

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Ricki Tamati (Applicant)  
**AND** Nigel Frogley Earthmoving Ltd (Respondent)  
**REPRESENTATIVES** Ken Nicolson, for Applicant  
Brian J.R Fox, for Respondent  
**MEMBER OF AUTHORITY** Yvonne Oldfield  
**INVESTIGATION MEETING** 16 December 2004  
**FURTHER WITNESS  
INTERVIEW** 20 December 2004  
**SUBMISSIONS** 28 January 2004, 25 February 2005  
**DATE OF DETERMINATION** 11 July 2005

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

- [1] The issue in this case is whether an employment relationship was ever formed at all.
- [2] In November 2003 Mr Tamati responded to an advertisement for a bobcat driver. He had a Heavy Transport licence but had not driven a bobcat before. Despite this lack of experience the owner of the respondent company, Mr Frogley, was prepared to consider him as he was having trouble finding someone. Mr Frogley arranged for Mr Tamati to spend two days with the previous driver to be shown how to use a digger, and then to spend most of a third day working with one on Mr Frogley's own farm.
- [3] When Mr Tamati left at the end of that day (a Saturday) Mr Frogley told him that he would telephone him. He did so on Sunday, telling him not to come in the next day, and then on the Monday he telephoned again and said that he had decided that he needed someone with experience.
- [4] Mr Tamati says he was offered permanent employment on the Friday. He therefore says that the call on Monday amounted to an unjustified dismissal. Mr Frogley says that Saturday was a work trial and that at no stage did he make any firm offer of work to Mr Tamati. In any event, he says that he told Mr Tamati that he proposed to take on his new driver as an independent contractor. There are therefore two issues for determination: whether work was offered and accepted and, if it was, whether it was to be pursuant to an employment agreement or to a contract for services.

## **Was an agreement reached between the parties and was it an employment agreement?**

- [5] Mr Frogley ran his business with the assistance of just the one digger driver on a contract for services. He had no other staff. The advertisement Mr Tamati saw in the paper was provided to me and there was nothing in to indicate that it was for a contractor. However, when Mr Tamati telephoned Mr Frogley in response to the advertisement Mr Frogley explained that he wanted a contractor.
- [6] Mr Tamati agrees that this is what he was told but said he was not sure what this meant in practice. He telephoned the “IRD infoline” on either the Friday or the Saturday and asked for advice on what would be expected of a contractor and whether the hourly rate was likely to be “plus or minus GST.” On the latter point he was advised to check with Mr Frogley.
- [7] On Friday 14<sup>th</sup> November, after spending that day and the Thursday with the previous driver, Mr Tamati went to meet Mr Frogley for the first time, at his farm. Mr Frogley told him that he could pay \$15.00 per hour and asked Mr Tamati to come back the next day to work on the farm. He let Mr Tamati take the truck and a company mobile phone home.
- [8] Mr Tamati told me that he thought he had a firm agreement on the Friday because he had had good feedback from the previous driver about his progress on the digger, and because Mr Frogley had told him:
- what the hourly rate would be;
  - to come back on Saturday;
  - to take the cell phone home.
- [9] Mr Frogley concedes that there was an agreement “of sorts” on these points. However he says he never indicated that there could be anything but a contractor arrangement between them and made no commitment that work would definitely be available. He said he saw Saturday as an opportunity for him to find out whether Mr Tamati would be suitable. He said that he would never have committed himself to taking on someone with no experience without establishing whether they could operate the machinery.
- [10] Mr Tamati spent four or five hours on the bobcat on the Saturday. Mr Frogley told me that he was not happy at all with the work he did and that Mr Tamati damaged a water tank rendering it useless. Although Mr Frogley was getting desperate to find someone, he also knew that becoming proficient on a bobcat took time and was concerned that with so little experience, Mr Tamati would not be able to manage the work. He told me that after thinking it over, he decided he should continue to look for someone with more experience, hence the Monday call to Mr Tamati.
- [11] Mr Tamati told me Mr Frogley said nothing to him about this, gave him the safety manual for the bobcat to take away and read, and appeared satisfied with his work. In Mr Tamati’s mind this amounted to further confirmation that he had a new job. He says he was therefore surprised and horrified when Mr Frogley rang and told him that he was not wanted.

### **Determination**

- [12] I am not satisfied that there is enough evidence for me to conclude that the parties entered into an employment relationship, for the following reasons.

- [13] The two days with the previous driver were training. On the Friday Mr Frogley and Mr Tamati met for the first time and agreed a rate of pay for any work that would be done. However I consider Mr Tamati to have been premature in thinking he definitely had work with Mr Frogley's company. It is not credible that Mr Frogley would have taken on an inexperienced driver without first assessing his ability to drive the bobcat. Saturday's work was a pre-engagement trial, not a probationary period, and ended with Mr Frogley advising that he would get back to Mr Tamati, nothing more.
- [14] Even more importantly it was never Mr Frogley's intention to take Mr Tamati on as an employee. Mr Tamati agrees that this was explained to him. The proposed working arrangements were not discussed in enough detail (and the relationship did not progress far enough) for the "real nature" of the proposed relationship to be established as anything different from what Mr Frogley planned.
- [15] I cannot on balance conclude that Mr Tamati became an employee. He is therefore outside the Authority's jurisdiction and I can do nothing more to help him with his employment relationship problem.

### **Costs**

- [16] I leave it to the parties to attempt agreement on this issue. If they cannot, I require submissions on Costs within 28 days of the date of this determination.

Yvonne Oldfield  
Member of Employment Relations Authority