

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 41/09  
5136292

BETWEEN                      JAMIE HARKINS  
   Applicant  
  
AND                                BRIAN CRUMP TRADING AS  
   NU COAT PAINTING  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Jamie Harkins in Person  
   Ilati Vukona for Respondent  
  
Investigation Meeting:     22 January 2009 at Tauranga  
  
Determination:              11 February 2009

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**DETERMINATION OF THE AUTHORITY**

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[1]     Mr Jamie Harkins was employed as a painter by Mr Crump trading as Nu Coat Painting. Mr Harkins claims he was unjustifiably dismissed. Mr Crump says Mr Harkins was not an employee but rather, was engaged on a “labour only” basis as an independent contractor.

[2]     The issues for determination are:

- Was Mr Harkins an employee pursuant to the Employment Relations Act;
- If Mr Harkins was an employee, was he unjustifiably dismissed;
- If Mr Harkins was unjustifiably dismissed, what if any, remedies should be awarded.

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

[3]     Section 6 of the Employment Relations Act 2000 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.

[4] 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 determining a 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 the parties*

[5] Mr Harkins applied for his position after it was advertised in the local paper. He was interviewed by Mr Crump at Mr Crump’s home. Immediately following the interview Mr Crump contacted Mr Harkins and offered him the position. There was no written offer or written agreement as to the terms of the offer. Mr Harkins believes Mr Crump advised him that after working for him for one or two months he would go onto wages. At the investigation meeting Mr Harkins could not recall what, if any discussion was had about wages, but he recalls being told he would work for 40 hours per week from 7.00am to 4.00pm each day.

[6] Mr Crump says he discussed the nature of the relationship at the interview where he told Mr Harkins he would be labour only on a starting rate of \$15.00 per hour and he would work from 7.30am to 4.00pm each day. Mr Crump acknowledged at the investigation meeting that he was intending to put Mr Harkins on wages but his work was deteriorating and so he never did.

[7] I am satisfied that initially the intention of the parties was for Mr Harkins to be engaged as a labour only contractor with a view to him becoming an employee. However, that intention is not on its own to be regarded as decisive of the matter.

*Control test*

[8] Mr Harkins took his instructions each day from Mr Cump and his work was supervised by a Foreman who was engaged as an employee of Mr Crump. Mr Harkins was required to report for work each day and to work from 7.30am to 4.00pm

[9] After a couple of months of working, Mr Harkins began taking the work van home and driving it to and from work. Mr Crump also provided to Mr Harkins all the tools and other materials he needed to undertake his work.

[10] On 21 May, when Mr Harkins arrived at work hung over, and requested the rest of the day off, Mr Crump refused his request and advised Mr Harkins he would receive a written warning for his attitude. Mr Crump says the warning was to show Mr Harkins that his behaviour would not be tolerated.

[11] Having regard to the above I conclude Mr Harkins was subject to significant and very real control by Mr Crump in performing his duties. I find the degree of control over Mr Harkins was characteristic and typical of an employment relationship.

*Integration test*

[12] Mr Harkins was engaged as a painter. The duties and functions he performed were central tasks in Mr Crump's painting operation. Mr Harkins role was not an adjunct function of the operation. Mr Crump's evidence was that others working for him in a similar capacity to Mr Harkins, were employed on wages.

*Fundamental test*

[13] Mr Harkins was not in business on his own account. He never produced invoices to Mr Crump for payment. The income Mr Harkins received for his work was his only income. He was not engaged or employed in any other capacity for any other principal or employer. There was no evidence that Mr Harkins operated a business or commercial operation whether in his own right or through any corporate structure.

[14] When Mr Harkins commenced employment he completed an IRD Tax Code Declaration for his income where he identified the appropriate tax code as being "MSL". It was his understanding that his income would be reduced by PAYE and payments for his student loan.

[15] I find Mr Harkins had no scope in his role as a painter to generate increasing earnings or profit and was not operating his own business and he was not in business on his own account.

[16] 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, rather it was in reality, an employment relationship.

**I find that Mr Harkins was an employee.**

**Was Mr Harkins unjustifiably dismissed?**

[17] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[18] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*X v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

[19] On Wednesday, 21 May 2008 Mr Harkins went out socially with a group of friends. He says he arrived home about 1.00am but found it difficult to sleep. He went to work on the morning of 22 May and decided to ask his boss if he could take ½ a day off work to try and recover from the previous night.

[20] Mr Crump says Mr Harkins told him he had been on 'P' all night something Mr Harkins denies in his written statement. However, at the investigation meeting Mr Harkins confirmed Mr Crump's evidence and told me Mr Crump asked him if he had been on 'P' all night to which Mr Harkins responded "something like that". Mr Crump refused Mr Harkins' request for time off as he felt Mr Harkins' condition was self inflicted. He gave Mr Harkins his work instructions for the day, advising Mr Harkins to join him on another worksite when he had completed the work. Mr Crump was of the opinion that the work should be completed by around midday.

[21] Mr Harkins says he completed a full days work at the first worksite, and finished at 4.00pm at which time he began throwing up and felt ill. Mr Crump says Mr Harkins did not complete his work and had left the worksite before 2.00pm. Mr Crump had tried contacting Mr Harkins on his cell phone to find out why he had not arrived at the second worksite, but had been unsuccessful. Mr Crump then drove to first the worksite to see him, but Mr Harkins had already left. This occurred before 2.00pm.

[22] Mr Harkins says that despite still feeling unwell on the Friday morning, he went into work and waited for Mr Crump to arrive. After Mr Crump had not shown up for 20 minutes Mr Harkins borrowed another workers cell phone and texted Mr Crump. Mr Harkins told Mr Crump he would wait five more minutes for him in case he wanted Mr Harkins to drive the van anywhere.

[23] Mr Crump immediately rang the cell phone and asked Mr Harkins to wait five minutes until he could get to the work site as Mr Crump wished to talk to him. Mr Harkins told Mr Crump "...no, f\*\*\* you, I'm going home, I'm sick". Mr Crump again asked Mr Harkins to remain at the work site that he wanted to give Mr Harkins a warning and give him a pay cheque. Mr Harkins, told Mr Crump to "...f\*\*\* off and go stick it up your arse." Mr Harkins then disconnected the call.

[24] Mr Crump rang Mr Harkins back immediately and proceeded to tell Mr Harkins he could f\*\*\* off if that's how he wanted it. To which Mr Harkins replied "...yep, f\*\*\* you and you can come pick up the van."

[25] Later that same day, Ms Lynn Lawrence (Mr Harkins' mother) contacted Mr Crump and asked if Mr Harkins had been fired. Mr Crump advised Ms Lawrence that Mr Harkins had walked off the job after telling him to stick the job.

[26] Four days later, on 27 May Mr Harkins attended his doctor where he reported that he had been vomiting for the previous 6 days. However, the medical information received from Mr Harkins doctor is not consistent with Mr Harkins contention that he had been vomiting for six days. The medical report records that Mr Harkins was not systemically unwell looking, he was alert with no sunken eyeballs, his mucus membranes were moist and he had good skin turgor.

[27] In some circumstances where a resignation occurs during a heated discussion, an employer should act with caution and allow a “cooling off” period. In those circumstances employers cannot safely insist on its interpretation of words of resignation that are “an emotional reaction or amount to an outburst of frustration”.

[28] However, I do not consider this to be in the category which required a cooling off period. Such situations usually require there to be some ambiguity as to whether there was an intention to resign. Mr Harkins’ statement to Mr Crump was unequivocal. Mr Harkins’ had been asked to wait at the worksite for 5 minutes to allow Mr Crump the opportunity to talk with him and to discuss a warning from the previous day.

[29] When Mr Crump rang Mr Harkins back he merely confirmed that if Mr Harkins wanted to leave then he could go (although he used much stronger terms than I have).

[30] When Ms Lawrence made contact with Mr Crump later that day and enquired as to whether Mr Harkins had been fired she was advised that Mr Harkins had walked off the job. Mr Crump told Ms Lawrence what Mr Harkins had said about sticking the job. Ms Lawrence agreed that Mr Crump should not have be spoken to like that and asked if Mr Harkins would be paid. Mr Crump told Ms Lawrence that he had a cheque on him and that had Mr Harkins not walked off the job he would have received it by now. Mr Crump told Ms Lawrence that he would attempt to get the cheque to Mr Harkins before the banks closed that day.

[31] I have concluded Mr Harkins was not dismissed and I can be of no further assistance to him. However, for the sake of completeness, I record here that had I found a dismissal, Mr Harkins’ conduct was such that he would have been precluded from receiving any awards.

**Costs**

[32] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Crump may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority