

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 33  
5317185

BETWEEN	IAN HAMBLY First Applicant
AND	KENNETH POINTON Second Applicant
AND	JOHN WALKER Third Applicant
AND	LYNDSAY WHITTLE Fourth Applicant
AND	MUSEUM OF TRANSPORT AND TECHNOLOGY BOARD Respondent

Member of Authority: Rachel Larmer

Representatives: Emma Butcher and Sarah Grainger, Counsel for Applicants  
Chris Patterson, Counsel for Respondent

Investigation Meeting: 11 and 12 October 2010 at Auckland

Submissions Received: 29 October and 5 November 2010 from Applicants  
29 October and 1 November 2010 from Respondent

Determination: 24 January 2011

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**DETERMINATION OF THE AUTHORITY**

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- A. **Ian Hambly, Kenneth Pointon, John Walker, and Lyndsay Whittle are not employees of the Museum of Transport and Technology Board.**
- B. **The real nature of the relationship between the parties is something other than a contract of service, so the applicants are not covered by the Employment Relations Act 2000.**

## **Employment relationship problem**

[1] Ian Hambly, Kenneth Pointon, John Walker and Lyndsay Whittle (the applicants) seek declarations that they are employees of the Museum of Transport and Technology Board (Motat) and that the Employment Relations Act 2000 (the Act) applies to them.

[2] The applicants accept they were volunteers at the outset of their relationship with Motat, but say an employment relationship developed over time. The Statement of Problem did not identify the date on which the applicants believe they entered into an employment relationship with Motat. The applicants' written statements were not specific about how and when they became employees. Their submissions suggested they changed from volunteers into employees in December 2005.

[3] In March 2009 the applicants signed a Volunteer Agreement, which on its face records the parties' understanding that they are volunteers not employees. The applicants say they signed the agreement under duress, because they were led to believe that they had to sign it if they wanted to continue their relationship with Motat. They argue that the doctrine of duress means the agreement is not binding on them. They also say that the agreement does not accurately reflect their view of the status of their relationship with Motat.

[4] Motat says the agreement records the parties' actual understanding that they were not in an employment relationship. It also says it never intended to enter into a contractual relationship with the applicants in relation to their role as Collection Managers, and that it did not do so. It says its relationship with the applicants has always been a voluntary one.

## **Background**

[5] Motat is a board established by the Museum of Transport and Technology Act 2000. It owns the assets of Motat, with the core asset being its transport related collections. Motat employs 63 employees and it has 275 volunteers.

[6] Motat is a unique environment which is heavily reliant on volunteers who have, and who continue to play, an important and key role in the operation of Motat and the care of its collections. The majority of Motat's volunteers are involved in

various activities relating to the acquisition, restoration, conservation, and maintenance of the collections.

[7] The volunteer collection groups are referred to as sections or collections. Each section or collection area is led by a Section Head/Collection Manager. Up until December 2005, Collection Managers were called Section Heads.

[8] The Collection Managers are effectively responsible for all matters pertaining to their collection, with Motat holding monthly operational meetings with the Collection Managers to discuss collection related issues.

[9] The Collection Managers are seen as the subject matter or section/collection experts. They decide what activities should be undertaken and what (if any) work should be done on the collections. They have administrative duties such as planning for the collections, preparing monthly reports, and responding to correspondence, emails, and phone calls. Some of them have spending authority up to a preset amount, and they prepare annual or monthly budgets for their collections.

[10] Motat has eleven Collection Managers. Two of the eleven (the Collection Manager - Rail and the Collection Manager - Trams) are employed on written employment agreements. The parties agree that these two Collection Managers are genuinely employees, so I refer to them as “the employee Collection Managers”.

[11] Motat regards the other nine, including the applicants, as volunteers. Of the applicants:

- a) Mr Hambly commenced as Section Head – Road Transport in October 2002. He was offered an honorarium of \$2,500 per annum, which he turned down, saying that he saw the time he contributed to Motat as charity. In December 2005 his title changed to Collection Manager and his honorarium increased to \$15,000 gross per annum, which he then accepted.
- b) Mr Pointon commenced as Section Head – Steam in June 2002, Mr Walker commenced as Section Head – Fire and Emergency in 1997, and Mr Whittle commenced as Section Head – Buses in June 2004. They all received honoraria of \$2,500 gross per annum. In December 2005 their titles

changed to Collection Manager and their honoraria increased to \$7,000 gross per annum.

[12] The applicants identified what work they thought was necessary and appropriate for their collections and then either did it themselves or allocated it to others to do. The arrangement was entirely flexible. Although Motat identified the administrative tasks required of the Collection Manager role, the applicants decided what to do, when to do it, how to do it, and where to do it. They could elect to do as much or as little as they liked. Motat did not control their work and it had no way of specifically knowing what work the applicants were doing.

[13] The applicants did not have set hours or days of work. They were not required to record their days or hours of work and could come and go as they pleased, which they did to suit themselves. They did not complete time sheets and Motat had no way of telling how many hours they were working. Unlike other Motat employees, the applicants did not have to request leave or submit leave forms if they were not available to work.

[14] The applicants were able to put their own needs before Motat's. A good example of this is when Derek Grieve, Manager Museum Operations, asked Mr Whittle on a Monday to respond to queries about some fuel card invoices and to meet with him about budget matters. Mr Whittle said he was not available to do so until the Friday because he was doing paid work elsewhere until then. Likewise the applicants did not attend training or operational meetings and did not submit budgets and reports on time if that conflicted with their other personal commitments.

[15] Although each applicant gave evidence about the work they did, they did not identify what specific obligations they say the parties agreed to impose on each other, other than referring to the administrative functions of the Collection Manager role. Although the Collection Managers had some specified responsibilities, mainly around planning and reporting, their activities were effectively determined by themselves. I find there was no obligation on Motat to provide the applicants with work. Nor was there any obligation on the applicants to undertake any work that was available.

### **Differences between employee Collection Managers and Applicants**

[16] The employee Collection Managers have written employment agreements and position descriptions, they have specified hours and days of work, and must submit

leave forms if they are away from work. They are required to meet with their manager to confirm their annual performance objectives, they must participate in the annual performance review process, and attend weekly meetings with their manager. The Collection Manager – Rail has three employees reporting to him, he is required to undertake the employees' annual performance reviews, and he has the power to hire and discipline staff.

[17] None of these features apply to the applicants.

[18] The two employee Collection Managers were employed in accordance with Motat's usual recruitment process. This consisted of;

- a. an initial review of Motat's business requirements,
- b. the development of a position description, job sizing the role to give a remuneration range,
- c. completion by Human Resources of a *Requirement for Recruitment* form, which had to be approved by the Director,
- d. advertising the position,
- e. short listing potential candidates,
- f. first and second interviews with leading candidates,
- g. a verbal offer to the successful candidate subject to satisfactory reference and police checks,
- h. a written offer and letter of appointment attaching two copies of an individual employment agreement; a position description; new employee information; consent to disclosure of information for police check and IR330 – employee declaration form.

[19] None of these stages in Motat's usual recruitment process applied to the applicants in their voluntary roles nor did they apply at the time the applicants say they changed from volunteers into employees.

[20] None of the applicants' Collection Manager roles were advertised. None of the applicants applied for a position. There were no interviews. No offer of employment

as a Collection Manager was made. The applicants did not expressly accept employment as Collection Managers. No contractual or employment documentation was generated. No pre employment checks were conducted.

### **Events of December 2005**

[21] A luncheon was held on 7 December 2005. It was an informal occasion which aimed to give the Collection Managers an opportunity to have a free and frank discussion of any issues they wanted to raise directly with the Chairman, the Director, or the Operations Manager. Since it was not a formal meeting no notes were taken, and no documentation was generated as a result of the meeting.

[22] There was discussion during the lunch about the need to continually improve the way Motat ran its operations, which included the need to move to a more professional and accountable environment in light of the increased public funds it was receiving. The parties discussed what that would mean in terms of extra administration such as attendance at meetings, report writing, and collection planning. The applicants were told that their title would change from Section Head to Collection Manager and that Motat intended to introduce job descriptions and performance measures.

[23] An increase in honoraria was also announced. The Section Heads/Collection Managers (apart from the two employee Collection Managers) are offered honoraria each year, although some of them decide not to take it. The honoraria are paid by equal monthly instalments.

[24] I accept Motat's evidence that the honoraria are paid at the Museum Director's sole discretion as a token of appreciation or gesture of goodwill for the *gray power* i.e. the knowledge and specialist or collection related expertise the Collection Managers contribute to their collections. I also accept that the increase reflected an increase in funding and that, although it was announced at the same time, it was not specifically linked with the change in title and increased administration duties.

[25] I do not accept the applicants' suggestion that the honoraria were payment for the work they did as Collection Managers. That was not the case before December 2005, and nothing in the evidence about the announcement at the 7 December 2005 luncheon indicated any essential change in the nature of the payment.

[26] I find the applicants were not and did not become required to do specific work in return for the honoraria. The honoraria were not and did not become linked to the type or amount of work done. Payment continued to be made regardless of how much or little work the Collection Managers did each month or year. It also continued to be paid if they were away from Motat and even if the applicants did not fulfil their Collection Manager responsibilities, for example by not attending operational meetings, not submitting reports, or collection plans or not providing financial or budget information within the required timeframes.

[27] The applicants' submissions suggested that the increase to the honoraria was to compensate them for extra Collection Manager duties and responsibilities, but I do not accept that because their oral evidence did not establish that link.

[28] I reject the applicants' further argument that because they had been paid honoraria previously they had an ongoing expectation and entitlement to it in future. The fact the annual honoraria had been paid previously or was paid by equal monthly instalments did not turn it into a fixed contractual payment.

### **Relevant documents**

[29] There are no contractual documents post December 2005 from which to determine the parties' entitlements and obligations. Nor is there any offer of employment or written employment agreement establishing that the parties entered into an employment relationship.

[30] There is other relevant documentation such as the payslips, the Volunteer Agreement, meeting notes, and the disciplinary letters which must be considered to determine whether they indicate the parties' mutual intention to be contractually bound.

#### *1. Payslips*

[31] The payslips pre and post December 2005 establish that the applicants were not receiving wages or salary. The monthly payment was clearly recorded as an honorarium, from which withholding tax was deducted. Since I find the honoraria were discretionary, the payslips are records of payment but not in themselves evidence of a contractual arrangement.

## 2. The Volunteer Agreement

[32] The Volunteer Agreement was introduced in 2009 not to change the parties' relationship but to record it. It stated:

*This agreement constitutes the understandings reached between the Volunteer and Motat on the obligations of the parties to this agreement. The Volunteer acknowledges that this agreement does not in any manner or form constitute an employment agreement between the parties.*

[...]

*What distinguishes a volunteer is that they neither expect, nor receive, any remuneration for the work they perform.*

[33] The applicants were given the agreement six weeks prior to the date by which they had to sign and return it. None of them expressly objected to signing it because they were employees.

[34] Mr Hambly and Mr Whittle objected to signing it because they did not believe it applied to them. Mr Hambly also objected to the definition of volunteer. However, they did not specifically tell Motat that the agreement did not apply to them because they were employees. Before signing, Mr Walker raised concern about a number of clauses but never mentioned he was an employee, not a volunteer. Mr Pointer did not raise any concerns before signing it.

[35] The evidence did not establish that the applicants signed the agreement under duress. However, I nevertheless find that it is not a contractual, and therefore enforceable, document because there was no evidence of consideration. I consider that the Volunteer Agreement is no more than a non binding description of the parties' understanding of the nature of their relationship. The description in the agreement to the effect that the applicants are not employees is a factor to consider, but is not determinative.<sup>1</sup>

[36] I do not accept the applicants' submission that the agreement is not a true reflection of their understanding of their relationship. It is significant that when presented with it none of the applicants told Motat they were employees. I consider that if they genuinely believed they were employees, they would have said that to Motat when presented with the agreement, which clearly stated that they were volunteers not employees.

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<sup>1</sup> Section 6(3)(b) of the Act

[37] I consider the agreement indicates that the parties were not in a contractual or employment relationship.

### 3. Meeting notes

[38] The meeting notes referred to were of a meeting on 4 March 2010 between Mr Whittle, Ms Winks, and Mr Gaskin, to discuss the use of the fuel card. Mr Whittle is noted as saying *he did not consider himself to be an employee and that the honorarium was certainly not intended in his view to be a wage.*

[39] In his statement Mr Whittle suggested they were Mr Gaskin's words which he had gone along with because he did not understand the significance of them. However, in his oral evidence he admitted that he may have said the words attributed to him. I note that Mr Whittle did not tell me that he would not have said something like that because at the time he believed he was an employee.

[40] I consider these notes establish that on 4 March 2010 Mr Whittle did not consider himself to be an employee. If he had genuinely believed he was an employee, it was unlikely he would have agreed with Mr Gaskin saying he was not, it was more likely that he would have replied that he was an employee.

### 4. Disciplinary letters

[41] In terms of the disciplinary letters, Mr Whittle and Mr Hambly were subjected to disciplinary processes which Ms Butler submitted indicated that Motat considered them to be employees.

[42] Mr Whittle received an undated letter post December 2005 containing a final written warning which stated that his conduct had struck *at the heart of the employment relationship* but that his *employment* would not be terminated.

[43] From April to December 2009 Mr Hambly received disciplinary letters from Motat which referred to an *employment investigation*, to Motat being Mr Hambly's *employer* and to *his employment* and the fact his *continued employment* with Motat could be in jeopardy and that his actions appeared to be in clear breach of *his terms and conditions of employment*.

[44] These letters were prepared by an external consultant who provides employment relations advice to Motat. Robin Winks, Human Resources Manager, said she raised concern with the consultant about the use of these employment related terms but was assured by him such language was necessary and appropriate because, out of fairness, Motat was adopting the same process it would have used if it had disciplinary concerns about an employee.

[45] Despite misgivings, Ms Winks accepted the advice that the employment related language did not create or acknowledge the existence of an employment relationship.

[46] I accept Motat's explanation that the employment related language in these letters does not indicate its intention or understanding that it was in an employment relationship with Mr Hambly, Mr Whittle, or the other applicants.

### **Change from Volunteer Arrangement into Employment Relationship**

[47] Because the applicants admit that their initial relationship with Motat was a voluntary one, the key issue in this case is whether that arrangement subsequently changed.

[48] In terms of timing, the applicants' submissions stated:

*The employment relationship was created when they became Collection Managers and received a significant increase in pay in 2005.*

[49] As to when and how the relationship became one of employment, the applicants' submissions recognised that:

*It cannot be stated with precision the time and date that the employment relationship began. There is no exchange or written correspondence between the parties or even a specific and focused discussion evidencing this.*

[50] Ms Butler submitted that in December 2005 Motat recognised the changing nature of the Section Head role by offering *a change in title, a change in pay, and required increased and ongoing responsibility and commitment from the applicants that was intended to be defined clearly in role descriptions.* [...] and that the applicants *accepted the title and the pay offered and they agreed to the responsibility*

*and commitment requirements of the respondent. The increase in payment was consideration for the concluded agreement, and the contract between the parties was created.*

[51] It was said this amounted to an “offer of employment” which the applicants “accepted by their conduct”.

[52] The evidence I heard from the applicants does not support this analysis of what occurred.

[53] None of the applicants gave oral evidence that they were made an offer during lunch or that they had accepted an offer of employment. When giving their evidence, none of them linked the increased honoraria, title change, and extra duties in the way their submissions did. During their oral evidence, none of the applicants were clear that their status changed at, or as a result of, the 7 December 2005 luncheon.

[54] In particular each applicant was asked *when did you stop regarding yourself as a volunteer?; when do you say you became an employee?; and was there ever any discussion about your change in status?*

[55] The applicants accepted there was never any discussion about their change of status but all of them struggled to answer the other two questions. There was a range of confused and contradictory responses. I was left with the very clear impression that they could not answer the questions because they simply did not know the answers themselves. There was such uncertainty that it would have been impossible for them to have had a meeting of the minds with Motat to change the status of their relationship.

[56] For example, during the course of his evidence Mr Pointer gave me four different dates, with the other applicants each giving me two or three conflicting dates as to when their status had changed. The following dates or time periods were all relied on at some point by the applicants as being the date on which the employment relationships with the Collection Managers were created: 2005, April 2005, mid 2005, August-October 2005, December 2005, September 2008, January – March 2009, and April 2009.

[57] Next, my examination of the parties’ conduct establishes that no-one acted as if they were in a contractual or employment relationship.

[58] Ms Butler pointed to discussion at the lunch in December 2005 about the need for a Collection Manager job description as evidence the parties intended to formalise their relationship and she relied on the employment related references in the disciplinary letters to demonstrate that an employment relationship existed.

[59] I do not accept the two matters relied on by Ms Butler are evidence of a contractual relationship. Firstly, five years have elapsed since that lunch without a job description for the Collection Managers being completed. Nothing was done to formalise the parties' relationship until the Volunteer Agreement was presented in early 2009. That was not a contractual document and it also specifically stated there was no employment relationship. Secondly the mistaken use of the employment related language in disciplinary correspondence does not create a contractual relationship or establish that the parties were in an employment relationship.

[60] I consider it significant that there is a stark contrast between the way in which Motat dealt with Mr Walker in relation to his Collection Manager role and how it treated him when it employed him on 17 January 2006 as a Weekend Manager. He continued as a Collection Manager whilst being employed as the Weekend Manager from January to June 2006.

[61] If Motat had intended to employ the Collection Managers then it is likely that it would have followed the same recruitment process it used for employing the two employee Collection Managers and for Mr Walker's weekend role. It is also likely that the key terms which applied to other Motat employees would have applied to the Collection Managers. That was not the case.

[62] The Weekend Manager job was advertised, Mr Walker applied for the job, was interviewed, received a verbal offer subject to a police check, and was given a written offer of employment which attached two copies of an employment agreement and a position description. Mr Walker expressly accepted the offer, and signed and returned the employment agreement before he started work. None of these steps had been applied to Mr Walker's Collection Manager role.

[63] Mr Walker's employment agreement for the Weekend Manager role set out his days and hours of work, his leave entitlements, his duties, the fact that punctuality was important, performance appraisal requirements, remuneration details, the requirement to attend training courses, redundancy procedure, disciplinary procedure, suspension

provisions, termination and notice provisions, and a problem resolution clause. None of these key terms had ever applied to Mr Walker's Collection Manager role.

[64] Mr Pointer, in equal shares with his son, owns a steam heritage engineering company called Colonial Iron Works Co Ltd.

[65] Mr Pointer became involved with Motat in 2001 when his company was engaged to restore the Pumphouse, which was a fulltime project until September 2002. When he became Section Head – Steam in June/July 2002, there was discussion about how to address the potential conflict of interest which arose from him continuing to contract to Motat through his company whilst simultaneously working for Motat as a volunteer Section Head.

[66] The potential conflict was addressed by an agreement that where the work could be done by volunteers, then Mr Pointer's overseeing of such projects would be in his voluntary role as Section Head, but when the work could not be covered by volunteers then it would become a commercial job, his company would be engaged to do it, and Mr Pointer would invoice Motat through his company for his time.

[67] If, as he suggests, Mr Pointer did enter into an employment relationship with Motat, then it is likely that Motat would have had further discussions with him about how to manage conflicts of interest that could arise by him continuing to invoice Motat as an independent contractor whilst simultaneously being employed by Motat as a Collection Manager. The fact no such discussions occurred suggests that Motat did not intend to change the voluntary relationship it already had with Mr Pointer.

[68] Mr Pointer's evidence was that he had three separate relationships with Motat; he was an independent contractor through his company, he was a volunteer when doing non Collection Manager work, and he was an employee when he was carrying out his Collection Manager role. When asked how Motat could determine when he was working in what capacity, Mr Pointer said *it was hard to know where to draw the line*.

[69] The lack of clarity over Mr Pointer's status when completing work for Motat, and the inability for Motat to be able to clearly determine what capacity specific work was being done in, suggests there was not a contractual relationship. If there had been then each parties' obligations should have been able to be easily identified.

[70] In response to an independent contractor contract given to him by Motat, Mr Pointer prepared his own contract in or around October 2009 which referred to him as a *current Motat volunteer* and as being a *Collection Manager at Motat in a volunteer capacity*. Mr Pointer said that reflected his signing of the Volunteer Agreement, which he intended to be bound by.

[71] I consider this indicates Mr Pointer did not consider himself to be an employee, because if he had genuinely believed he was an employee then it was surprising he described himself as a volunteer at the time of his independent contractor negotiations.

[72] Mr Whittle described himself to me as being a volunteer and employee. He said he worked on a voluntary basis to clean buses and tinker with machinery but worked as an employee when he carried out his Collection Manager duties. He accepted that it was difficult for Motat to tell when he was acting in what capacity because it was impossible for it to know what work he was doing. This suggests there was not a contractual relationship between the parties, for the same reasons that applied to Mr Pointer's situation.

[73] I conclude that the parties' overt conduct suggests they were not in a contractual relationship. I do not consider there is sufficient evidence from which the existence of a contractual relationship could reasonably and objectively be implied.

## **Conclusions**

[74] Subsequent changes to an arrangement which was never intended to be legally binding must be supported by clear evidence of mutual intent and agreement. That is lacking here. The applicants' own evidence on when the employment relationship was supposed to have commenced is unclear and contradictory.

[75] Motat made no representations, either expressly or by its conduct, that the applicants could reasonably construe as an offer to enter into a legally binding contractual relationship.

[76] The title change was merely that. The increased administrative requirements introduced at the end of 2005 were not indicative of a mutual intention to change the applicants' voluntary arrangement into a legally binding contractual relationship but

instead reflected Motat's transition from an unstructured informal environment into a more accountable and professional one.

[77] There was no mutuality of obligation in terms of an obligation on Motat to provide work and remuneration and on the applicants to accept that work and undertake it to a satisfactory standard. There was no promise by Motat to pay the applicants for their services as and when rendered. The evidence did not establish certainty of the terms of what the applicants alleged was a contractual relationship.

[78] The evidence did not establish that normal contract formation requirements existed. Nor did it establish that the parties, by their conduct, created a legally binding contract.

[79] The applicants' confusion around the date the alleged transition from volunteers to employees occurred, the complete lack of any process regarding the alleged change in status, the absence of any binding obligations on the parties, the lack of credible evidence establishing the mutual intent to be legally bound, the failure of the parties to demonstrate by their overt conduct that they were in a contractual relationship, and the labelling of the relationship as a voluntary one, are all factors which lead me to conclude there was no intention to create legal relations, and therefore no contract existed.

### **Declaration**

[80] There was no mutual intention or agreement between the parties to create or enter into a legally binding contractual relationship. In the absence of a contractual relationship, the applicants cannot have been engaged in a contract of service, so they do not fall within the definition of employee in the Act.

### **Costs**

[81] The respondent has been successful and is entitled to costs. The parties are encouraged to resolve costs between them. If that is not possible, then the respondent has 28 days from the date of this determination within which to file a costs memorandum. The applicants then have 14 days within which to file a memorandum in response.

[82] This timetable must be strictly adhered to. Departure from it will require prior leave of the Authority.

**Rachel Larmer**  
**Member of the Employment Relations Authority**