New Zealand Employment Relations Authority Decisions

Harlow v Western Property Management Ltd (Auckland) [2016] NZERA 711 (15 January 2016)

Last Updated: 15 December 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND		
		[2016] NZERA Auckland 18
		5529252
	BETWEEN	DEBRA HARLOW Applicant
	AND	WESTERN PROPERTY MANAGEMENT LIMITED First Respondent
	AND	TONY TEAGUE Second Respondent
Member of Authority:	Robin Arthur	
Representatives:	Graeme Tanner, Counsel for the Applicant	
Ross France, Counsel for the Respondents		
Investigation Meeting:	12 November 2015	
Further information or submissions:	18 November 2015 from the Respondents and 19 November 2015 from the Applicant.	
Determination:	15 January 2016	
DETERMINATION OF THE AUTHORITY		

A. Debra Harlow was an employee of Western Property Management Limited (WPML) from 26 March 2012 to 3 April 2014.

B. Ms Harlow's employer was WPML, not Tony Teague.

C. The parties are directed to mediation to address Ms Harlow's personal grievance application.

D. Costs are reserved.

Employment Relationship Problem

[1] Debra Harlow worked at the offices of Western Property Management Limited (WPML) from 26 March 2012 until she resigned on 3 April 2014. Tony Teague is WPML's sole director and shareholder. The company operates a business providing property management services to owners of rental properties.

[2] On 2 July 2014 Ms Harlow raised a personal grievance about the end of her employment and lodged a statement of problem in the Authority on 30 April 2015. She claimed her resignation was really a constructive dismissal because she resigned rather than follow what she said was an unreasonable and unlawful instruction from Mr Teague. She said Mr Teague had told her to tell property owners who enquired about funds due to be paid to them that the delay was the result of tenants not paying their rents. She refused to comply with the instruction because she considered what Mr Teague said was inaccurate.

[3] Ms Harlow's application to the Authority sought remedies for a personal grievance and orders that WPML pay her holiday pay and money to cover PAYE on her wages which had not been paid to IRD.

[4] Her application identified both Mr Teague in his personal capacity and WPML as Ms Harlow's employer. In separate statements of reply WPML and Mr Teague each denied Ms Harlow was ever their employee. Rather they said she had only contracted to provide services to WPML and that Mr Teague's dealings with her were in his capacity as director of WPML, not personally.

[5] Two preliminary issues required investigation and determination:

(i) Was Ms Harlow an employee or an independent contractor?
(ii) If an employee, who was her employer – WPML or Mr Teague or both?

The investigation

[6] For the Authority's investigation of those issues witness statements were lodged by Ms Harlow, Mr Teague and four others. Mark Nicholson and Kevin Gray, who both did what they called 'job-by-job' maintenance work on WPML-managed

properties, gave evidence that they had heard Mr Teague refer to Ms Harlow as an employee. Rae Nunes Vaz, a business contact and friend of Ms Harlow, gave evidence about her assumption that an office administrator in a property management business would be an employee rather than a contractor. Ms Vaz had previously worked in the real estate industry. She also owned some rental properties that she arranged for WPML to manage while Ms Harlow worked for it. Mr Teague's son Aidan Teague – who operated his own property sales business from the same premises as WPML – gave evidence about his observations of Ms Harlow's hours of work and whether she did any work for his business at the direction of Mr Teague.

[7] Under oath at the investigation meeting each witness confirmed their own written statement and answered questions from me and the parties' representatives. The representatives also provided oral closing submissions on the facts and issues for determination. Following the investigation meeting WPML and Mr Teague sought and were granted leave to lodge further evidence, in the form of an affidavit from Mr Teague. His further evidence was the subject of further submissions, in writing, from the representatives.

[8] As permitted under s174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Credibility issues

[9] During questioning in the Authority investigation and in closing submissions the parties hotly contested the credibility of the evidence of Mr Nicholson, Mr Gray and Mr Teague. The three men socialised together and had met as often as two or three times a week at three different bars in West Auckland. Their friendship soured from around late 2013 in a dispute over payment for maintenance work done by Mr Gray and Mr Nicholson on a rental property managed by WPML. Mr Gray also said Mr Teague owed him around $2000 for an airfare to Thailand he purchased for Mr Teague but was not refunded when Mr Teague pulled out of the trip at the last minute.

[10] Mr Teague alleged that Mr Nicholson and Mr Gray had harassed him over the payments. He complained to the Police that he believed Mr Nicholson and Mr Gray

were involved in an incident (on 23 July 2014) where the wheels of his vehicle were spiked at the Henderson RSA, an incident (on 14 August 2014) where five windows of his house were broken when he was out, and another incident (on 16 September 2014) where a man came to WPML's offices and was said to have demanded Mr Teague pay money owed to Mr Gray. The man involved in the office incident, after leaving the premises, backed his motor vehicle into Mr Teague's car. The man was later charged by Police and convicted in the District Court at Waitakere for threatening behaviour and wilful damage. He was sentenced to 150 hours community work and ordered to pay reparation of $500.

[11] In their evidence to the Authority Mr Nicholson and Mr Gray confirmed they knew a man with the same name as the convicted man but denied any knowledge of or involvement in the incidents about which Mr Teague complained. Mr Gray said someone claiming to be from the Police had contacted him by telephone about a complaint from Mr Teague. He said he told the caller he was happy to meet to answer any questions but had no further contact from the Police about the issue.

[12] There was no evidence before the Authority on which I could rely to establish that Mr Nicholson or Mr Gray were involved in the three incidents of property damage about which Mr Teague had complained to the Police

[13] In turn Ms Harlow, in closing submissions, also attacked the credibility of Mr Teague's evidence. The submissions referred to findings of the Real Estate Licensing Board in 2006 that Mr Teague was not a credible witness and had lied to the Board.1 There were also said to be inconsistencies in his evidence to the Authority on the hours Ms Harlow worked at the office and what WPML's computer records showed about the times at which she had made administrative entries. He was also said to have given inconsistent evidence about whether or not he knew that the man who threatened him and damaged his car at his office in September 2014 was subsequently convicted and ordered to pay him reparations in June 2015.

[14] The purpose of this contest as to credibility was to raise doubt about evidence of Mr Nicholson and Mr Gray that they had heard Mr Teague refer to Ms Harlow as his employee, had heard him speak disparagingly about her and had observed her working office hours consistent with Ms Harlow's evidence about when she worked.

1 *The Bayfield Real Estate Company Limited t/a Bayfield First National v Real Estate Institute of New Zealand Incorporated*, 2006/594 (21 September 2006).

For reasons set out in this determination I concluded Ms Harlow was an employee without having to rely on the evidence of Mr Nicholson and Mr Gray so any decision on their credibility proved unnecessary. Neither did their evidence that they had heard Mr Teague on various occasions refer to Ms Harlow as "my employee" really assist with the question of whether he was her joint employer with WPML. As likely as not the expression could have been used by him as the director and owner of the company rather than suggesting she was, in fact and law, also employed by him in any personal capacity.

[15] Neither was it necessary to make a general credibility finding about Mr Teague's evidence. Rather it was, as with all aspects of the evidence, weighed in the balance of probabilities with its likelihood assessed against the evidence of other witnesses and what was apparent from documents made at the relevant times.

[16] Similarly it was unnecessary to make a negative finding of credibility about Ms Harlow's evidence – as the oral closing submissions of WPML and Mr Teague suggested should be made – based on her personal business knowledge of the difference between an employment relationship and working as an independent contractor. The evidence on those points is considered elsewhere in this determination, essentially as a factor that strengthened her argument that she was working as an employee for WPML.

Ms Harlow's employment status: employee or independent contractor?

[17] The first issue for resolution concerned whether the Authority had jurisdiction to deal with Ms Harlow's application. If Ms Harlow were determined to be an independent contractor the Authority would not be able to consider her personal grievance application as that avenue for legal redress against an employer is open only to present or former employees.

[18] Section 6 of the Act defines an employee as any person of any age employed by an employer to do any work for hire or reward under a contract of service. Where the Authority is required to determine whether a person was employed under a contract of service by any other person (being either an individual or some other legal personality, such as a registered company), the Act directs the Authority to

"determine the real nature of the relationship between them". In carrying out that assessment the Act states that the Authority:2

(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 their relationship.

[19] Factors for consideration in that assessment include:3

- the written and oral terms of any contract (for what they may indicate of a common intention of the parties); and
- divergences from those terms and conditions apparent from the way the relationship operated in practice;
- the way in which the parties actually behaved in implementing their contract; and
- the levels of control and integration and (fundamentally) whether the contracted person was working on her or his own account; and
- industry practice (which may assist the analysis, but is of itself not determinative).

The terms of the relationship

> [20] Ms Harlow did not have a written agreement about the terms on which she worked at WPML's offices. She began work there on 26 March 2012 after having met earlier that day with Mr Teague at a nearby café. He had contacted her after a property manager, who did inspections as well as administration and 'front desk' work, had left the business.
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> [21] Ms Harlow and Mr Teague, in their evidence for the Authority investigation, did agree about the range of the work that they had discussed. Ms Harlow was to deal with office work that included operation of a property management software system (referred to as the Palace system), handle telephone queries from tenants over rental payments and repair or maintenance requests, and attend to Tenancy Tribunal matters when they arose.
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> [22] Their evidence conflicted sharply on what was agreed that day about the basis on which Ms Harlow was to work. She said Mr Teague had agreed to pay a salary of

2 Employment Relations Act 2000, s 6(3).

3 *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [32].

$46,000 (up from his original offer of $40,000) and, after going back to his office with her to check PAYE rates in an IRD booklet, he confirmed she would receive a weekly net payment of $670.

> [23] Two other aspects were relevant to assessing the terms of the relationship – one concerned previous work-related contact between Ms Harlow and Mr Teague, and one concerned Ms Harlow's own property maintenance business.
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> [24] Mr Harlow had previously worked for a business in which Mr Teague was involved. During the period between 2005 and 2007 she did work for a business trading as First National Henderson. There was no doubt that work was carried out as an independent contractor. Ms Harlow was the sole director and a shareholder of a company called Associated Services Group Limited (ASGL). She provided First National Henderson with invoices from ASGL for her hours. No evidence established that she made any such arrangement, or that Mr Teague sought one, when he asked her to work for WPML in March 2012.
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> [25] He did however make arrangements that allowed for Ms Harlow to operate her own lawn mowing business, trading as Clover Gardens, while working at WPML. This included providing lawn mowing services for some of the properties managed for their owners by WPML. At the time Ms Harlow employed a man to do the lawn mowing work. She provided the assignments to her worker and then prepared an invoice for each job that was entered into and paid through the WPML accounts. The arrangement included Clover Gardens paying 10 per cent of the invoice price to WPML as a 'cut' for the work. Mr Teague did not see the invoices but was aware of, and agreed to, the work being done for various WPML-managed properties. He accepted his business had received the 10 per cent cut. Overall the evidence of Ms Harlow and Mr Teague supported a conclusion that the arrangement for Clover Gardens to provide lawn mowing services was an agreed 'side business' that was not part of the arrangements made for the administrative and property management work that Ms Harlow did at WPML's offices in the period she worked there.

Any divergence in practice from the terms?

> [26] There were no significant divergences in how Ms Harlow carried out the office work that she was asked to do or how she was paid for that work that indicated

the work was, in practice, done under as an independent contractor rather than as an employee.

> [27] There was no record of times that Ms Harlow logged onto and off the office computer system but the date and times of entries she made in various computer records established she mostly worked standard office hours, starting around 8.30am or 9am each morning, and sometimes worked later into the evening. Ms Harlow's evidence, which I accepted was more likely than not to be correct, was that absences or later times apparent from those records were due

to her attending to tasks such as appearing at Tenancy Tribunal hearings on behalf of WPML clients, doing errands for Mr Teague and taking approved holidays.

[28] WPML records and Ms Harlow's personal bank statements confirmed she usually received a weekly payment of $670. On most occasions that was paid in cash but occasionally was made either by cheque or by direct credit. Those payments were recorded in WPML's accounting system under the heading of management fees but the records did not include a category or heading of wages and salaries under which those payments could alternatively have been entered.

[29] There was a dispute in the evidence of Mr Teague and Ms Harlow as to why she was usually paid in cash. Mr Teague said he arranged to pay her in cash because Ms Harlow had asked him to do so as she then paid her Clover Gardens worker in cash when he called by the WPML office each week for his wages. Ms Harlow denied she asked for that arrangement and said it was Mr Teague who decided to usually pay her in cash. Either way the form of payment supported Ms Harlow's argument that she was an employee, particularly in the absence of any invoices for her work that would be expected if she were working on an independent contractor basis.

Actual behaviour

[30] Other aspects of how Ms Harlow carried out her work and the arrangements for it also supported her argument that she was an employee. She had a key for the premises and used a WPML business email address and its business letterhead in carrying out her role, which included dealing with clients and tenants of managed proprieties. Mr Teague expected her to use the title of property manager in her role and in other correspondence she also referred to herself as the office manager.

[31] Ms Harlow also referred to two Tenancy Tribunal decisions in which she was described as either as an employee or former employee of WPML. One of those decisions appeared to be directly quoting from Mr Teague's evidence to the tribunal. However Mr Teague said he only described Ms Harlow as the property manager and not as an employee in his evidence. As the focus of the Tenancy Tribunal deliberations was on tenant and landlord issues, rather than the employment status of an agent of the company, reference to what was said in those decisions neither added to nor detracted from the other evidence about whether Ms Harlow was a contractor or an employee.

The control, integration and fundamental tests

[32] Ms Harlow's evidence about the hours and nature of her work plainly met the requirements of the tests of control and integration as to whether she was an employee. However what she actually did could also have been done in the same way (with the same degree of control and integration) under an arrangement where she worked through a company or as an individual for WPML on an independent contractor basis. In that respect, for the purpose of this determination and the particular circumstances, neither of those two tests provided a definitive result. Rather it was the fundamental test that really assisted.

[33] The fundamental test considers whether the contracted person effectively worked on his or her own account. The absence of invoices from Ms Harlow to WPML for her work was an indicator that she did not do her office work for it as business on her own account. It was particularly significant in this situation because Ms Harlow clearly knew and understood the difference. She had provided invoices when she worked for one of Mr Teague's earlier businesses during 2005-2007 and she provided WPML with job by job invoices for the work done by her Clover Gardens 'side business'. If she and Mr Teague had arranged for her to work as an independent contractor for WPML she could easily have provided invoices for that work, either on a personal basis or through the registered company of which she was a director. There may have been some tax benefit or incentive for her to do so. The fact she did not, and the lack of any evidence that any such arrangement was ever discussed, supported the conclusion that Ms Harlow was not in business on her own account in respect of the office work she did for WPML.

[34] Other factors supporting that conclusion were that she was clearly intended to carry out the required administrative work herself (including use of the specialised Palace software) rather than being permitted to delegate it to someone else – that is an employee or sub-contractor of her own – in the way that a true independent contractor would have been free to do. Neither was she free to come and go from WPML's office as she pleased. Rather she was expected to attend to her work during usual office hours, except for explained or permitted absences. In reaching that conclusion I accepted and preferred Ms Harlow's evidence to that of Mr Teague.

[35] She also used WPML's premises and equipment (being its computer and phone systems and email account) for her work. By contrast her Clover Gardens lawn mowing business, that truly provided services to WPML on an independent contracting basis, used its own van and lawn mowers for the work carried out.

Industry practice

[36] Although there was no independent or expert witness evidence about whether usual industry practice in property management businesses was that 'front office' managers worked as employees, there appeared to be no reason to disagree with the evidence of Ms Nunes Vaz that she understood and assumed that was the case. More specifically Mr Teague asked Ms Harlow to work for WPML because an employee who did the office and administrative work had left the business. The role Ms Harlow undertook covered the same administrative work as that of the departed employee.

Conclusion on real nature of the relationship

[37] On the basis of the evidence described above I concluded the real nature of the relationship was one of employment rather than providing services as an independent contractor. It was consistent with Ms Harlow's receipt of regular wages, the absence of invoices for her work, the history of how the administrative work was carried out in the business, and how Ms Harlow actually carried out the work.

Was Ms Harlow jointly employed by WPML and Mr Teague?

[38] The second question for determination concerned the potential application of the principle in employment law that an employee may be jointly employed by more than one person or legal entity. The existence of such employment relationships is determined objectively by considering who an independent but knowledgeable

observer would have said was the employer. Common control by the joint employers is usually a feature of such a relationship.4

[39] Ms Harlow relied on three asserted facts in support of her contention that her employment relationship was with both WPML and Mr Teague:

(i) her work was controlled and directed by Mr Teague; and
(ii) she did some work for Mr Teague in his personal capacity as an auctioneer; and
(iii) she did some work for Leading Edge, the business of Mr Teague's son Aidan, and did so at Mr Teague's direction.

[40] However, taken overall, the evidence did not support in any sufficiently compelling way Ms Harlow's contention that she was jointly employed by both WPML and Mr Teague.

[41] Firstly, she was aware throughout her employment that the business was operated by WPML, a company of which Mr Teague was a director. She was aware from her own business experience, including her Clover Gardens lawn mowing business, that control by a director of the work of an employee of the company did not create a personal employment relationship between the director and the employee.

[42] Secondly, Mr Teague may have had her do some work to assist him in his personal role as an auctioneer but, objectively viewed, she did so under his direction as a director of WPML and she received her ordinary wages from WPML for doing so. It was, in effect, no different than an employer getting an employee to help out a third party and paying for the employee to do so. It did not, in the ordinary run of things, create an employment relationship with that third party.

[43] Thirdly, Ms Harlow had assisted Leading Edge by getting some printing quotes for a listing and disclosure form. Aidan Teague's evidence was that she did so because he was talking about needing printing work done and Ms Harlow had volunteered that she knew a printer who could do the work. Having then made contact with the printer, her name was included on the quote and a subsequent invoice

4 See *Hutton & Others v Provenco Cadmus Limited (in receivership)* [2012] NZEmpC 207 at [79] citing *Orakei Group (2007) Ltd (formerly PRP Auckland Ltd) v Doherty (No 1)* [2008] ERNZ 345 at

[53] and [56]-[58] *and Mehta v Elliott (Labour Inspector)* [2003] NZEmpC 110; [2003] 1 ERNZ 451 at [22].

for printing sent to Leading Edge by the printer. Copies of email correspondence established Ms Harlow was in touch with the printer around that time (in November 2013) in connection with printing requirements for her own business, not that of WPML or Mr Teague. Even if Mr Teague had suggested she assist Aidan Teague's business on that task, it did not establish an employment relationship with either that business or Mr Teague's personal interests outside of WPML. Again, if she was asked to do that task by Mr Teague (although it was not clear she was), she did so under his direction as a director of WPML and received her ordinary wages from WPML for doing so.

[44] Ms Harlow's oral evidence confirmed her real reason for asserting a personal employment relationship with Mr Teague was driven by a concern that he would simply put WPML into liquidation if she were eventually found to be entitled to the remedies and orders she sought. In closing submissions she alleged Mr Teague's business history showed a "concerning pattern of liquidating companies, registering new entities and continuing to trade under a new company". She referred to the Real Estate Agents Licensing Board decision in 2006, which had described such activity by him, and to Mr Teague's registration in May 2015 of a new company, called West Management Limited, shortly after being served with her statement of problem.

[45] Mr Teague accepted he had registered a new company but denied any intention to liquidate WPML.

[46] While Ms Harlow's concern was not unreasonable, the possible prospect of liquidation of WPML did not allow the evidence about with whom she had an employment relationship to be viewed differently or simply ignored. Given there was no decision yet on her grievance or remedies sought and WPML remained in existence, it was too early to consider whether principles for 'piercing the corporate veil' (in relation to the assets of any other company set up by Mr Teague) might apply in any ultimate outcome to Ms Harlow's application to the Authority.5

[47] Ms Harlow carried out her work as an employee of WPML and her wages were paid, as far as can be ascertained, from funds provided by or through WPML's business. The employment relationship was established by Mr Teague acting in his capacity as director of WPML, as Ms Harlow knew and understood.

5 *Square 1 Service Group Limited v Butler* [1994] NZEmpC 96; [1994] 1 ERNZ 667.

[48] Ms Harlow's statement of problem attached a copy of a statement she was said to have made to the Police on 16 April 2014. The statement concerned allegations of what she described as "possible fraudulent activity" by Mr Teague and explained the reasons she said she left the employment on 3 April 2014. In answer to a question from me at the Authority investigation meeting Ms Harlow confirmed I could rely on the contents of her statement to the Police as being accurate. Significantly, for the present purpose, her statement described herself as having been "employed by Western Property Management" with Mr Teague as its "sole company director". I have accepted Ms Harlow's own description to the Police as accurately characterising the real nature of her employment relationship. From the outset the employment was with WPML alone, not jointly with Mr Teague in his personal capacity. That situation did not change by the parties' conduct through the course of the relationship.

Direction to mediation

[49] In light of the finding that Ms Harlow was an employee of WPML, it was appropriate to direct the parties to mediation under s 159 of the Act. The parties are required to comply with the direction and attempt in good faith to reach an agreed settlement of their differences. Meanwhile the proceedings are suspended until the parties have attended mediation or the Authority otherwise directs.

Costs

[50] Costs are reserved in respect of the determination of preliminary issues.

Robin Arthur

Member of the Employment Relations Authority