

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 10/09  
5098820**

BETWEEN      SIMON PAUL WESTWELL  
                         Applicant  
  
AND              CLINTON IVAN WHEELER  
                         Respondent

Member of Authority:      Leon Robinson  
  
Representatives:          Applicant In Person  
   Respondent In Person  
  
Investigation Meeting:      18 June 2008  
  
Determination:              19 January 2009

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1] The applicant Mr Simon Westwell asks the Authority to investigate and determine that he was an employee. Mr Westwell says he is owed unpaid annual leave and statutory holidays. He also claims that he was unjustifiably dismissed. The respondent Mr Clinton Ivan Wheeler ("Mr Wheeler") says Mr Westwell was not an employee but rather, was engaged on a "labour only basis" as an independent contractor.

[2] The parties were unable to resolve the problem between them by the use of mediation.

**The facts**

[3] Mr Wheeler traded as Sunwest Painting, a painting business.

[4] In early 2004, Mr Westwell resided in the United Kingdom. He and Mr Wheeler corresponded by telephone and email in relation to Mr Westwell being engaged as a painter in Mr Wheeler's painting business.

[5] By letter addressed to Mr Westwell dated 22 June 2004, Mr Wheeler offered to engage Mr Westwell as a foreman painter. Mr Wheeler wrote:-

*Employment opportunity for Simon Westwell*

*Sunwest Painting would be very happy to offer a full time position to Simon Westwell starting ASAP. The position is for a Forman Painter and the job description includes: running jobs, organising staff, liaising with customers and general painting and decorating.*

*The hours of this position are to be a minimum of 40 hours per week, however I would allow up to 50 hours per week. The rate of pay would be negotiable between \$20.00 to \$25.00 per hour, which would be paid fortnightly into a bank account of Simon's choice.*

*Qualifications required for this position include trade papers (city and guilds).*

*I am willing to keep this job offer open to Simon until the end of November 2004, and if he were to take this position, I would provide full time work indefinitely for him.*

[6] Mr Westwell accepted the offer and arrived in New Zealand in September 2004. His family remained in the United Kingdom. Mr Westwell commenced work for Mr Wheeler as foreman painter on 21 September 2004.

[7] Mr Westwell and Mr Wheeler had formed a friendship between them as a result of their correspondence. Mr Westwell initially resided with Mr Wheeler and then latterly with an acquaintance of Mr Wheeler.

[8] Mr Wheeler was engaged by Mr Wheeler as foreman painter from 21 September 2004 until 12 April 2006 when the relationship ended. The friendship between Mr Westwell and Mr Wheeler also ended.

## The merits

[9] The principal issue is to determine whether Mr Westwell was an employee.

*(i) Employee or independent contractor?*

[10] Section 6 of the *Employment Relations Act 2000* ("the Act") prescribes that the Authority must determine the real nature of the relationship. The intention of the parties is still relevant but is no longer decisive. The real nature of the relationship

can be ascertained by analysing the tests that have been historically applied such as control, integration, and the “fundamental” test<sup>1</sup>.

[11] In making the assessment, the Authority is required to consider all relevant matters, including any matters that indicate the intention of the parties. The Authority is prohibited from treating as a determining matter any statement by the parties that describes the nature of the relationship. The assessment calls for an analysis of the actual operation of the relationship in practice.

### **Intention of parties**

[12] While the letter of 22 June 2004 expressly refers to and in my view implies an employment relationship, Mr Wheeler gives evidence to the Authority that he and Mr Westwell subsequently entered into a further agreement that Mr Westwell would be engaged on a labour only contract basis. Mr Wheeler says this agreement was entered into between them at his home on 11 October 2004. Mr Wheeler produces a letter dated 11 October 2004 as evidence of this further agreement. The letter states:-

*Dear Simon*

*As per our discussion on the evening of the 11th October 04, regarding our arrangement and agreement, I would like it noted that you will work for Sunwest Painting on a labour only contract basis. Sunwest Painting looks forward to our future working relationship.*

*Yours faithfully*

*Clinton Wheeler*

*Sunwest Painting*

[13] Mr Westwell denies that he agreed to be a labour only contractor and says that the parties only ever intended he would be an employee.

[14] Produced to the Authority is a copy of Mr Westwell's tax code declaration to the Inland Revenue Department. Dated 1 October 2004, Mr Westwell declares his tax code "WT" and his withholding payment category as "Labour - only Contracts In Building Industry". Mr Westwell says he was instructed to complete the form by Mr Wheeler. He says he wrote what he was told and there was no discussion.

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<sup>1</sup> *Bryson v Three Foot Six (No 2)* [2005] ERNZ 372

[15] The Authority finds that initially the parties intended Mr Westwell would be an employee. That is the situation they represented to the New Zealand Immigration Service.

[16] However, subsequently the parties varied the agreement between them such that Mr Westwell would be engaged as a labour only contractor. This the Authority finds was the intention of the parties as to the nature of the relationship from October 2004. However, that intention is not on its own to be regarded as decisive of the matter.

### **Control test**

[17] Mr Westwell was engaged as foreman painter. He was introduced to clients as such. He supervised co-workers and was paid an additional \$1.00 per hour for that responsibility. He supervised sub-contractor painters and liaised with clients on each job.

[18] He was required to report for work each day and worked summer hours Monday to Friday from 6.30am to 6.00pm and Saturdays 7.00am to 1.00pm. In the winter Mr Westwell worked 7.30am to 4.00pm.

[19] Mr Westwell says he did not take holidays. He also says he did not take sick days either because he was never unwell. He says he did have the odd day off work.

[20] Mr Westwell answered to Mr Wheeler. Mr Wheeler gave instructions to Mr Westwell including as to the work to be performed and how that work was to be carried out. Mr Wheeler told Mr Westwell the jobs to go to, how long each job was to take and the requirements for each job.

[21] Mr Westwell was provided with Sunwest business cards to hand to customers and potential customers.

[22] He was provided with clothing bearing the Sunwest logo to wear for work including work shorts and T shirts. He says he was required to wear this clothing.

[23] Mr Westwell says that initially Mr Wheeler would simply ask what hours he had worked and would then pay those advised hours. However, Mr Westwell further

says that in April 2005, Mr Wheeler asked him to provide timesheets in the form of invoices for the hours he had worked from September 2004 through to April 2005. Mr Westwell says Mr Wheeler said his accountant had made the request for IRD purposes. Mr Westwell tells the Authority he then prepared invoices for the said period as he had been asked to do by Mr Wheeler.

[24] Copies of all these invoices are produced to the Authority. They are issued by "westworld decorating" with Mr Westwell noted as proprietor. The description column on each invoice is "labour only" and there is a column "Emp. ID" showing "C.Contract" for client contract.

[25] At first Mr Westwell used his own personal vehicle to travel to jobs. Mr Wheeler paid him \$20.00 each week for petrol and from April 2005 this increased to \$40.00. In January 2006 Mr Westwell was given Mr Wheeler's Toyota Hiace van when Mr Wheeler moved to Northland. Mr Westwell used the vehicle for both work and private use. The fuel was paid by Mr Wheeler.

[26] Mr Westwell provided only basic hand tools and all other materials and tools were provided by Mr Wheeler.

[27] Having regard to the above, I conclude that Mr Westwell was subject to very significant and very real control by Mr Wheeler in performing his duties as foreman painter. I find the degree of control over Mr Westwell during his working day significant and I conclude that such control was characteristic and typical of an employment.

### **Integration test**

[28] Mr Westwell was engaged as foreman painter. The duties and functions he performed were central tasks in Sunwest Painting's operation. Mr Westwell's role formed an integral part of Sunwest Painting. His role was not an adjunct function of the operation.

### **Fundamental test**

[29] Mr Westwell presents his personal financial statements for the financial year ended 31 March 2005 prepared by his accountants.

[30] Mr Westwell was not registered for GST.

[31] The tender of invoices by Mr Westwell was entirely at Mr Wheeler's request. In April 2005 Mr Wheeler asked Mr Westwell to prepare invoices for the preceding period and thereafter. Mr Westwell did so. This invoicing arrangement was entirely at Mr Wheeler's request.

[32] Mr Westwell's work as foreman painter with Mr Wheeler was his only income. He was not engaged or employed in any other capacity for any other principal or employer.

[33] There is no evidence that Mr Westwell operated a business or commercial operation whether in his own right or through any corporate structure.

[34] I find that Mr Westwell had no scope in his role as foreman painter to generate increasing earnings or profits. There was no profit motive involved.

[35] For the above reasons, I find that Mr Westwell was not operating from the basis of his own business operation and he was not in business on his own account.

### The determination

[36] Having applied the facts of this case according to the prevailing legal tests I conclude that while this relationship was apparently one of a labour only contractor but in substance was in reality an employment relationship. **I find that Mr Westwell was an employee.**

### The resolution

[37] Consequent upon my findings that Mr Westwell was an employee, he is entitled to annual holiday pay and statutory holidays. Based on the calculations he has provided, **I award Mr Westwell \$4,948.92 as arrears of wages being unpaid annual leave (6% of total gross \$82,482.00). I further award Mr Westwell the gross sum of \$3,024.00 as arrears of wages for unpaid public holidays.**

[38] It is necessary for Mr Westwell to account to the Commissioner of Inland Revenue for PAYE income tax.

[39] I find that Mr Westwell is not entitled to pursue a personal grievance for unjustifiable dismissal. Firstly, he did not raise any such personal grievance within the period prescribed. Secondly, I find he was not dismissed, but rather, on his own evidence, he left the engagement of his own accord.

### **Costs**

[40] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Westwell is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Wheeler is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson  
**Member of Employment Relations Authority**