

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** John Bell (Applicant)  
**AND** JHL Paint Management Services Limited (Respondent)  
**REPRESENTATIVES** John Shadbolt, Advocate for Applicant  
Carl Blake, Counsel for Respondent  
**MEMBER OF AUTHORITY** Dzintra King  
**INVESTIGATION MEETING** 26 April 2005  
**DATE OF DETERMINATION** 31 May 2005  
**SUBMISSIONS RECEIVED** 25 May from Applicant  
25 May from Respondent

DETERMINATION OF THE AUTHORITY

The applicant, Mr John Bell, says that he was unjustifiably dismissed from his employment by the respondent, JHL Paint Management services. The respondent asserts that Mr Bell was a contractor and not an employee and denies that there was a dismissal.

Mr Bell applied for a position with JHL Paint Management Services. Mr Bell subsequently worked for the respondent. The terms of the engagement are recorded in a letter sent to Mr Bell. The letter reads as follows:

*Dear John*

*Thank you for your time and interest in the position advertised.*

*I would like to confirm our arrangement on (sic) you commencing work on the 23 February on a Labour Only basis at \$19.00 an hour. This would run for up to a month's period giving us both the chance to evaluate. Should either party wish to terminate no notice would be required.*

*I look very much forward to working with you and hope that both our visions materialise.*

*Many thanks again John, and see you Monday around 7 am if OK.*

*Yours sincerely,*

*Ian Lillie*

Mr Shadbolt maintained that Mr Bell was an employee from the outset although during the conference call that preceded the meeting he had conceded that Mr Bell was employed on a labour only contract. Mr Bell changed his evidence during the course of the meeting and maintained he had always been an employee on a month's trial period.

In order for Mr Bell to have been dismissed and for me to have jurisdiction Mr Bell needs to establish that he was an employee and not a contractor. The claim was that either Mr Bell was an employee from the outset or that at some stage he became an employee.

### **Was Mr Bell an employee at the outset?**

The employment relationship was labelled as being that of a labour only contractor. Mr Bell submitted invoices, was GST registered, had withholding tax deducted and worked on a labour only basis. The company supplied him with a work vehicle, paid for the petrol, supplied the requisite tools, gave him an accommodation allowance which he could use to stay at whatever accommodation he chose. Employees were told where to stay, paid for the accommodation themselves and were reimbursed. The work pattern differed from that of an employee. The employment contract provided that employees would have set hours of work and that overtime would have to be pre-approved. Employees were supervised by a foreman; Mr Bell was not although the quality of his work was checked by Mr Lillie. Mr Bell was given a list of jobs. He could determine when they were done, what time he started and finished, and the order in which the jobs were to be done. Mr Lillie said Mr Bell had the right to refuse work; on the one occasion when Mr Bell indicated he could not work Mr Lillie promptly made other arrangements.

Looking at the situation overall, Mr Bell was, as the letter of 18 February 2004 states, employed as a labour only contractor. He was not an employee.

### **Did Mr Bell become an employee?**

Mr Bell was of the view that the discussions he had had with Mr Lillie included an agreement that after a month, subject to both parties being happy and Mr Bell's work being good, Mr Bell would become an employee on an hourly rate of \$22.

That, however, is not what the letter says. There is no reference to a change in employment status and there is no reference to \$22 per hour.

While I accept that Mr Bell genuinely believed that he had an agreement to this effect I am satisfied that he did not. My view is based both upon the letter sent by Mr Lillie and also upon listening to the evidence. Mr Bell heard what he wanted to hear. He turned a possibility into a certainty.

There was discussion about when meetings to ascertain what the situation would be regarding Mr Bell's "employment" had been called and taken place. Although much of that was not agreed it does not matter. It was agreed that at some point Mr Bell was given a draft employment contract by Mr Lillie. Mr Bell did not sign it principally because it did not contain a wage rate. The offering of the contract did not make Mr Bell an employee. It is clear that there was no acceptance by Mr Bell of the offer at any stage. I accept the respondent's submission that this was a case of failed negotiations for an employment contract, after which Mr Bell chose to terminate his contractor relationship.

After the end of the first month Mr Bell continued working for Mr Lillie as a labour only contractor. He was not an employee at the outset and he did not become an employee. The ending of the

working relationship came about because Mr Bell would not agree to becoming an employee on a pay rate that differed from that which he was engaged upon as a contractor.

Mr Bell was at no stage an employee, nor did he become one.

**Costs**

Should the parties be unable to resolve this issue, the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King  
Member of Employment Relations Authority