the submission of counsel for Mr Annas that he received consideration from the Trust for the work he performed after moving into the cottage, both before and after the café opened, in terms of accommodation and left over food. There is no doubt he benefitted from the rent-free accommodation he had from 10 September to 21 December 2015 and from the food for a lesser period.

[85] I find, however, those benefits flowed from his relationship with Ms McCourt, for whom they were provided. Any advantage Mr Annas received was as her partner not as an employee of the Trust. Under the terms of the Occupancy Agreement Ms

McCourt was to sign a tenancy agreement and pay a weekly rental for the cottage accommodation.<sup>8</sup> The liability for the rent would lie with her and not with Mr Annas.

[86] If Mr Annas was not in business for himself, and was not an employee of the Trust, the question remains whether he was employed by FOTR. I have concluded he was not. I accept Mr Annas performed work in the café and expected remuneration for that work. However, as noted above, his expectation was that he would be remunerated from Ms McCourt's half share of any profits made by the café. The work he performed was to assist her in obtaining, and maximising, that profit. I therefore consider that, if anyone employed Mr Annas, it was Ms McCourt. That is not a claim he has brought to the Authority and I take that matter no further.

### **Determination**

[87] Ms McCourt was not in an employment relationship with the Beaurain Trust. She was a director and shareholder of Fridge on the Ridge Limited, in a profit share arrangement and was not also employed by it. That being so I have no jurisdiction to deal further with her claims.

[88] Mr Annas was not in an employment relationship with either the Beaurain Trust or Fridge on the Ridge Limited. His claims against the first and second respondents are dismissed.

### **Costs**

[89] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority

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<sup>8</sup> In fact there was no tenancy agreement provided. The informal agreement between Ms McCourt and the Trust appears to have been that rent would commence once the business became profitable.