

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 102/07
5052820

BETWEEN MARK BELL
 Applicant

AND GK & CL WHITING-
 HARRISON LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Paul Brown, Advocate for Applicant
 Raewyn Gibson, Advocate for Respondent

Investigation Meeting: 19 June 2007 at Christchurch

Submissions received: 3 July 2007 from Applicant
 10 July 2007 from Respondent

Determination: 14 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Bell's claim is that he was unjustifiably dismissed after one day's employment as a gib fixer. He says he was offered \$15 per hour for this work, but was dismissed by the respondent following his first day on the job. By way of remedies Mr Bell seeks a determination that he was an employee, a determination that the true respondent is Greg Harrison, a determination that he was unfairly dismissed, compensation for humiliation and hurt in the sum of \$10,000, lost remuneration for the period following his resignation from his previous employment and for the period of seven weeks from the date of the alleged dismissal. He also seeks interest on the above amounts. Further he seeks a penalty for the respondent failing to provide an individual employment agreement.

[2] The respondent says it and the applicant were never in an employment relationship but that it engaged Mr Bell, as it has others, as a contractor. By its directors, the respondent says they met the applicant at a result of newspaper advertising and that Mr Bell was offered a trial to determine whether he had the necessary skills to succeed. Mr Whiting-Harrison says it became clear in the course of the day that Mr Bell was unsuitable and advised him of this in the telephone message. The respondent paid the applicant \$200 for the work he undertook on behalf of the company.

How the problem arose

[3] Prior to this matter arising, Mr Bell was employed as a builder's labourer at an hourly rate of \$12. He wanted to improve his prospects and so placed a number of advertisements in a newspaper. Mr Whiting-Harrison said he also placed advertisements in the same newspaper and cannot recall whether first contact came from the applicant or from him. Mr Bell says that Mr Whiting-Harrison rang him in response to his ad and *he told me he was looking for a worker for his gib stopping business. I explained I did not have any experience in gib stopping, but that I was keen to learn. We talked about a number of things, such as the sort of work he did and where he worked; Greg Harrison said he would provide all the tools and equipment, and the rate of pay.*

[4] Virtually every significant aspect of the evidence from this point is in contention. The two men agree they met at the home of Mr and Mrs Whiting-Harrison. Mr Whiting-Harrison says he spoke to Mr Bell about becoming a sub-contractor in the dining area. His wife, who was preparing a meal in the adjacent kitchen, confirmed this. Mr Bell said they had met in an office. Mr Whiting-Harrison says he explained the arrangements which the company had with all of the sub-contractors engaged; that the company was a gib fixing contractor which sub-contracted work out from time to time to other people; that the company could not guarantee any specific hours of work but that sub-contractors were free to take up other work and had no obligation to be available when contacted by the company, that the starting sub-contracting rate was \$15 an hour and that the company would deduct withholding tax from the hourly rate but that Mr Bell would be responsible for his own tax. He says that Mr Bell was given an IRD330 which his wife had located to give to him and advised that Mr Bell's tax code would be WT. He also says that he

told the applicant he would recommend that Mr Bell set aside a further 5% of his pay for tax as on occasions, the withholding tax did not cover all of a sub-contractor's liabilities. Further, Mr Whiting-Harrison says that Mr Bell would need to provide his own basic tools but the company would provide specialist equipment for the job. Further, he told Mr Bell that he would contact the applicant when work became available so Mr Bell would be able to have a trial. Further, Mr Whiting-Harrison says that he would arrange that trial so it would not interfere with the applicant's current employment. Finally, he says that he specifically recalls telling the applicant *not to give up his day job* until he had a couple of day's trial to see whether he was suited to the task.

[5] The applicant says that at no stage did he ever have a conversation with Mr Whiting-Harrison in which he was told the role was one of an independent contractor. He says that if he had been told anything like this he would not have resigned from his employment. Mr Bell also says that he had no gib stopping experience and did not have any of the requisite tools. Further he says neither Mr nor Mrs Whiting-Harrison gave him a form to take away.

[6] After this meeting Mr Bell telephoned Mr Whiting-Harrison on a number of occasions asking if there was work available and he replied that he would contact the applicant when work was available. He says that about two weeks after he and the applicant had met, Mr Bell telephoned him to advise that he had resigned from his job and he would really like some work. Mr Whiting-Harrison says he advised the applicant there was no work available and that he should feel free to take up other work. A short time after this a work trial was arranged however, it was delayed a few days. Eventually a trial was arranged for Friday 29 September and Saturday 30 September 2006.

[7] At the completion of the day Mr Whiting-Harrison considered the applicant's aptitude and decided that he had not shown the basic skills necessary for someone who had the hammer-hand experience Mr Bell had claimed. He said that Mr Bell had difficulty hammering nails in and reading a measuring tape accurately. On 29 September Mr Bell asked for his payment for the day and says *as I had promised Mark Bell \$100 per day for two days I arranged for my wife to give him the \$200 when he called around to our house that afternoon. There was no tax deducted from*

this payment. Because I considered Mark Bell to be unsuitable for the role, he did not work on 30 September 2006.

[8] Mr Whiting-Harrison says he tried a number of times to contact Mr Bell before leaving a phone message on 1 October 2006.

[9] Mr Bell's version is *two days later, on Sunday, I received a brief text message saying that I was fired. I texted back, saying this was not on. I then got an answer phone message from Greg explaining in more detail why he had fired me.*

[10] Mr Whiting-Harrison says at no stage did he tell Mr Bell that he was *fired*.

Issues

[11] For the Authority to determine this matter it must decide the following issues:

- was Mr Bell engaged by the respondent as an employee, and if so on what terms; or
- was the applicant engaged as an independent sub-contractor; and
- was the applicant dismissed from employment; and
- If so, to what remedies is he entitled.

The investigation meeting

[12] At the investigation meeting the Authority heard evidence from Mr Bell on his own behalf. For the respondent, Mr and Mrs Whiting-Harrison gave evidence. The evidence was relatively concise and witnesses were open in their responses to questions from the Authority member and from the respective representatives.

Discussion and analysis

[13] Significant difficulties arise in this case. The first is the lack of any definitive documentation, the second is the imprecision of dates on which the parties met to discuss the terms of engagement and the third is the brevity of the engagement.

[14] Each of these presents problems in determining the issues between the parties. In such circumstances, the Authority, having considered the evidence before it

considered the demeanour of witnesses and the relevant tests set out in the case law precedents. Where the facts are in some doubt, a determination may have to be made on the balance of probabilities.

Documentation

[15] There is no employment agreement (which the respondent argues is consistent with the status of a contractor). Nor is there a letter setting out the terms on which the applicant and respondent were to work together. The applicant says he was offered and accepted a rate of \$15 an hour and that he presumed that this would be on the basis of 40 hours per week. The respondent says the rate is correct, but that is when it is able and the applicant agrees to be available to do the work offered to him. It says, as a contractor to builders, it undertakes to do the work offered, and when work is available, to offer that work to sub-contractors if they are available at the time required.

Imprecise dates of meetings

[16] Not a great deal hangs on this. Both parties agree they met one evening to discuss the terms of engagement. The relative positions of both parties are set out above.

The one day engagement

[17] Here, the parties are staunchly opposed in their views. Mr Whiting-Harrison says he had told the applicant not to leave his current employment, that he would arrange a trial engagement for Mr Bell which would not interfere with the applicant's existing employment. Mr Bell says he was offered full time employment which he presumed would be for 40 hours a week.

[18] At the investigation meeting I took particular notice of Mr Bell and, in particular, Mr Whiting-Harrison as they gave their responses to questions.

[19] Both are open and honest men and the Authority had no reason to doubt the integrity of either. The difference discerned was between a young man unfamiliar with the industry practice of sub-contracting on a labour only basis and who was looking to establish safe employment in the building industry, and a sole trader of some 7 years experience prior to incorporating the respondent company on 10 July

2007, and who, on the statement of his accountant, has always *when additional labour was required it has always been withholding payments to sub-contractors subject to the deduction of withholding tax. These sub-contractors are technically self employed.*

[20] On that basis it seems more likely than not that Mr Bell was engaged for a trial to determine whether, in the respondent's view, he could establish himself as a gib fixer on contract.

The Tests

[21] Ms Gibson ably set out the relevant tests the Authority is required to consider and placed those tests in the context of the evidence before the Authority.

Intention

[22] The respondent says it has always engaged labour in gib fixing on a contracting only basis. It says the provision of the IR330 form and the advice to Mr Bell as to the tax category and that he ought to provide an additional 5% tax to cover his potential liabilities, was a genuine effort to ensure he was covered in a taxation setting. This it appears is consistent with the respondent's intention to engage Mr Bell as a sub-contractor. It is unlikely that he would have discussed the issue of tax with Mr Bell at all if he was seeking to employ him. He certainly would not have given him this particular form, nor advised him of his tax code.

[23] Perhaps Mr Bell did not understand the technical aspects of the offer and the significance of the tax discussion, and believed he would be an employee.

Control

[24] Given, as it eventuated, the applicant was engaged for only one day, the relevance of this test is somewhat diminished. If, as the respondent contends, Mr Bell was on a trial as to his skills, it is highly probable that he would be closely supervised. That supervision may have been by Mr Whiting-Harrison or by another person designated by the respondent. Further evidence from the respondent indicated that once it was satisfied at the level of skill possessed by one of its contractors, the job

was set up by the respondent and the contractor or contractors were left to their own devices to complete it.

[25] The other significant issue is whether the respondent was in control of the hours Mr Bell was to work. I think it is clear from the evidence from the respondent that Mr Bell was able to take work from whoever he chose to take it. He was not bound to be available whenever, whatever, to the respondent. Mr Whiting-Harrison was quite clear in his evidence, *our sub-contractors were free to take up other work and had no obligation to be available when asked.*

Integration

[26] There is no evidence that Mr Bell was integrated into the respondent's business. The evidence was that he was on a trial as to his skills.

[27] I think it is highly unlikely that Mr Bell would have been put to work on the contracts secured by the respondent without some critical assessment of his skill level. I therefore take the view that his longer term prospects were dependent on his ability to satisfy the respondent. It may be regrettable that he was unable to achieve this, but it does not change the right of a contractor to determine who it will have perform work on its behalf.

The fundamental test

[28] This requires the Authority to determine whether the applicant structured his self employed business and how he went about structuring that business.

[29] Looking at the evidence as a whole I am of the view that Mr Bell was looking for an employment relationship when he spoke to Mr Whiting-Harrison. I do not think other options had crossed his mind and the applicant is likely to have been confused by the discussion regarding tool provision, taxation matters and the uncertainty of work availability. What I find difficult to understand is how he was able to leave the meeting with the impression he was being employed at some future date by the respondent there having been no discussion regarding hours of work, annual leave or special leave entitlements.

Credibility

[30] On behalf of the respondent Ms Gibson has submitted a number of issues in relation to which evidence the Authority ought to prefer.

[31] In determining this matter I have had regard, not so much to the credibility of the witnesses, as to their relative experience in the building trade and business life in general.

[32] To avoid any doubt, on the basis of invoices submitted by others working for the respondent, I am satisfied that the respondent paid for work done on an hourly rate basis rather than a square metre basis. The respondent is entitled to adopt this practice if it chooses.

[33] I have also been mindful of the very common practice of builders or project managers contracting out the fixing of gib and the stopping of gib to different companies. It appears to me the respondent company and Mr Whiting-Harrison is engaged in this common industry practice.

The determination

[34] Having considered the evidence in the light of the relevant tests, I return to the issues set out above. On the balance of probabilities I find;

- Mr Bell was not engaged by the respondent as an employee nor did the respondent extend to the applicant an offer of an employment relationship; and
- the respondent intended to engage the applicant as an independent sub-contractor subject to Mr Bell's demonstrating an adequate level of skill; and
- I find the applicant was not dismissed from his employment.
- The applicant is not entitled to the remedies he seeks.

[35] That said, I want it to be clear that while the respondent discussed the engagement of Mr Bell with the applicant, a letter setting out the terms of any engagement and any trial period prior to longer term engagement, would have avoided

the angst this matter has occasioned both parties. I strongly recommend the respondent to adopt this practice.

[36] The applicant does not have a personal grievance and while the Authority accepts he is aggrieved, it is unable to assist him further.

Costs

[37] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority