

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Cherie Florence Jameson (Applicant)  
**AND** Barrage Publications Limited (Respondent)  
**REPRESENTATIVES** Mark Ryan - For the Applicant  
Stuart Cummings – For the Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 4 August 2004  
**FINAL SUBMISSIONS** 9 November 2004  
3 December 2004  
**DATE OF DETERMINATION** 17 February 2005

**DETERMINATION OF THE AUTHORITY**

**The Employment Relationship Problem**

- [1] This matter was filed with the Authority on 6 March 2003, as an alleged personal grievance for unjustified dismissal. In a *Statement in Reply* received by the Authority on 27 March 2003, the Respondent conveyed that it did not accept that the Authority had jurisdiction, largely because Ms Jameson was a contractor and not an employee.
- [2] Following a lengthy delay, for various reasons, and following discussions with the Authority, it was subsequently agreed that the threshold question for determination is: Was the relationship between Ms Jameson and the Respondent that of employee and employer or was the contractual relationship a contract for services?

**The Identity of the Respondent Party**

- [3] It has been accepted by all concerned, that Ms Jameson entered into a contractual relationship with Barrage Publications Limited, not Jervois Publishing Limited, as cited. The entitling above and the records of the Authority now reflect that.

**Background Facts and Evidence**

- [4] At the material times, Barrage Publications Limited (“BPL”) was a company owned by Mr Bruce Laybourn.

- [5] Mr Laybourn and Ms Jameson had previously been acquainted in a personal relationship. The nature of that relationship is not relevant to the matter that has to be determined, apart from the fact that it appears to have had some influence in regard to the general climate pertaining to the discussions that took place at various times.
- [6] The evidence of Mr Laybourn is that sometime in September 2000, there were some discussions regarding Ms Jameson working for BPL on a contract basis for a period of approximately two months. A “*Contract for Service Proposal*” was presented to Ms Jameson but it seems that no agreement was reached. Mr Laybourn says that albeit there was no agreement entered into, in deference to the “desperate” financial position that Ms Jameson was in at the time, he paid her \$500.00 per week for some weeks. This evidence is only relevant to the extent that it shows that there were some previous difficulties in regard to these two people reaching an amicable agreement as to terms and conditions, and the nature of the relationship.
- [7] Early in the year 2001, Mr Laybourn and Mr Richard Ward entered into a partnership for the purpose of producing and publishing a new magazine, *Wine Destinations*.
- [8] Mr Laybourn and Ms Jameson had some discussion regarding entering into a contract whereby Ms Jameson would fulfil the role of obtaining advertising for the magazine. The nature of the work involved was only for a defined period as the magazine is published once each year. The evidence of Mr Laybourn is that because of the previous difficulty in regard to reaching an agreement with Ms Jameson, if an agreement had not been reached on this second occasion, the working relationship would not have commenced.
- [9] Mr Laybourn says that an agreement was reached with Ms Jameson and he recorded the terms in a letter dated 10 May 2001. He personally delivered this letter to Ms Jameson the same day, at a Herne Bay address. The letter is on a *Destinations Magazine* letterhead. It has as its subject matter; “**Re Set period contract**” and goes on to convey to Ms Jameson that:

“This letter is to confirm your set period contract, selling advertising for Barrage Publications Ltd. The period of your contract is from May 8, 2001 until September 30, 2001.

Under this contract you will supply a weekly invoice to Barrage Publications Ltd. This will be for \$650 - \$150 of which is to be paid to Gubb & Partner.

These weekly payments of \$650 are an advance on your advertising commission of 10% of sales. As with usual advertising sales commission practices, this 10 per cent is for your own sales only (ie: is net of advertising agency and production charges).

I understand you wish to seek advice about setting up your own company to carry out this contract. Clearly you are self-employed and the basis of payment can be made either directly to you as a sole trader or a company to be formed. Please advise ASAP so our accounts staff can apply GST if necessary.

If there is no company structure set up within 14 days from today’s date, we will have to make tax deductions as required by law.”

- [10] Mr Laybourn says that Ms Jameson subsequently sought to have the commission increased to 15% but he declined and Ms Jameson then commenced work upon accepting that the terms of the letter would apply. The alternative would have been to engage someone else. The matter of the payment of \$150.00 to Gubb & Partner, related to monies owed by Ms Jameson to that law firm.

- [11] The evidence of Ms Jameson is that she had never seen the above letter until her lawyer showed it to her in the course of these proceedings. Ms Jameson says that the above letter and the earlier mentioned contract for service proposal, are both fabrications. Furthermore, Ms Jameson appears to be saying that the letter dated 10 May 2001, was constructed for the specific purpose of supporting the Respondent's position in regard to the matter that has to be determined by the Authority.
- [12] Apart for that being an unlikely notion, given the overall evidence, the Authority subsequently received acceptable evidence, in the form of a sworn affidavit from Mr Laybourn, with relevant evidence from a computer specialist annexed, that confirms that the letter of 10 May 2001 was created at 4:41pm on 10 May 2001.
- [13] On the matter of the letter dated 10 May 2001, I find that the evidence of Mr Laybourn is credible and acceptable and that the evidence of Ms Jameson is not. I further conclude that it is more probable than not that Ms Jameson did view the letter on 10 May 2001 and that following an unsuccessful attempt to increase the commission percentage, she accepted its content as reflecting the terms of engagement that she had agreed to with Mr Laybourn.
- [14] There is some uncertainty about when Ms Jameson commenced her role with BPL but it appears that it was on or about 8 May 2001 and that she initially worked for a few days from Mr Laybourn's office. The evidence of Mr Laybourn is that there was not a "dedicated" area for Ms Jameson to work from but that she had the use of a desk if she wanted one though it appears that Ms Jameson used his desk, as well as a glass-topped table in the living area of the apartment attached to the offices.
- [15] From on or about Tuesday 15 May 2001 to Friday 18 May 2001, Ms Jameson accompanied Mr Ward on a tour of winemakers located in Martinborough and Hawkes Bay. The evidence of Mr Ward is that because of his 37 year background in the wine and food industry, he was well placed to provide contacts and introductions for Ms Jameson to assist in obtaining contributions to the *Wine Destinations* magazine. Prior to leaving for this trip, Ms Jameson was given the sum of \$500.00 to cover the cost of accommodation and expenses. The evidence of Mr Ward is that Ms Jameson spent this money on the purchase of a camera at an antique shop in Carterton. The effect was that the accommodation at Martinborough had to be billed back to the business. Mr Ward paid his own expenses.
- [16] The evidence of Ms Jameson is that the accommodation and expenses for this trip were paid for by BPL. She says that the evidence of Mr Ward is simply what Mr Laybourn told him to say. However, I find the evidence of Mr Ward to be credible and acceptable and the evidence of Ms Jameson is once again wanting.
- [17] Mr Ward also gave evidence about his belief as to the contractual arrangement with Ms Jameson. That evidence is consistent with Mr Laybourn's and acceptable to me.
- [18] It transpired that Ms Jameson was unable to secure any sales on the four day familiarisation / marketing trip. Mr Laybourn says that he attempted to arrange for Ms Jameson to come into his office to discuss the progression of sales and follow up on contacts but Ms Jameson was reluctant to do so and that she stated that she was a contractor, the implication being that: "*she could come and go as she pleased.*"
- [19] Mr Laybourn also gave evidence about an unauthorised "arrangement" that Ms Jameson had entered into with Mr Gary Rodgers of Rodgers Design Forum, for hair extensions, other hair products and maintenance, to the value of \$4,500.00. In a letter dated 24 May 2001, on a

*Destinations* letterhead, Ms Jameson confirms that: “Destinations magazine will honour \$4500 worth of travel arrangements for yourselves in exchange for that value of hair product and maintenance.” Ms Jameson has signed the letter using the title, “Wine Destinations Publisher.”

- [20] Mr Laybourn makes the point, that while before the Authority, Ms Jameson is claiming that she was an employee, when entering into the above arrangement, she claimed to be the “Publisher” of *Wine Destinations*. I cannot help but conclude that the actions of Ms Jameson were unauthorised and less than honest and may even be seen to be bordering on fraudulent. I understand that Mr Laybourn placed this matter with the Police.
- [21] It appears that matters came to a head on or about 20 May 2001. The evidence of Mr Laybourn is that Ms Jameson came into the office and an altercation took place. The totality of the evidence pertaining to that is not relevant to the threshold matter that I have to determine. However, Mr Laybourn says that during this altercation, Ms Jameson became “angry and arrogant” and informed him that as a contractor, she could do as she liked. The outcome of this tête-à-tête was that Ms Jameson left and never carried out any further work for BPL. She claims that she was dismissed. Mr Laybourn says that the actions of Ms Jameson were a clear statement that she no longer wished to be bound by the contract that existed.

### **Was Ms Jameson an Employee or a Contractor?**

- [22] The starting point in determining this matter is section 6 (2) of the Employment Relations Act 2000 (“the Act”). It provides that:

“In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.”

Then, at subsection (3) it is provided that:

“For the purposes of subsection (2), the Court or the Authority –

- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.”

- [23] Having weighed all of the evidence available to me and made an assessment of the credibility of the parties, I have little difficulty in concluding that the real nature of the relationship was that of a contract for services. That is, Ms Jameson was an independent contractor.
- [24] I find that it was the intention of the parties that Ms Jameson should be an independent contractor. Despite what Ms Jameson says now, in the light of a breakdown in the relationship, I have no doubts that she accepted that she was an independent contractor, and that the term of the contract for services was limited to the production of one annual edition of the *Wine Destinations* magazine.
- [25] I find that apart from attempting to obtain a better rate of commission, Ms Jameson accepted that the terms of her engagement were as contained in the letter of 10 May 2001. In that letter, Mr Laybourn conveys that:

“I understand you wish to seek advice about setting up your own company to carry out this contract. Clearly you are self-employed and the basis of payment can be made directly to you as a sole trader or a company to be formed. Please advise ASAP so our accounts staff can apply GST if necessary.”

- [26] There is some evidence from Mr Goodall, an accountant. He alludes to Ms Jameson consulting him about the process of establishing her own business. While that evidence is inconclusive, it does appear that Ms Jameson made some enquiries about setting up her own business but never went any further. Nonetheless, the consultation with Mr Goodall is consistent with the other evidence that points to the intention of the parties.
- [27] It is also clear from the overall evidence that Ms Jameson never at any time felt that she was accountable to or under the control of Mr Laybourn. Indeed, on the contrary, it appears that Ms Jameson was very much a “free spirit” and did as she pleased, but little that was conducive to the best interests of the business.
- [28] I also gave some consideration to the manner in which Ms Jameson was paid and whether that pointed more to her being an employee. However, I have concluded that the payments received by Ms Jameson were advances on anticipated commissions on advertising sales, albeit Ms Jameson never made any sales, much to the chagrin of Mr Laybourn I suspect. I also conclude that the payment arrangement was peculiar to the circumstances in that the past relationship that existed between Ms Jameson and Mr Laybourn may have had some influence.
- [29] In conclusion, while I found that there was a substantial conflict in the evidence between Ms Jameson and Mr Laybourn about most matters, overall I found the evidence of Mr Laybourn to be immensely preferable to that of Ms Jameson.

## **Determination**

- [30] I find that the real nature of the relationship that existed between Ms Jameson and Barrage Publications Limited was that of a contract for services. Ms Jameson was not an employee, hence, the Authority does not have jurisdiction to determine the matter of the alleged personal grievance.

## **Costs**

- [31] Costs are reserved. The parties are invited to attempt to reach a resolution of this matter. In the event that a resolution is not achieved, submissions can be made to the Authority for an order.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**