



# New Zealand Employment Relations Authority Decisions

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## Frazer v JHL Paint Management Services Limited [2011] NZERA 40; [2011] NZERA Christchurch 12 (21 January 2011)

Last Updated: 11 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 12

5289823

BETWEEN

AND

GRANT FRAZER Applicant

JHL PAINT MANAGEMENT SERVICES LTD Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received: Determination:

M B Loftus

Georgina Burness, Advocate for Applicant Ian Lillie, Representative of the Respondent

20. July 2010 at Christchurch At the investigation meeting

21. January 2011

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] The applicant, Mr Grant Frazer, claims he was unjustifiably dismissed from the respondents employ on 27 November 2009, with the dismissal being effected by the removal of a work vehicle he used to perform his duties.

[2] The respondent [JHL] advances two arguments in response. It contends that it never employed Mr Frazer but engaged him as a contractor. It adds that, in any event, it was Mr Frazer who brought the relationship to an end as he stopped accepting work that was offered.

#### Questions for determination

[3] There is one initial question that must be answered and that is whether or not Mr Frazer was an employee of the respondent. In the event he was, it must be determined whether or not he was dismissed and if so, whether the respondent can then justify the dismissal.

#### Background

[4] The respondent runs an industrial painting business concentrating mainly on storage tanks. It operates throughout New Zealand.

[5] Mr Frazer was, prior to his engagement with the respondent, driving trucks though he did perform other tasks here and

there and was seeking a career beyond driving. One day he visited a friend he had not seen for some time, Mr Mike Ballinger. Mr Ballinger owns and operates a hydroponics business and for the next day or so Mr Frazer assisted Mr Ballinger. At some point Mr Frazer asked Mr Ballinger if he had any ongoing work. The answer was no, but the query prompted a discussion about JHL's business.

[6] Mr Ballinger had previously worked for JHL in an ad-hoc type of way. Whilst he enjoyed the task, he had to consider his own business a priority and was unable to continue. Mr Ballinger says he explained that JHL's ability to offer work was inconsistent and "very part time", though he felt there was potential to grow the business. Mr Frazer expressed an interest though Mr Ballinger felt that he was really looking for something that offered more work. In any event the conversation led to Mr Ballinger telephoning Mr Lillie, JHL's Auckland based owner, and putting Mr Frazer's name to him as someone who could perform the work he had previously performed.

[7] Mr Frazer denies that Mr Ballinger cautioned him about the casual and uncertain volume of work that JHL might offer. He says his understanding of the conversation was that Mr Ballinger was describing the work as he performed it and felt that as they had differing skills any arrangement he might enter into would differ and he would get more work.

[8] Mr Lillie subsequently contacted Mr Frazer and they discussed the type of work the firm performed and Mr Frazer's suitability. Aside from possessing the skills Mr Lillie required, he is adamant that he understood from the conversation that Mr Frazer had other part time employment which would sit well with the ad-hoc offerings he may be able to make. He says he was careful to explain the ad-hoc nature of the work and that it was definitely part-time. He says Mr Frazer remained interested.

[9] The two spoke again a couple of weeks later and this led to an arrangement which would see Mr Frazer come to Auckland for a few days, perform some work and, if suitable, discuss a possible arrangement. On 18 August Mr Frazer went to Auckland where he spent three days. He says he worked with two of JHL's staff and had two conversations with Mr Lillie. He says that the first conversation concentrated on his skills and suitability while the second canvassed work arrangements.

[10] Mr Frazer says that Mr Lillie advised that he had about three months work in the South Island and they then discussed a work vehicle and the equipment that would be required. Discussion moved to a rate (\$25 per hour) and Mr Frazer says that Mr Lillie then asked whether he wanted to be a contractor or employed as the two Auckland staff he had been working with were. Mr Frazer states he replied PAYE, meaning employed, and that Ian's wife subsequently asked if he was interested in Kiwisaver to which he replied yes.

[11] Mr Frazer says he again raised the issue of ongoing work but received the same response, namely that there was some three months work available. He says he did, however, assume there would be more given what he had witnessed in Auckland.

[12] Mr Lillie says it was quite evident that Mr Frazer was capable and had advised it was work he would enjoy. Aside from Mr Lillie and his wife, JHL then had four people working for it - two as part-time contractors and two full time employees with Mr Lillie advising that it is the hours that dictate how they are engaged. He was happy to retain full-timers as employees but those on the ad-hoc casual arrangements were engaged as contractors. Mr Lillie says he therefore offered Mr Frazer work as a contractor. They discussed an hourly rate and agreed \$25 before Mr Lillie asked whether Mr Frazer wanted to be responsible for his tax or have withholding tax deducted. He says Mr Frazer opted for withholding tax.

[13] Mr Lillie says he understands that Mr Frazer subsequently approached his wife who provided the firms administrative support and asked that he be treated as an employee for tax purposes and join Kiwisaver. He says he did not know of that at the time and would not have approved as that was not the arrangement they had entered into but accepts it happened.

[14] Mr Frazer then returned to Christchurch, bringing with him a vehicle provided by JHL along with some equipment. Mr Lillie would mail notification of sites to be visited, the tank(s) involved, what was required and an estimate of how long he thought the job would take. Mr Frazer would then do the job and forward a note advising how long he had actually taken along with a photo(s) of the completed task.

[15] While Mr Frazer did not work regular hours or days, he spent a reasonable amount of time working for JHL over the next couple of months (September and October). He was, however, dissatisfied with the amount of work offered and tensions arose. Mr Frazer says that while the issue of hours had never been discussed he thought he had a guarantee of forty per week due to the fact that the two workers he had been with in Auckland were engaged between eight and ten hours each day. He says he was continually pushing Mr Lillie for work as, at the time, his income was limited to the money he earned working for JHL.

[16] Mr Frazer adds that when he raised the issue of more hours Mr Lillie would often 'cut him short' by responding *that he (Frazer) was getting me (Lillie) all fired up*. He then added it was firing him up too as *I'm an employee with living costs, bills etc and an expectation of work that wasn't being met*.

[17] Notwithstanding these tensions, Mr Lillie was pleased with the quality of Mr Frazer's work. He therefore accepted the

annoyance generated by the requests for more work.

[18] What brought matters to a head from Mr Lillie's perspective was his discovery that Mr Frazer had claimed payment for Canterbury Anniversary day (13 November).

He says he then discovered the arrangement Mr Frazer and his wife had made and that Mr Frazer had claimed, and received, payment for Labour Day. He says he felt this necessitated a need to confirm the nature of the relationship originally entered into, which prompted a phone conversation on 17 February and an e-mail he sent on 18 November. It read: *Dear Grant*

*Thank you for the chat on the phone yesterday regarding the agreement for work between ourselves. I feel it is important that we both understand where we are heading since we have now completed the initial 2 to 3 month work load that we initially agreed upon, and with this now coming to an end it is most important for both of us to understand what lies ahead.*

*I will see how you are placed for a possible meeting on Monday or Tuesday next week to discuss some of the following items and any other concerns you may have.*

- 1. My understanding was that you would work on an hourly rate for work completed, when work was available, much the same as Mike Ballinger, due to the fact that we do not have at this stage full time work available.*
- 2. Regarding statutory [sic] holidays, it was not our intention to pay for these days due to the position being on a casual basis, and your ability to take days off as you require (and did last week) and your option to take up other employment with other parties to fill in when required or work was unavailable. As you are aware we have paid the last two days you claimed (a reference to Labour Day and Canterbury Anniversary which had been paid).*
- 3. There is work at some sites (Edendale) that is more viable to get one or two of our guys trained to Fonterra Standards to do, which will result in them picking up the vehicle from yourself to complete, this of course would leave you without a vehicle and the ability to work for a period of say a week, of course depending on work available.*
- 4. As has occurred, and will be occurring again on a more frequent basis due to the large portion of work now completed, is possible extended periods of no work, this is going to create financial pressure on both parties and we need a clear understanding between ourselves, mainly yourself to ensure you are under no stress or false allusions.*

*As you mentioned you are off on Friday, but would appreciate if you could get back to me before Friday to confirm you are available next week (preferably Tuesday) to discuss further, allowing me some time to book a flight.*

*Kind regards Ian Lillie*

[19] Mr Frazer says he took exception to the e-mail. He is of the view that it fails to reflect the agreement between the two and represented a unilateral variation. He says he telephoned Mr Lillie but simply heard a reiteration of the views expressed in the e-mail, that Mr Lillie confirmed he was coming to Christchurch the following Tuesday and that he asked that the vehicle be available which led to Mr Frazer taking it to the airport Monday evening and leaving it in a car park there.

[20] Neither suggest there were two phone conversations. It would appear they are talking about the same call but disagree about when it occurred. I prefer Mr Lillie's recollection if, for no other reason, the e-mail refers to a previous discussion.

[21] On 19 November Mr Frazer sent an e-mail advising that he was unable to meet on either the Monday or Tuesday and suggested they meet either Wednesday or the following Monday (30 November).

[22] This led to further discussion with Mr Lillie saying that during a conversation which occurred on the Sunday they agreed to meet at the BOC site on Wednesday 25 November. Mr Frazer has no recollection of this and says the meeting was never confirmed though he agrees there was further discussion with, for example, both agreeing they discussed the fact that Mr Frazer could not meet on the Monday or Tuesday as he was performing work for another employer.

[23] Mr Lillie went to the BOC site on Wednesday but Mr Frazer was not there. He says his concern increased when he discovered that no work had been done despite having already received payment claims from Mr Frazer for that site and he was told by staff there that while Mr Frazer had made arrangements to come, he had not. That led to an e-mail he sent the following day which read:

*Dear Grant, could you please forward the BOC site reports with the detail of works completed to date, this includes the previous week and the latest, this I think already totals 17 hours.*

*Was on site at BOC yesterday as planned, pity you could not make it as planned, you must still be busy with your other job. Kind regards*

[24] That was essentially that. While Mr Frazer states that he was never told he was fired, he received no further jobs from JHL. Mr Lillie disagrees. He says he initially felt let down and was uncertain about where things were going. It was Mr Frazer's failure to respond to the 26 November e-mail along with ensuing communications which soon convinced him the relationship was over. The communication referred to was a series of texts and e-mails which became increasingly bitter

with Mr Frazer making various claims about unpaid monies and Mr Lillie alleging that Mr Frazer refused to answer requests for information about the work he had done, made wage claims when he had not worked and was improperly retaining company property.

[25] Lastly comment should be added about the vehicle given the assertion that the dismissal was affected by its removal. After using the vehicle while in Christchurch Mr Lillie returned it the airport when he left. As events transpired it remained in the airport car park for quite some time.

### **Determination**

[26] The first question to be determined is whether Mr Frazer was an employee or a contractor. While I must say I preferred Mr Lillie's evidence as being more consistent and accurate than Mr Frazer's, I can not conclude that Mr Frazer was a contractor. Even if he is right about the original status there is Mr Lillie's own evidence about the subsequent discussion between Mr Frazer and Mrs Lillie.

[27] I can have no doubt that given the Lillie's relationship and the fact that Mrs Lillie is both a Director and (effectively) a 50% shareholder in the company that Mr Frazer could rightly conclude she had authority to alter any existing agreement and, assuming he was not already an employee, change his status. In any event, there is absolutely no doubt that he was treated as an employee for tax, superannuation and, at least as far as statutory holidays are concerned, pay purposes. If Mr Frazer were not initially an employee, I must conclude he became one.

[28] That then raises the question of whether or not Mr Frazer was dismissed. In my view the answer must be no - he was not dismissed.

[29] Irrespective if which label you put on the arrangement, employee or contractor, it is clear there was no guarantee of ongoing permanent work - the arrangement was casual. In reaching this conclusion I am not only swayed by my preference for Mr Lillie's evidence about what was offered and accepted but note the evidence of both Mr Ballinger and Mr Frazer which supports this conclusion.

[30] Mr Ballinger was a good witness. There was evidence that notwithstanding his involvement in the investigation meeting he had maintained a positive relationship with both Mr Lillie and Mr Frazer and had no preference in respect to the outcome. He simply sought to tell the truth and that was that his experience of JHL suggested there was no way it could offer ongoing permanent work in the South Island and that he clearly explained that to Mr Frazer. I believe him and also note uncontested evidence from both he and Mr Lillie that when they first discussed Mr Frazer the part time nature of the work was mentioned and that Mr Frazer was with Mr Ballinger.

[31] Then there is Mr Frazer's own evidence. He never suggested a contractual guarantee of regular ongoing work and consistently commented about being told that there was only a couple of months work lined up. His views about continuity were, and this was frequently expressed in his evidence, a mixture of assumption and hope. Likewise Mr Frazer does not claim he was guaranteed full time work during that limited period - indeed he states that actual hours were never discussed and he made various assumptions based on his limited observation of the hours worked by the two Auckland employees (see 15 above).

[32] Comment should also be made about the parties respective positions concerning the 'cessation'. I have some difficulty accepting Mr Frazer's allegation that a dismissal was effected by the removal of the vehicle. It may be this has been alleged given the absence of actual advice of dismissal but the reality is that the vehicle was returned to Christchurch airport and was available to be picked up and used had he so chosen. Likewise Mr Lillie's view that Mr Frazer had ended the relationship by not accepting offers of work is also tenuous as he accepts it only occurred once - in respect to BOC on Wednesday 25 November.

[33] The reality is that while Mr Lillie may have had some initial confusion about what was occurring, it soon became obvious the relationship had suffered an unfortunate and negative turn. He then stopped making offers to Mr Frazer but given the casual nature of the arrangement that is something he was entitled to do. Casual employment sees a cessation at the end of each engagement and in the absence of an accepted promise of re-engagement, there is no ongoing obligation on either party.

[34] The conclusion that Mr Frazer was not dismissed means he has no grievance and his application must fail.

### **Costs**

[35] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event JHL wish to seek costs, it is required to file an application within 28 days of this determination. A copy shall be served on the applicant who is to file any response within 14 days of the application.

Mike Loftus

