

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 50
5443856

BETWEEN

MARCINA MALCOLM
Applicant

AND

PLATINUM PROPERTY
TRUST
First Respondent

PORTFOLIO PROPERTY
MANAGEMENT LIMITED
Second Respondent

Member of Authority: Michele Ryan

Representatives: The applicant in person
Craig Relph for the First and Second Respondent

Investigation Meeting: 9 April 2014 at Wellington

Submissions Received: 9 April 2014

Determination: 21 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Marcina Malcolm, lodged her statement of problem on 18 December 2013 citing Platinum Property Trust (the Trust) as the respondent.

[2] Ms Malcolm claimed she had worked for the Trust from 16 February 2011 until 12 March 2013 but had not received payment of accrued holiday leave when her employment ended. She stated that she had been unable to quantify the amount owed because the Trust had refused to provide her with wage and time records. Ms Malcolm further reported that she had taken 7 annual leave days in total during the

course of her employment. She seeks the balance of her statutory entitlement to holiday pay.

Relevant information

The positions of the parties prior to the investigation meeting

[3] No statement in reply was ever lodged, however a representative of the Trust, Mr Craig Relph, participated in a case management call on 13 March 2014. Mr Relph is a director and/or shareholder of a range of companies.

[4] It became apparent that in addition to the contested claim about holiday pay, there was a dispute as to the identity of Ms Malcolm's employer. Mr Relph stated that the Trust had dissolved and no assets were available to remedy Ms Malcolm's claim. In response to Mr Relph's assertions, Ms Malcolm stated she had worked for a business that was trading under the control of the Trust called 'Portfolio Property Management' (Portfolio¹) and that entity continued to trade.

[5] A notice of Direction was sent out to the parties which provided a timetable for exchange of information. Ms Malcolm was asked to produce evidence so as to establish the correct identity of her employer. Amongst other matters Mr Relph was asked to provide information as to the status of Trust and to produce wage and time records.

[6] In a written brief of evidence received on 26 March 2014 Ms Malcolm revised her position. She said that her employment agreement recorded the Trust as her employer, but that in reality she performed work for another entity, Platinum Rentals Limited (Platinum) and then later, for Portfolio.

[7] In an email dated 4 April 2014 Mr Relph also altered his position. He stated Ms Malcolm had been employed with Platinum. With regards to Portfolio, he was emphatic that Ms Malcolm had not been employed by that company.

The investigation meeting

[8] An investigation meeting was held on 9 April 2014. Mr Relph presented on behalf of the Trust as a trustee, and as a director/shareholder of both Platinum and Portfolio. Ms Malcolm was self-represented.

¹ Later evidence indicated Portfolio Property Management is a limited liability company

[9] At the outset of the Authority's investigation meeting Mr Relph's view as to the identity of Ms Malcolm's employer altered again. He accepted that Ms Malcolm had been employed by the Trust pursuant to a written employment agreement but says that engagement was momentary. He says Ms Malcolm quickly became an employee of Platinum and then later, Portfolio. With Mr Relph's consent, Portfolio Property Ltd was joined to this application as a second respondent².

[10] Mr Relph advanced an argument that any holiday pay entitlement owed to Ms Malcolm for the period of time she was employed by Platinum cannot be retrieved as that company went into liquidation on 30 March 2012. He accepted that Portfolio is likely to owe some holiday pay but challenges Ms Malcolm's assessment as to the amount outstanding. He says that whatever sum the Authority determines, Portfolio is unwilling to pay on the basis that Ms Malcolm stole from the company. Ms Malcolm says there is no substance to Mr Relph's claims.

[11] In reply to Mr Relph's inquiry as to whether Ms Malcolm's holiday pay can be set off against monies he regards as stolen from Portfolio, I advised that no counterclaim was made nor evidence furnished to substantiate the allegations made against Ms Malcolm. In these circumstances I am unwilling to take into account Mr Relph's assertions about Ms Malcolm's conduct.

The issues

[12] The Authority is required to determine:

- whom Ms Malcolm was employed by and when;
- what amount of holiday pay is owed and by whom.

Whom was Ms Malcolm employed by and when?

[13] Mr Relph's and Ms Malcolm's statements as to whom Ms Malcolm was employed by and when, were each, in part, contradicted by documentary evidence furnished to the Authority. Where there is conflict between oral evidence and the written evidence I have preferred evidence contained in documents made closer in time to the events in question.

² Pursuant to s221(a)

[14] I find Ms Malcolm was first employed by the Trust on 16 February 2013. This conclusion is supported by a written employment agreement signed by Ms Malcolm on the same date naming the Trust as her employer.

[15] Mr Relph says Ms Malcolm became an employee of Platinum almost immediately after her employment with the Trust began.

[16] During initial questioning Ms Malcolm agreed with Mr Relph's assertion that she had been employed by Platinum although as the investigation meeting progressed she became increasingly uncertain as to whom she regarded her employer.

[17] It was clear from the totality of Ms Malcolm's evidence that she has little commercial experience and had not made a distinction between various companies operating under the directorship of Mr Relph. I do not consider any criticism can be levelled at Ms Malcolm's failing in this regard. There was evidence of work moving from Platinum to Portfolio in or around the time Ms Malcolm commenced working and Ms Malcolm says she was simply informed that the employer's branding was being changed. I note that neither Platinum nor Portfolio describe itself in letterheads or banners as a limited liability company which would indicate separate legal status. Finally, Ms Malcolm's electronic payslips consistently bore the name of the Trust in the header.

[18] I am not persuaded that Platinum was Ms Malcolm's employer. Mr Relph's evidence is that Platinum went into liquidation on 30 March 2012. However the Companies Office register records Platinum as entering into liquidation on 8 November 2010, 5 months prior to Ms Malcolm's involvement with any of the entities under the control of Mr Relph. During the investigation meeting Mr Relph advised that relevant documentation associated with Ms Malcolm's employment with Platinum had remained with the liquidators. After the meeting Mr Relph was asked to obtain information verifying the liquidators had consented to Platinum entering into an employment relationship with Ms Malcolm whilst in liquidation. That information was not provided.

[19] In all the circumstances I have insufficient evidence to satisfy me that Ms Malcolm and Platinum had clear intention and agreement to enter into an employment relationship and I decline to make a finding in this regard.

[20] Mr Relph and Ms Malcolm do agree that at the time Ms Malcolm's employment concluded she was an employee of Portfolio. The question then becomes when her employment with Portfolio began.

[21] I was provided with a copy of a document addressed to Ms Malcolm, care of Portfolio dated 3 July 2012. That document refers to Ms Malcolm's performance in her role over the calendar year of 1 April 2011 to 31 March 2012, and provides for a variation to terms and conditions of employment. Ms Malcolm produced a letter sent by Portfolio's management dated 19 August 2011 thanking her for "*effort, enthusiasm and dedication you show to this business*" and a further letter bearing the letterhead of Portfolio, dated 18 October 2012 to the Ministry of Justice advising Ms Malcolm had been employed by Portfolio since February 2011.

[22] I have no reason to doubt the veracity of these documents. In the absence of evidence to the contrary these documents persuade me to conclude Ms Malcolm became an employee of Portfolio Property Ltd in February 2011.

[23] I accept Mr Relph's testimony that Ms Malcolm was employed by the Trust and that this engagement was fleeting. I conclude that Ms Malcolm's employment was transferred relatively soon after 16 February 2011 but not to Platinum as deposed by Mr Relph, but rather to Portfolio.

Is Ms Malcolm owed holiday pay and if so how much and by whom?

[24] Mr Relph produced electronic wage and time records, and holiday and leave records. Ms Malcolm initially disputed the correctness of the leave records although during the course of the meeting she accepted that she had not included in her assessment paid holidays³ taken over the annual shut down period between Christmas and resumption of business the following year.

[25] I regard the holiday and leave records as accurate.

[26] Mr Relph accepts that outstanding holiday leave was not paid when Ms Malcolm's employment ended. He says this is because of the allegations against Ms Malcolm.

³ Those days which are not regarded as statutory holidays

[27] Mr Relph further contends that the holiday and leave records do not provide an accurate means by which to calculate Ms Malcolm's entitlement because the records include leave accrued while employed with Platinum which cannot now be claimed. As noted, no counter claim or evidence was provided with respect to Mr Relph's allegations, nor have I found that Ms Malcolm was employed by Platinum.

[28] Ms Malcolm was contractually entitled to 20 paid annual holidays per year. Over the course of her employment lasting approximately 2 years and one month she took 25 days annual leave. She is entitled to be paid the remaining 15 days which were outstanding at the date of her second anniversary of employment, plus a further sum equal to 8% of earnings for the month or so following that anniversary.

[29] I have no evidence that Ms Malcolm was paid out any accrual of leave for the short period of time (at most, 8 working days) when she was employed by the Trust. I consider any holiday leave she accrued transferred with her to Portfolio when she commenced her employment with that company.

Order of the Authority

[30] Pursuant to s.131(1)(b) of the Employment Relations Act, I order Portfolio Property Management Limited to pay Ms Malcolm the following:

- (a) **\$3173.10 (gross)** as the sum equal to 15 days of outstanding holiday leave (at the rate of \$211.54 per day) accrued for the period between 16 February 2011 and 16 February 2013; and
- (b) **\$287.69 (gross)** as 8% of earnings from 16 February 2013 until 12 March 2013.

Costs

[31] Neither party was represented. As a consequence no order for costs will be made.

Michele Ryan
Member of the Employment Relations Authority