

Attention is drawn to paragraphs 9 and 10 prohibiting publication of certain information contained in this determination.

Determination Number: CA 60/05
File Number: CEA 187/04

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Rex Thackwell (Applicant)

AND Toll NZ Consolidated Limited (formerly Tranzrail Limited) trading as
Tranzlink Christchurch (Respondent)

REPRESENTATIVES Philip C Butler, Advocate for Applicant
Jenny Gibbs, Counsel for Respondent

MEMBER OF AUTHORITY Helen Doyle

INVESTIGATION MEETING 11 March 2005

SUBMISSIONS RECEIVED 29 March and 20 April 2005 from the applicant
29 March and 14 April 2005 from the respondent

DATE OF DETERMINATION 27 April 2005

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant, Rex Thackwell, owned and operated a courier business for about eight years until June 2003 when he sold the business and did some temporary driving work.

[2] Tranzlink is a wholly owned subsidiary of Toll NZ Consolidated Limited. Tranzlink Christchurch is the distribution division of Tranzlink and has 56 employees on site and 34 owner drivers engaged as independent contractors. I shall refer to the respondent in this determination as Tranzlink.

[3] In October 2003 Brian Watson, an owner driver with Tranzlink, spoke to Mr Thackwell. Both men knew each other. Mr Watson asked Mr Thackwell if he was looking for a job. He told Mr Thackwell that Tranzlink had started up a contract with Bunnings. Mr Watson said that he was sure he told Mr Thackwell the Bunnings contract was an owner driver contract and that he never told Mr Thackwell he would be employed as a Tranzlink driver. Mr Thackwell said that he was not told that the Bunnings contract was an owner driver contract by Mr Watson. After about two weeks Mr Watson asked Mr Thackwell to contact the Branch Manager at Tranzlink.

[4] Mr Thackwell went to talk to the Branch Manager at Tranzlink in October 2003. As a result of that conversation and the subsequent actions of people at Tranzlink, Mr Thackwell says he was employed by Tranzlink as a driver. He claims that after a two week period of employment from 28 October 2003 until 7 November 2003 he was unjustifiably dismissed from his employment by Mr Watson.

[5] Mr Thackwell seeks to recover wages for two weeks in the sum of \$1409.80 inclusive of holiday pay. He also seeks lost wages from 10 November 2003 to 15 March 2005 in the sum of \$20,459.60 inclusive of holiday pay together with \$7000.00 compensation.

[6] Tranzlink say that Mr Thackwell was never employed by them. It says that the two weeks Mr Thackwell spent between 28 October and 7 November 2003 in the van with Mr Watson were to assess whether Mr Thackwell wanted to take up an owner driver business. When it was clear that Mr Thackwell did not want to progress with the owner/driver business he then left.

The issues

[7] The essential issue in this employment relationship problem is whether Mr Thackwell was an employee of Tranzlink.

[8] If I find that Mr Thackwell was an employee of Tranzlink then a further issue arises as to Mr Watson's authority to dismiss Mr Thackwell.

Prohibition of Publication

[9] The Branch Manager of Tranzlink Christchurch died in an accident shortly after the statement of problem was lodged with the Authority. There was consent to the suppression of his name. I prohibit from publication under clause 10 (1) of the second schedule of the Employment Relations Act 2000 his name and I shall refer to him in this determination as Mr Y.

[10] Ms Gibbs sought suppression of commercial rates and margins in the briefs of evidence. I accept that the industry is competitive and there is genuine concern that others may gain an advantage from the information in this case. I am not prepared to make an order prohibiting publication with respect to what Mr Thackwell said he expected to be paid. This involves some comparison in a general way with the amount received by Mr Watson and is important with respect to the issues I am required to determine. The cost margins in paragraphs 27 and 28 of Ms Reid's brief of evidence are commercially sensitive and I take into account that had Mr Y not died they would probably not have been provided. I prohibit from publication under clause 10 of the second schedule of the Employment Relations Act 2000 the parts of paragraph 27 and 28 of the brief of evidence of Ms Reid, a sales representative with Tranzlink who was responsible for managing the relationship between Bunnings and Tranzlink, that refer to cost margins.

Was Mr Thackwell an employee of Tranzlink?

[11] Whether the parties intended to enter into an employment agreement and whether they succeeded in doing so are questions to be determined objectively - *Fletcher Challenge Energy Ltd v ECNZ Ltd* [2002] 2 NZLR 433 at pg 444.

[12] There was an understanding between those in the management team at Tranzlink to whom Mr Y spoke with over the September and October period 2003 that the Bunnings contract was to be undertaken by a contractor as an owner driver. During the tendering process there was a discussion about the options of an employed driver or a contracted driver. Ms Reid said the decision was made

to have a contracted driver on the run because the driver would have a vested interest in the success of the run. The respondent engages its 341 owner drivers nationwide on an independent contractor basis.

[13] Mr Watson was approached to set up the Bunnings run as an experienced and available owner driver. His health precluded him committing to the run on a long term basis. The Bunnings run is currently operated by an independent contractor as an owner driver.

Meeting between Mr Y and Mr Thackwell in October 2003

[14] Mr Thackwell said that Ms Reid and two other Tranzlink managers were present for the duration of the meeting he had with Mr Y in October 2003. Having heard the evidence I am satisfied that Mr Thackwell was mistaken as to that and conclude that only Mr Y was present for the whole meeting. Mr Thackwell was introduced that day to two managers, Mr Pizzey and Mr Brennan and Ms Reid was called into the meeting to meet Mr Thackwell and explain to him the culture of Bunnings.

[15] There was some discussion about Mr Thackwell's curriculum vitae at the meeting. I do not find that much turns on that. The driving matters referred to in the curriculum vitae would have clearly been of interest. The front page of the document provides that Mr Thackwell completed a Land Transport defensive driving course and a heavy trade course and the licenses held are set out as *Classes 1,2,3L,4,5L,6D,F, Goods and Services and Dangerous Goods*. The last entry in the work history on the curriculum vitae was that Mr Thackwell was self employed as a courier for nine years until he sold the business in June 2003.

[16] Mr Thackwell said that he was asked what *wage* he was looking for and that when he responded \$12.00-\$14.00 per hour was told by Mr Y that they would certainly pay higher than that. Mr Y and Mr Thackwell did not conclude with any degree of certainty what the payment to Mr Thackwell would be on an hourly basis. The discussion was in the nature of a preliminary one but it did confirm that Mr Thackwell's expectations did not exceed what Tranzlink were prepared to pay. I have considered the cost margins to Tranzlink on the Bunnings run and the fact that Mr Watson was paid a \$15.00 hourly rate. I conclude in weighing up whether the discussion was more likely to have been about rates or wages that it is more likely Mr Y's answer was about a rate to be paid to an independent contractor rather than an hourly rate to an employed driver.

[17] There was a discussion about Tranzlink having the delivery contract and how the new Bunnings store would open over the weekend.

[18] The conversation then progressed to a discussion of the various possibilities for the Bunnings run. The possibilities that Mr Thackwell told me about were consistent with both his brief of evidence and the letter setting out the facts in respect of the grievance sent to Tranzlink by Mr Butler. They were running the contract through Mr Watson's business or offering the contract to someone else in six months time. Mr Thackwell told me that he thought the first possibility of running the contract through Mr Watson's business meant that Mr Watson would be supervising him. It is likely that if the contract was run through Mr Watson's business that an employment relationship would be with Mr Watson rather than Tranzlink.

[19] Given that the possibilities put forward both involved the run being operated by a contractor as an owner driver it is difficult to understand what Mr Y would mean by his statement that Tranzlink wanted to get the contract up and running before deciding how it was going to be set up and that this would take six months. I am of the view that there was some confusion on Mr Thackwell's part about the possibilities put forward by Mr Y which are at the heart of this

problem. Mr Thackwell's evidence was to the effect that he understood that he was to be employed by Tranzlink for at least six months until a decision was made as to the possibilities for the run. This evidence appears inconsistent with the fact that Mr Watson was already doing the run under his contract but did not want to continue for health reasons. I find that the possibilities which Mr Thackwell gave evidence about support the respondent's position that the Bunnings run was always to be done by an owner driver as an independent contractor rather than an employee and that the meeting was for Mr Y to assess Mr Thackwell's suitability for an owner driver position.

[20] Mr Y then asked Mr Thackwell if he would mind going to Bunnings to meet the manager. Mr Thackwell agreed that he would and Mr Y and Mr Thackwell shook hands. He was told that he would be given a telephone call about the start date.

[21] Mr Thackwell said that he understood when he left the meeting with Mr Y that Tranzlink were going to employ him on wages, look at how the contract was working and then make a decision about how it was going to be set up in six months. There was an expectation that the run would start around Labour weekend but no firm start date. There was no agreed amount with respect to payment for Mr Thackwell and there were two possibilities for the operation of the run that Mr Thackwell could recall and there had been no discussion about the hours or days required to be worked.

[22] Mr Thackwell questioned in his evidence *why, if it is suggested he was to be employed by Mr Watson wasn't Mr Watson in the meeting with Mr Y?* Mr Watson clearly thought Mr Thackwell capable of doing the run. It was Mr Y who had to be satisfied of Mr Thackwell's suitability independently of Mr Watson and I do not consider such an interview for the possible engagement of an owner driver as an independent contractor to be unusual.

[23] Mr Thackwell went immediately after the meeting with Ms Reid and Mr Watson to Bunnings where they met with the trade department manager. He was more likely than not introduced to the manager at Bunnings as *the new driver*. The Bunnings contract was discussed in a general operational way. Ms Reid took both Mr Watson and Mr Thackwell back to Tranzlink. Mr Thackwell understood someone would contact him about a start date and he then went home.

Starting the Bunnings contract

[24] Mr Thackwell did not hear anything for about a fortnight so he telephoned Mr Y to ascertain what the situation was. Mr Y said that he did not know and that he would telephone Mr Thackwell when he knew the starting date. Mr Thackwell said that he had two job opportunities over this period which he turned down because he had committed himself to Tranzlink. He became anxious as Labour weekend approached. On the Friday before the Labour weekend there was a message from Mr Y along the lines of *can you start at 6.30am on Tuesday after Labour weekend...can meet you... at Tranzlink before going around to Bunnings*. Mr Thackwell said that he remembered Mr Y saying at the end of the message *we are looking forward to having you aboard*.

[25] Mr Thackwell went to Tranzlink as arranged with Mr Y on Tuesday, 28 October 2003 at about 6.30am. Mr Watson and Mr Y were present when he arrived. The lease van for the run had not arrived in time so a courtesy vehicle had been provided.

[26] The courtesy van was not equipped with a radio telephone. It was probable that some discussion took place about payment of Mr Thackwell's cell phone account until there was a vehicle equipped with a radio telephone in a few days. A radio telephone was generally provided. There seemed confusion from the respondent that Mr Thackwell's evidence was that he was to be

supplied with a cell phone. That was not the nature of his evidence. Mr Thackwell's cell phone number was put up on a white board at despatch at Bunnings.

[27] Mr Thackwell arrived for the first day of work wearing sneakers. Ms Reid purchased some safety boots for Mr Thackwell from Bunnings when a spare pair of boots on site at Tranzlink was not the correct size. I accept Ms Reid's evidence that the boots were purchased so as not to delay the first day of the Bunnings account and were required for health and safety reasons. There was no previous discussion with Mr Thackwell so as to conclude that such a purchase was planned.

[28] Both Mr Thackwell and Mr Watson agreed that for the first week there was no discussion between them as to payment for Mr Thackwell, employment with Tranzlink or discussion about owner/drivers. I conclude that there would have been discussion about the day to day duties and tasks to be undertaken on the run. Mr Watson said that he always understood that Mr Thackwell was to be a contract driver and was coming along to *look at what was involved as a prospective owner/driver*. Mr Thackwell said that he understood Mr Watson was there to train him. It does seem clear that Mr Watson was in charge during the two weeks but on at least one occasion he left Mr Thackwell in the van by himself whilst he visited his accountant.

[29] Mr Thackwell was not paid during the two weeks he was with Mr Watson and he did not fill out any documentation for taxation purposes. On Monday 3 November he said he was told by Mr Y that Mr Watson was considering taking the contract on but *don't worry you will get paid*. Mr Thackwell said that he indicated to Mr Y that he may look at the contract if Mr Watson was not interested at a later date. Mr Watson was already doing the run and paying the associated costs so it is difficult to see why Mr Y would say that Mr Watson was considering taking it on. I accept that Mr Watson wanted, as he said, to *get rid* of the run because the work involved was not appropriate with his health condition having recently suffered a stroke. I conclude that Mr Thackwell's evidence as to this conversation is unreliable in terms of who would pay Mr Thackwell and do not place weight on it.

[30] Most of the work undertaken between 28 October and 7 November 2003 was performed for Bunnings. Mr Watson and Mr Thackwell took a water tank down to Temuka one afternoon for Tranzlink but that would appear to be the only work of significance that was not performed for Bunnings.

The events of 7 November 2003

[31] Mr Watson said that during the second week he told Mr Thackwell to take the Bunnings/Tranzlink proposal which was sitting in the glove box of the van home with him and read it with Glenis his wife. Mr Watson presumed he did take it home.

[32] I prefer Mr Watson's evidence on the matter of the proposal and costings to Mr Thackwell's. I did not agree with Mr Butler's submission that Mr Watson was the least credible of the respondent's witnesses and was only saying what he thought Tranzlink wanted him to say. Mr Watson was not particularly polished in the answering of questions or delivery of his evidence but he conceded matters when it may not have been helpful for him to do so and I found him to be a straightforward witness. For these reasons I prefer his evidence about the exchange that took place between Mr Thackwell and Mr Watson on 7 November 2003 particularly where a close consideration of Mr Thackwell's evidence as to the exchange on 7 November shows it is not altogether inconsistent with Mr Watson's own evidence.

[33] On 7 November Mr Watson had a discussion with Mr Thackwell and asked Mr Thackwell what he wanted. Mr Thackwell said that he was interested but only as an employed driver because

he did not want to be bothered with the costs associated with an owner/driver doing a contract run. Mr Thackwell advised Mr Watson that he wanted \$14.00 per hour together with the kilometre rate. Mr Watson told me that he took from the conversation that Mr Thackwell wanted him to employ him and he was not happy with that because he saw Mr Thackwell getting all the money leaving him to pay all the costs. Mr Watson said to me that it would have left him with earnings from the contract of \$1.00 per hour. Mr Thackwell's own evidence is that Mr Watson said *there was not enough money in the contract to employ him*. Mr Watson told Mr Thackwell that if he did not want the contract then he may as well take the belongings from the van. Mr Thackwell duly did so and went home.

[34] Mr Thackwell said that he telephoned Mr Y and left a voice message and a message with his secretary but Mr Y did not return the calls. Mr Thackwell felt hurt and angry because he said that he was a man of his word and although he was quickly able to secure alternative employment he does not enjoy his work and is paid less than \$15.00 per hour.

[35] Mr Y responded in writing to Mr Butler's letter setting out the facts of Mr Thackwell's grievance. Ms Reid said that she had been told that Mr Thackwell did not want to take the contract up for the Bunnings run and that he was not coming back. She said that as far as she was concerned Mr Watson would continue with the Bunnings run and Tranzlink would search again for an owner driver.

Conclusions

[36] In answering the question whether Mr Thackwell was an employee of Tranzlink I have considered objectively the totality of the dealings between the parties including the conduct of the parties after the meeting between Mr Y and Mr Thackwell.

[37] There was nothing between the parties in writing.

[38] I am not satisfied that the evidence and my findings support Tranzlink intended to or did enter into an employment agreement with Mr Thackwell. I find that the meeting between Mr Y and Mr Thackwell in October 2003 was for Mr Y to meet Mr Thackwell and assess his suitability to become an owner driver for the Bunnings run.

[39] Mr Watson had put Mr Thackwell's name forward as someone who may be suitable and interested in being an owner driver for the Bunnings run. Mr Y had met with him on that basis. The conduct between the parties after that meeting is capable of supporting Tranzlink's view that there was a real possibility Mr Thackwell would become an owner driver on the Bunnings run and enter into a contract with Tranzlink after assessing the run.

[40] Mr Thackwell then told Mr Watson on 7 November 2003 that he wanted to be an employee rather than an owner driver. Mr Watson did not consider that he could pay Mr Thackwell what Mr Thackwell wanted and suggested that he might as well take his belongings. I am of the view that Mr Watson's conduct on 7 November supports that Mr Watson did not consider Mr Thackwell to be an employee of Tranzlink. It is highly unlikely had Mr Watson thought Mr Thackwell was an employee of Tranzlink he would have had the conversation and suggested Mr Thackwell take his belongings. Mr Watson then advised Mr Y who in turn advised Ms Reid that Mr Thackwell had decided not to be an owner driver and was not coming back.

Determination

[41] I do not find that Mr Thackwell was an employee of Tranzlink. He is not therefore able to pursue a personal grievance under section 102 of the Employment Relations Act 2000 and has no basis to invoke section 103 of the Employment Relations Act 2000 to initiate grievance proceedings against Tranzlink.

[42] I am therefore not required to consider the issue of Mr Watson's authority to dismiss Mr Thackwell.

Costs

[43] This was not an easy case. Mr Thackwell said that he tried to contact Mr Y a few days after 7 November but there was not response to his message. The parties may wish to reflect on this. I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority