

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 355  
5419141

BETWEEN                      GRAHAM BURTON  
   Applicant  
  
A N D                              CEDRIC HENRY  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Applicant in Person  
   Respondent in Person  
  
Investigation Meeting:        26 July 2013 at Hamilton  
  
Date of Determination:        9 August 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Burton) alleges that he is owed wages by the respondent (Mr Henry). Mr Henry resists that claim.

[2]     This is a case where the evidence proffered by each party is so different as to raise real doubts about whether the parties are talking about the same events. Because there is so little common ground between them, the Authority will set out briefly the two competing versions of events before analysing the issues in dispute.

[3]     By way of illustration of the difficulties in addressing this claim, the Authority notes that the parties were interviewed separately although the interviews took place with the Authority on the same day.

## **Mr Burton's view**

[4] Mr Burton says that he met Mr Henry about six months before the investigation meeting, that Mr Henry had assisted him with the provision of some paint for a family member and that when the two men were having a quiet drink in the local RSA, Mr Henry asked Mr Burton if the latter would care to help him with a couple of jobs to earn a bit of money and Mr Burton agreed.

[5] Mr Burton alleges that he told Mr Henry that his hourly rate was \$20 and that Mr Henry accepted that rate. According to Mr Burton, the discussion took place before the first of two jobs that Mr Burton says he was hired for, that first job being a job in Thames.

[6] Mr Burton says that on the way to Thames he was driving Mr Henry's van while Mr Henry was driving his truck with a cherry picker unit on it. Mr Burton says he was stopped by Police at a checkpoint, was found to have a vehicle infringement and was given a \$200 infringement notice.

[7] Mr Burton claims to have worked 12 hours on 30 October 2012 and another 10 hours on 31 October 2012, both on the Thames job painting the back of the PGG Wrightson building.

[8] A second job on 5 November 2012 resulted in a claim of 8 hours work for each day of that week, 5 to 9 November 2012, together with Monday, 12 November and Wednesday, 14 November as well.

[9] Mr Burton says that the only money he received was \$200 at the end of the Thames job and that he was told by Mr Henry that there was more money to come his way.

[10] Mr Burton says that the matter was discussed between the two men in the Morrinsville RSA on 21 November 2012 when Mr Henry allegedly said that he had some money for Mr Burton but no money changed hands.

[11] Mr Burton's evidence is that he persevered and finally spoke again with Mr Henry on 10 December 2012 in which conversation it appears that Mr Henry made it painfully clear to Mr Burton that there was no money due to him.

[12] Mr Burton subsequently filed his claim in the Authority.

## **Mr Henry's view**

[13] Mr Henry maintains that he has known Mr Burton for two to three years (not the six months that Mr Burton speaks of) and that he (Mr Henry) had gone out of his way to help Mr Burton on a number of occasions.

[14] Mr Henry told the Authority that he had spent half a day teaching Mr Burton some of the finer points of the painting trade and had done what he could to assist Mr Burton and his family over the time that he had known him.

[15] Mr Henry agrees that the two men had a discussion over a beer in the RSA which resulted in Mr Burton coming with Mr Henry while the latter was working but Mr Henry is adamant that all Mr Burton was there for was to give him a hand. He says that when they were having a drink together, Mr Burton volunteered to drive the van to the Thames job and that he told everybody in the RSA that "*he was giving me a hand*".

[16] Mr Henry remembers Mr Burton saying words to the effect "*little buddy, you have helped me, I will come and give you a hand*".

[17] Mr Henry explained to the Authority that at the Thames job, it was useful to him to have Mr Burton offer to drive the van and that he understood that that was being done as a kindness and that there was no suggestion that Mr Burton was "*working*". Further, Mr Henry maintained that Mr Burton did not do any gainful work on the Thames job; he was simply there.

[18] Similarly, on the subsequent job in Hamilton City, again Mr Henry's evidence is explicit that Mr Burton was just coming along for the ride and did not actually do any gainful work.

[19] On the matter of the payment to Mr Burton of \$200, Mr Henry readily acknowledges that payment was made but denies that he said there was more money to go to Mr Burton. Mr Henry told the Authority that the payment was to reimburse Mr Burton for the traffic infringement fine and nothing more. The fine was for exactly \$200.

[20] Perhaps of most importance for the purposes of the Authority's investigation is that Mr Henry maintained that there was never any discussion about payment, never

any discussion about Mr Burton working, and that Mr Henry simply thought he was coming along as a friend, in effect because he had nothing better to do.

[21] Equally importantly from the point of view of the Authority's investigation, Mr Henry has provided, at the Authority's request, documentation setting out the nature of Mr Henry's obligations in respect of individuals that he has working with him when he is out on a job.

[22] Mr Henry explained to the Authority that he had a contract with an entity called Programmed Property Services to which Mr Henry was a contractor. Programmed Property Services provide maintenance for building owners.

[23] One of Programmed Property Services' clear requirements is that any person going onto one of its client sites in Programmed Property Services' name must have the appropriate certification from Programmed Property Services and the appropriate qualifications.

[24] The Authority has been provided with a Programmed Property Services' document styled "*Contractor Management*" which sets out the procedure for engaging, inducting and monitoring the performance of any person who attends on any site where services are being delivered by Programmed Property Services.

[25] For the avoidance of doubt, the Authority is satisfied on the evidence it heard that both of the jobs referred to by Mr Burton were jobs given to Mr Henry by Programmed Property Services.

[26] Mr Henry says simply that Mr Burton was giving a mate a hand and was not working for wages or indeed providing contractual services, that if Mr Burton had been on site providing any form of work, whether for wages or pursuant to contract, Mr Burton would have been required to have the appropriate Programmed Property Services' certification and he did not.

[27] Mr Henry seemed genuinely horrified that Mr Burton, who he previously had thought of as simply an acquaintance he had tried to befriend and assist, would bring this claim against him.

## **Issues**

[28] The only question for the Authority to decide in the present case is whether the real nature of the relationship was one of employment or not.

### **What was the real nature of this relationship?**

[29] The Authority is satisfied on the evidence it heard that Mr Burton was a volunteer and that his claim to be owed wages is without foundation. There are a number of difficulties with Mr Burton's claim and it is appropriate that the Authority sets them out one by one.

[30] The first is that the very different recollections of the two men about the nature of their relationship makes it inevitable that issues of credibility should arise. Of particular relevance in this regard is the difference between the two of them in terms of the length of time that they maintain they knew the other man. Mr Burton talks of a relationship of barely six months while Mr Henry talks of knowing Mr Burton for two to three years. Mr Henry talks of having done a number of kindnesses for Mr Burton over that longer period of time while Mr Burton maintains that the relationship was of much shorter duration and the range of contacts the two men had is, on Mr Burton's evidence, much reduced.

[31] But there are difficulties also with Mr Burton's claim that the employment relationship was formed when the two men were drinking in the RSA. The Authority has been provided with a statement by a witness to that conversation, Mr Cyril Leggett. Mr Henry told the Authority that Mr Leggett assisted him from time to time with Mr Henry's painting contract.

[32] However, Mr Leggett had other responsibilities of his own and was not always available to Mr Henry. Mr Leggett was present in the RSA when Mr Henry and Mr Burton were there as well and he overheard the discussion between Mr Burton and Mr Henry. Mr Burton disputes this evidence but since both Mr Henry and Mr Leggett maintain that the latter was present, it seems to the Authority more likely than not that Mr Leggett was there and did hear the conversation.

[33] Indeed, it was Mr Leggett's unavailability that caused Mr Henry to cast about looking for somebody else to drive his van. Mr Leggett's statement to the Authority

is that he was asked by Mr Henry if he could drive the van to Thames but that Mr Leggett was unable to assist on this particular occasion.

[34] Mr Leggett says that Mr Burton was sitting at the same table with them and that Mr Burton offered to drive the van “*as a favour*” because Mr Henry “*had done numerous favours for [Mr Burton]*”.

[35] As if that is not enough, Mr Leggett also told the Authority that Mr Henry had made it clear at the time to Mr Burton that there was no question of employment because first he never employed people for this sort of work, second he only used subcontractors, and third those subcontractors had to be vetted appropriately by the Programmed Property Services system. That necessitated them having a variety of certificates, a Police vetting check and as a subcontractor, would need to be registered for GST.

[36] Again, Mr Burton disputes that this happened but the Authority prefers the evidence that it did. For one thing, what Mr Leggett told the Authority was broadly similar to Mr Henry’s evidence. Moreover, Mr Leggett says that Mr Henry had approached him first ( as was apparently his custom ) to see if Mr Leggett could provide the assistance needed, but Mr Leggett had other obligations and was unable to assist on this particular occasion. Mr Leggett’s evidence is that Mr Burton was drinking with them at the RSA at the time, overheard Mr Henry’s request to Mr Leggett, heard the refusal, and offered to help. The Authority considers that is a complicated chain of events to make up and concludes that Mr Leggett’s recollection of events is to be preferred.

[37] Mr Leggett described the nature of the relationship that he had with Mr Henry as similar to the one that Mr Henry intended with Mr Burton, namely one of two friends helping each other as and when necessary. Mr Leggett made clear that Mr Henry would regularly ask him for assistance, and vice versa, and that those various periods of assistance either way were always provided whenever the person requested was able to and that they were never paid for in any shape or form.

[38] Mr Burton’s claim is exclusively one of employment; he makes no claim that he was a subcontractor to Mr Henry. Yet the evidence is clear that Mr Henry does not employ anybody for this kind of work. The Authority is satisfied from what it has heard that Mr Henry’s only form of engagement is via contract with various

subcontractors and that only those subcontractors who have passed through the stringent Programmed Property Services vetting system can be engaged.

[39] There is no evidence before the Authority to suggest that Mr Burton has any of the necessary requirements to fulfil a contractual role with Mr Henry and, as the Authority has just made clear, that is not Mr Burton's claim anyway; his claim is that he is owed wages, that is that he was employed by Mr Henry.

[40] For the sake of completeness, the Authority notes that in any event it has no jurisdiction to deal with contractual claims, even if there were evidence of a contractual relationship, which there is not. The Authority's powers are limited by statute to dealing with employment relationship problems and the Authority is absolutely satisfied that there is no employment relationship here.

[41] It seems apparent on the evidence that Mr Henry sought the assistance of someone he regarded as a friend in exactly the same way he had regularly done with Mr Leggett (and continues to do with Mr Leggett). The Authority is satisfied that when the nature of the "*engagement*" was discussed, Mr Henry was absolutely clear that it was neither employment nor contractual in nature and that Mr Burton was simply asked to be a volunteer.

[42] The evidence of Mr Leggett is particularly important because first he was asked to assist first and could not, then he heard the conversation between Mr Henry and Mr Burton wherein Mr Burton offered his help instead, and then he has satisfied the Authority that what Mr Henry was proposing was simply that Mr Burton give him a hand. Mr Leggett's evidence is that Mr Burton offered to give Mr Henry a hand and that in doing so he referred, in Mr Leggett's hearing, to the fact that Mr Henry had already assisted him in a number of ways.

[43] Mr Henry followed up that offer by immediately making it clear that there was no money involved, that he did not employ anybody, and that he only contracted with other individuals and then only when they had been vetted by Programmed Property Services.

[44] For the sake of completeness, the Authority notes again that Mr Burton disputes all this but the evidence for Mr Henry has the ring of truth around it. In short, it would be a complicated story to invent.

[45] And Mr Leggett's evidence is that he helped Mr Henry in precisely the way that Mr Henry thought Mr Burton would assist him, that is as a volunteer. No doubt Mr Leggett's willingness to contemplate such an arrangement may have lulled Mr Henry into a false sense of security that anyone would see the proposed relationship in similar terms. Clearly Mr Burton says the relationship was one of employment for him but the weight of the evidence is against him.

[46] Mr Leggett says the nature of the relationship was spelled out in the RSA. He says Mr Henry explained that he employed no one and that that sub contractors had to be vetted by his principal first. That is Mr Henry's evidence as well. And Mr Leggett also maintains that he heard Mr Burton offer to help "as a favour" and to acknowledge that Mr Henry had helped him out in the past.

[47] The Authority's considered view is that the only categories of person assisting Mr Henry on his jobs were contactors or volunteers. Mr Burton's claim is one of employment. There is simply no evidence of Mr Henry employing anyone else for this sort of work so it is difficult to understand why Mr Henry would vary that arrangement for Mr Burton. Mr Leggett's evidence supports the conclusion that Mr Burton offered to help out, as a friend, and that in any event, Mr Henry made clear he did not employ anyone on this sort of work.

[48] Mr Burton makes no claim to have been sub contracted to Mr Henry which is the only category of engagement Mr Henry uses where there is any form of income generation. Mr Burton apparently did not have any of the necessary certificates to be sub contracted and in any event, the Authority has no power to consider contractual arrangements.

### **Determination**

[49] The Authority is satisfied on the balance of probabilities that Mr Burton was not employed by Mr Henry and was legally no more and no less than a volunteer and that as a consequence, he has no entitlement to wages because the relationship was not one of employment.

[50] Put simply, the Authority's considered opinion is that Mr Henry had no intention of creating a legal relationship with Mr Burton and therefore did not make Mr Burton any offer of employment which the latter could accept.

[51] The weight of evidence strongly suggests that Mr Henry intended that Mr Burton would assist him in the same way that Mr Leggett had in the past, and continues to do. Save for Mr Burton's own claim, there is no evidence of an employment relationship and Mr Burton's claimed employment relationship is out of step with the nature of Mr Henry's commercial relationships, which are contractual rather than of an employment nature.

James Crichton  
Member of the Employment Relations Authority