

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Elijah Senice (Applicant)  
**AND** R Savory Limited (Respondent)  
**REPRESENTATIVES** J Dale, Advocate for Applicant  
Glenn Finnigan, Counsel for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 5 April 2005  
**SUBMISSIONS RECEIVED** 14 and 20 April 2005  
**DATE OF DETERMINATION** 29 April 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Elijah Senice has an employment relationship problem on the ground that he was unjustifiably and constructively dismissed by his former employer, R Savory Limited (“Savory”). He also makes other allegations about the way he was treated during his employment, as well as claiming for the payment of bonuses he says he was owed.

[2] Savory says there was no employment relationship between the parties, rather Mr Senice was a contractor to it. By agreement, this determination addresses only whether there was an employment relationship between the parties.

**The nature of the parties’ relationship**

[3] Savory had a contract for building work at St Kentigern’s College (“St Kentigern’s”). It subcontracted C & T Contractors Limited (“C & T”) to carry out some of the work, supplementing the work carried out by Savory’s own employed workforce. Savory’s general practice was to maintain its own employed workforce, and to engage contractors on a temporary basis when required as a ‘top up’ for particular projects.

[4] C & T had engaged Mr Senice some time early in 2002, and in late May or early June 2002 it sent him to work as a labour-only carpenter on the St Kentigern’s site.

[5] By mid-June 2002 C & T had not paid Mr Senice, and others it had engaged, for their work at St Kentigern’s. Mr Senice approached Mike Carter, Savory’s site manager there, to advise that because of the non-payment he did not intend to continue to report for work. Mr Carter suggested that Savory might engage Mr Senice itself, particularly as Mr Senice was working on some shutters

and the work had not been completed. In addition Mr Carter did not think it right that Mr Senice and his colleagues were not being paid for their work.

[6] After confirming with his manager, Paul Housham, that Savory could engage Mr Senice, Mr Carter spoke again to Mr Senice. He told Mr Senice and another colleague that they could come to work for Savory, but would first have to hand their notice in to C & T. He said in evidence that he believed he also said they would be working as labour-only contractors, but Mr Senice could not recall whether that was said. Mr Carter also advised that the rate of pay would be \$21.00 per hour, that payment would be made weekly on invoice, and that 20% withholding tax would be deducted from the payment. From Savory's perspective \$21 per hour was the rate paid to contractors but not necessarily to its own employed staff. After attempting to negotiate a higher rate of pay Mr Senice agreed to the arrangements.

[7] There was no written agreement. Although there is no legal requirement that labour-only contractors (as distinct from employees) be provided with one, it is useful to reduce the terms of any agreement to writing in order to limit the scope for disagreement about their content.

[8] Thereafter Mr Senice worked solely on the St Kentigern's site, until work ran out in or about January 2003 and he was offered work on other Savory sites. He was free to accept or reject further work, and he chose to accept it.

[9] Standard hours of work were 44 per week, with some Saturday work. Mr Senice's invoices showed widely varying weekly hours of work. He also had a number of absences, but he was not disciplined for them although they were for personal reasons rather than because he was working elsewhere. He did not claim sick leave or annual leave, and did not submit invoices in respect of a two-week absence over the Christmas – New Year period of 2002-2003.

[10] Mr Senice provided his own set of basic carpenter's tools. He was not paid anything in the nature of a tool allowance. He also supplied his own safety boots. Savory provided larger power tools and specialist tools, a safety vest (pursuant to its obligations under its contract with St Kentigern's) and some leads. However the construction equipment was there because some 70% of the workforce on the St Kentigern's site comprised Savory's employed workforce, and Mr Carter did not insist that the contractors use only their own tools.

[11] Inevitably on a building site some degree of co-ordination and direction of work tasks is required. The mere fact this is necessary, and as a result involves some degree of control over the work of individuals, does not mean that everyone subjected to such control is an employee in law. The real question concerns the extent to which such oversight as there may be goes beyond providing co-ordination and becomes direct supervision over the way in which work is carried out.

[12] Here, Mr Senice said at the investigation meeting that he enjoyed working at St Kentigern's and Savory "did not interfere with what I did." Subsequent difficulties seemed to concern Mr Senice's relationship with Mr Housham and raised different issues.

[13] Overall, these facts indicate that the parties' relationship was a contract for services rather than an employment relationship. Since I am not persuaded there was an employment relationship, the Authority cannot take Mr Senice's claims any further.

## **Costs**

[14] Costs are reserved.

[15] The parties are invited to settle the matter. If they are unable to do so they may seek a determination of the Authority by making written application, and giving reasons in support.

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