

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 140
3208799

BETWEEN TOBIE ERCEG
Applicant

AND YACHT FINDERS GLOBAL
LIMITED
Respondent

Member of Authority: Alex Leulu

Representatives: Applicant in person
Daniel Church, counsel for the Respondent

Investigation Meeting: 17 and 18 October 2023 in Auckland

Submissions received: 9 November, 6 and 7 December 2023 from the
Applicant
30 November and 6 December 2023 from the
Respondent

Determination: 8 March 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In October 2022 Tobie Erceg was engaged by Yacht Finders Global Limited (YFG) to carry out work on its behalf. Ms Erceg's work relationship with YFG ended in December 2022. Ms Erceg claimed she was engaged as an employee by YFG. She also made several other claims against YFG including claims for unjustified disadvantage and constructive dismissal.

[2] YFG opposed Ms Erceg's claims and said she was never an employee for YFG. Alternatively, if the Authority found Ms Erceg was an employee, it also said she was not unjustifiably disadvantaged and not constructively dismissed.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Ms Erceg, Deborah Erceg, Gail Cooke and YFG director, Gary Erceg. Aidan Harvey was also summonsed by the Authority to appear at the investigation meeting as a witness. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The parties also lodged written closing submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

- (a) Was Ms Erceg engaged as an employee for YFG?
- (b) If so, was Ms Erceg unjustifiably disadvantaged and/or constructively dismissed by YFG? If Ms Erceg was found to be unjustifiably disadvantaged and/or constructively dismissed, is she entitled to remedies in the form of:
 - (i) Lost wages because of her dismissal (subject to evidence of reasonable endeavours to mitigate her loss); and
 - (ii) Compensation under s 123(1)(c)(i) of the Act?
- (c) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Erceg that contributed to the situation giving rise to her grievance?
- (d) If she was an employee, to also determine whether she was subjected to:
 - (i) Bullying;
 - (ii) Breach of its COVID-19 commitments to her;
 - (iii) Bad faith negotiations; and
 - (iv) Being required by YFG to work unreasonable work hours; and

- (e) Should either party contribute to the costs of representation of the other party?

Context

Prior to Ms Erceg's work for YFG

[6] YFG operated as a yacht brokerage company based in Westhaven, Auckland. Gary Erceg is the sole director of YFG. Mr Erceg is also the father of the applicant, Ms Erceg.

[7] From April 2022 Ms Erceg assisted Mr Erceg with various work tasks in relation to YFG. These tasks included Ms Erceg sending emails on behalf of YFG to its clients. To carry out her tasks, Mr Erceg provided Ms Erceg with a laptop and a mobile phone. Both parties accept there was no intention for Ms Erceg to receive any form of reward for this work.

[8] In September 2022 Ms Erceg and Mr Erceg discussed the possibility of Ms Erceg carrying out further work for YFG. During this discussion Ms Erceg said she wanted to introduce Mr Harvey to Mr Erceg as a possible business partner. Mr Harvey was a close friend of Ms Erceg.

Work arrangement

[9] On 26 September 2022 Ms Erceg, Mr Erceg and Mr Harvey met at the Prego restaurant in Ponsonby (Prego meeting). At this meeting, they discussed Ms Erceg and Mr Harvey's future involvement in YFG's business operations.

[10] During the Prego meeting, they agreed for Ms Erceg and Mr Harvey to carry out paid work for YFG. Ms Erceg was to receive a payment of \$500 a week for her work. Her work was to include tasks she had previously carried out for YFG (sending emails and letters to YFG clients).

[11] Ms Erceg was also due to start shortly after the meeting and would carry out her work from home. She was due to transition to working in the YFG offices in December 2022. Mr Harvey had a separate work arrangement. He was due to start work for YFG on 10 October 2022.

[12] The parties dispute whether the work arrangement discussion occurred at this meeting or at a subsequent meeting. They also dispute whether Ms Erceg and Mr Harvey were offered partnerships in the business.

[13] After the Prego meeting, both Ms Erceg and Mr Harvey assumed work titles for YFG. Ms Erceg was designated as an “Operations Director”. Mr Harvey was designated as “General Manager - Sales and Marketing”. YFG dispute how these titles came about. It claimed these titles were made up by Ms Erceg and Mr Harvey. In any event, the evidence shows YFG accepted these titles. These titles were used to introduce Ms Erceg and Mr Harvey to its stakeholders.

Ms Erceg’s resignation

[14] In late November 2022 YFG held a weekly meeting. Mr Erceg and Mr Harvey attended the meeting. Ms Erceg did not attend the meeting. As a result of the meeting, Ms Erceg and Mr Harvey’s work titles were changed by YFG. Ms Erceg’s title became “Customer Coordinator”. Ms Erceg was not aware of the title change until she was notified by email on 30 November 2022.

[15] On 13 December 2022 Mr Erceg and Mr Harvey had a workplace dispute. As a result, YFG terminated its work agreement with Mr Harvey by email. Ms Erceg also found out about the end of Mr Harvey’s work for YFG. She was unhappy with YFG’s decision. Because she disagreed with YFG’s decision in respect of Mr Harvey, she resigned from YFG.

Post resignation

[16] After Ms Erceg resigned from her role, there were further communications between her and Mr Erceg. This included unsuccessful attempts to mend their familial differences.

[17] Ms Erceg and Mr Harvey jointly lodged a statement of problem against YFG on 2 February 2023. On 25 August 2023 Mr Harvey withdrew his claims against YFG.

Was Ms Erceg an employee of YFG?

Definition of the word “employee”

[18] Ms Erceg claimed she worked for YFG as its employee. The word “employee” is defined under s 6 of the Act. Under the Act the Authority can determine whether a

person meets the definition of an employee. In doing so it must determine the real nature of the relationship.

[19] In making this determination the Authority:¹

- (a) Must consider all relevant matters, including any matters that indicate the intention of the parties, and
- (b) Is not to treat as a determining matter any statement by each party that describes the nature of relationship.

[20] In determining the real nature of an employment relationship, the Authority relies on well-established tests to ascertain whether a person is an employee or an independent contractor.

Intention test

[21] The intention test establishes what the parties intended their working relationship to be. This is usually established by understanding the terms and conditions of the parties' work agreement.

[22] There was no written agreement or contract between Ms Erceg and YFG for her work. Most of what was agreed to arose from the Prego meeting. The main plan for her work arrangement was for her to be introduced further into YFG's business with the promise of a subsequent partnership role in the business. Ms Erceg claimed there was never any mention she was an independent contractor.

[23] Ms Erceg said her work was to be a continuation of her previous work arrangement for Mr Erceg and YFG. The nature of her previous work arrangement appeared to consist of irregular work which depended on when Mr Erceg needed Ms Erceg's assistance.

[24] Prior to starting her paid work for YFG there was no discussion about her work hours, payment of tax or whether she was entitled to holidays and sick leave.

[25] YFG claimed Ms Erceg was engaged as an independent contractor. It said at no point was Ms Erceg ever described as an employee for YFG. YFG described its

¹ Employment Relations Act 2000, s 6.

arrangement with Ms Erceg as a father helping his daughter. For this reason, YFG said it arranged:

- (a) Ms Erceg's hours at one hour a day so it would not impede with her childcare responsibilities; and
- (b) Her pay was treated as payment "under the table" to avoid a clash with her Work and Income New Zealand (WINZ) benefit payments. To facilitate this, YFG paid her through a debit card which would be topped up with each pay.

[26] The position of the parties under the intention test was finely balanced. The evidence shows there was an intention to pay Ms Erceg for her work. However, the evidence does not categorially determine the intent of the parties and whether there was an intention to create an employment relationship (or a contractual relationship). The question of intention is not determinative of the true nature of the relationship. This matter may be guided by an analysis of the other well-established tests.

Control test

[27] The control test focusses on the degree of control or supervision exercised over a person's work. This test requires an analysis of the level of control one party has over the work of the other party.

[28] Ms Erceg disagreed with YFG's contention she had agreed to work an hour a day. She said she was required to work "all hours" as required by Mr Erceg. She also said she attended key YFG meetings.

[29] YFG said its control over Ms Erceg's work was "virtually non-existent". It said Ms Erceg enjoyed a considerable degree of autonomy and flexibility. YFG relied on a "WhatsApp" message exchange where Mr Erceg had followed up Ms Erceg's progress on letters she was tasked to write. Mr Erceg sent the message on Friday 25 November 2022. In response, Ms Erceg messaged saying she was unable to do so at that time because of her child commitments. However, she also explained she would work on the letters during the following weekend.

[30] Ms Erceg did have a considerable amount of autonomy and flexibility in completing her work for YFG. This flexibility was mainly about when Ms Erceg would

complete her work (as opposed to how). The example referred to by YFG was no different to any other analogous employment situation where a manager would follow up on the work of an employee.

[31] In this case the ‘control test’ was inconclusive in supporting an enquiry into the true nature of Ms Erceg’s work relationship with YFG. This was because Ms Erceg had only worked for YFG for a short period of time and had worked relatively short hours. This provided little time to assess what control YFG had over all aspects of her work. The enquiry was made even more difficult given her work arrangement had started with her working from home (and ended before she was due to work at the YFG offices). Generally working from home arrangements involve some element of worker independence.

[32] A further difficulty with assessing Ms Erceg’s circumstances under this test was the apparent familiarity in her communications with her father Mr Erceg. YFG’s example highlighted frank and candid interactions between them with the use of emojis and colloquial language not regularly seen in day-to-day professional relationships.

Integration test

[33] The integration test assesses whether a person was an integral part of the business. If so, this would support a person’s argument for being an employee for the business. Alternatively, the test may show the person was a supplementary part of the business. This supports an argument for the person being an independent contractor.

[34] Ms Erceg was given the title of “Operations Director”. Ms Erceg was also announced in a YFG press release (the press release) as one of two senior appointments for YFG. As part of her role Ms Erceg drafted, reviewed, and proofread emails and letters for Mr Erceg. She also sent emails on behalf of YFG.

[35] YFG said the purpose of Ms Erceg’s proofreading role was to assist Mr Erceg with his dyslexia and could have been outsourced externally. It also said, Ms Erceg’s responsibilities did not extend into YFG’s core business of yacht brokerage.

[36] Ms Erceg’s role was an integral part of the business. She was represented to stakeholders as a senior member of the organisation. The emails and letters which formed part of Ms Erceg’s work were communications which were relevant to YFG’s core business.

Fundamental/economic reality test

[37] The fundamental or economic reality test requires a general analysis of the work relationship to determine its economic reality. An employment relationship will show an employee's work will benefit the employer. Alternatively, a self-employment situation will show a person is in business on their own account. This test also includes an inquiry into the type of tax paid by an employer.

[38] As previously stated in this determination, Ms Erceg's work contributed to YFG's core business. This was a benefit for both Mr Erceg and YFG.

[39] As already expressed in its arguments in respect of the intention test, YFG argued Ms Erceg's work was arranged solely for her benefit. It said her hours were for the benefit of her childcare obligations and her mode of payment (by debit card) was to allow her to continue to receive a benefit from WINZ.

[40] YFG also alleged Ms Erceg avoided paying tax on the \$500 payment she received from YFG. This position is contrary to the evidence provided to the Authority by Mr Erceg. In his witness statement, Mr Erceg referred to Ms Erceg's \$500 payment and said, "I paid tax on this money".² Mr Erceg confirmed this again during the investigation meeting.

[41] Based on the available information, the fundamental or economic reality test weighed in favour of Ms Erceg's arguments of her being employed by YFG. Ms Erceg's preference of works hours was no different to an employee negotiating appropriate hours with their employer. The evidence also showed YFG (or Mr Erceg) had paid the tax on her behalf. This aligned with general employment practices where an employer deducts PAYE tax from an employee's wages.

[42] There was also insufficient evidence to show Ms Erceg was a person who was in business on her own account.

Conclusion on the nature of the relationship

[43] Determining whether Ms Erceg was an employee for the purposes under the Act was a finely balanced analysis. The analysis was made difficult by the short period of time Ms Erceg had worked for YFG and her familial relationship with Mr Erceg.

² Witness statement of Gary John Erceg dated 21 July 2023 at para [11].

[44] There was no doubt Mr Erceg had attempted to help his daughter financially by paying her for her work with YFG. However, this intention manifested itself into an employment relationship. This was mainly due to Ms Erceg being integrated into the YFG business. Her work benefitted the business, and she was paid accordingly for the work. For these reasons, Ms Erceg was employed by YFG.

Unjustified disadvantage claim

[45] Ms Erceg claimed she was unjustifiably disadvantaged when YFG changed her job title from “Operations Director” to “Customer Coordinator”. She was not present at the meeting leading up to the change. She also said the change in her job title was like a demotion and it changed the way she was seen by the local yacht industry.

[46] YFG opposed Ms Erceg’s claims for two reasons. Firstly, it said Ms Erceg’s claims were out of time.³ Ms Erceg first made her claim for disadvantage in her statement of problem. The statement of problem was served on YFG on 17 February 2023. In her evidence Ms Erceg said her “demotion occurred before she started working”. She started her work for YFG in October 2022. YFG relied on Ms Erceg’s statement to say she had raised her claim outside the statutory timeframe of 90 days.

[47] YFG’s position is inconsistent with the evidence which showed Ms Erceg was already working for YFG before her title had changed. YFG’s own submissions referred to the WhatsApp messages which shows Ms Erceg was working for YFG on 25 November 2022. Ms Erceg’s reference to the title change “before starting work” was likely a reference to her planned transition to work at the YFG offices.

[48] Mr Harvey also confirmed in evidence the change in his and Ms Erceg’s work titles occurred in late November 2022. He said Ms Erceg was notified of the change by email on 30 November 2022. In raising her grievance to YFG through her statement of problem on 17 February 2023, Ms Erceg had raised her grievance within the 90-day period.

[49] YFG’s second reason for opposing Ms Erceg’s unjustified disadvantage claim was because it believed Ms Erceg did not suffer a disadvantage. It said she was not demoted and did not suffer any discernible disadvantage as a result. Deborah Erceg

³ Employment Relations Act 2000, s 114.

confirmed the title change was because the original titles were inappropriate. She said the titles did not reflect the nature of Ms Erceg and Mr Harvey's work for YFG.

[50] Ms Erceg's job title was an important aspect of her role. It not only reflected her role within YFG, but also helped establish her rapport with external stakeholders. This was emphasised by YFG early in Ms Erceg's role through the press release.

[51] YFG's unilateral decision to change Ms Erceg's job title without consultation was unreasonable. Although there was no material loss to Ms Erceg, the concept of disadvantage caused by an employer's unjustifiable action is a broad concept and was not limited to material loss or demonstrable financial loss.⁴ Ms Erceg's claim for unjustifiable disadvantage is established.

Constructive dismissal claim

[52] Ms Erceg claimed she was constructively dismissed when she resigned from her role on 13 December 2022. In her evidence, Ms Erceg said she had resigned from her role because of how Mr Harvey was treated by YFG and Mr Erceg.

[53] In response to Ms Erceg, YFG made several submissions including the following reference to Ms Erceg's resignation:

a hysterical over-reaction to a situation that did not directly impact on the relationship between her personally and the Respondent.

[54] A constructive dismissal is when an employer's conduct compels a worker to resign. This includes circumstances where an employee's disadvantage was caused by an employer's breach of obligations owed to the employee. A resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee an employee would resign rather than put up with the ongoing breaches.⁵

[55] Ms Erceg's resignation was due to YFG's actions towards someone else as opposed to her. It was also not sufficiently clear whether her decision was because of any action towards her by YFG.

⁴ *Alliance Freezing Co (Southland) Ltd v New Zealand Engineering Workers Union* (1989) ERNZ Sel Cas 575 at [580].

⁵ *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374-375.

[56] In both her email and in her evidence, Ms Erceg confirmed her reason for her resignation was because of how Mr Erceg treated Mr Harvey. Although she had a close friendship with Mr Harvey, her resignation did not arise from direct actions by YFG towards her and her own employment.

[57] For the stated reasons, Ms Erceg's claim for constructive dismissal was unsuccessful.

Remedies

Ms Erceg's claim for compensation

[58] Ms Erceg had established a personal grievance for unjustified disadvantage relating to the change in her title. She is entitled to an assessment of remedies to address her grievance.

[59] Ms Erceg referred to her title change as a demotion. As a result, she said she felt extremely humiliated. At the investigation meeting, the emotional distress relating to her claims overall was evident. In her statement of problem, she had claimed a compensation payment of over \$50,000 for both her grievances.

[60] YFG said Ms Erceg's claims for compensation should be "sufficiently connected" to her grievance giving rise to her claim for compensation. The majority of YFG's submissions were made in anticipation of a successful claim by Ms Erceg for constructive or unjustified dismissal (which was unsuccessful). However, it did submit for any compensation awarded to Ms Erceg to be at the lower to middle end of a scale ranging from no compensation up to \$12,000.

Contribution

[61] There was no evidence to show Ms Erceg had contributed to the situation giving rise to her grievance in a way that might require a reduction of her remedies. Ms Erceg was not present at the meeting leading to her title change. She only became aware of the title change after she had been copied into an email by Mr Harvey. Since there was no fault or wrongdoing on Ms Erceg's part, there were no grounds to consider a reduction to any remedies awarded to her.

[62] I accept Ms Erceg did suffer hurt and humiliation because of YFG's actions in changing her work title. Considering similar cases, an appropriate remedy was an order

for YFG to pay Ms Erceg an amount of \$5,000 for hurt and humiliation in respect of her unjustified disadvantage claim. YFG is to pay this amount to Ms Erceg within 28 days of this determination.

Ms Erceg's bullying allegations

[63] Ms Erceg's allegations of bullying against YFG and Mr Erceg were difficult to assess. Although Ms Erceg referred to communications with Mr Erceg during her employment, much of the interactions related to their familial relationship.

[64] Both parties accepted the familial relationship between Ms Erceg and Mr Erceg had previously been fractured and dissonant (prior to Ms Erceg's employment). Aspects of this relationship were reflected in events which occurred during Ms Erceg's employment.

[65] There is no statutory definition for bullying. However, the Employment Court had described the WorkSafe New Zealand's definition as a "yardstick" for assessing whether appropriate steps were taken by an employer.

[66] WorkSafe New Zealand's "Preventing and Responding to Workplace Bullying: The Guidelines" defines bullying as:⁶

repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.

[67] There was insufficient evidence to show Ms Erceg was bullied by YFG in line with the WorkSafe definition. Much of this behaviour was attributed to circumstances related to Ms Erceg's personal relationship with Mr Erceg. As previously mentioned in this determination, their style of communication was usually informal. This made it difficult to determine whether any bullying had occurred in line with expectations usually expected in a strictly professional work environment.

[68] Because of Ms Erceg's relatively short period of employment for YFG, it was also difficult to assess whether any of Mr Erceg's alleged behaviour was "repeated" as in accordance with the WorkSafe bullying definition. For these reasons, no findings are made in respect of Ms Erceg's bullying allegations.

⁶ WorkSafe New Zealand "*Preventing and responding to Workplace Bullying: The Guidelines*", first published in 2014 and updated in 2017.

Ms Erceg's remaining claims

COVID-19 requirements

[69] Ms Erceg was unable to sufficiently particularise her claims against YFG for its breach of its COVID-19 commitments to her. In her closing submissions, she had referred to evidence that had not been fully adduced at the investigation meeting. For this reason, the Authority was unable to make a finding in respect of this claim.

Claim for bad faith negotiations

[70] Ms Erceg's claim against YFG in respect of bad faith negotiations was also difficult to assess. Her claim appeared to relate to what was agreed to by YFG with her and Mr Harvey during the Prego meeting (and what happened subsequently). Her claim included allegations of YFG's failure to adhere to promises of a partnership for her and payment for her work. She also referred to YFG changing her job title which was addressed earlier in this determination.

[71] Much of the difficulty with assessing Ms Erceg's claims arose from:

- (a) the general nature of how her claim was specified; and
- (b) the absence of any specific remedy sought from Ms Erceg to address her claim.

[72] These difficulties hindered YFG's ability to respond to Ms Erceg's bad faith claim. It also made it difficult for the Authority to assess and determine any outcome. For this reason, no finding is made in respect of Ms Erceg's claim against YFG for bad faith negotiations.

Claim for working unreasonable work hours

[73] Ms Erceg's claim against YFG for "unreasonable hours" was also unclear. Ms Erceg's evidence did not identify which days of her employment contributed to her claim.

[74] Although Ms Erceg claimed she was available to work all hours of the day, this was not supported by the evidence before the Authority. For this reason, no findings were made in respect of Ms Erceg's unreasonable work hours claim.

Other matters

[75] Ms Erceg's closing submissions referred to further claims against YFG. She also introduced and relied on evidence which was not submitted at the investigation meeting. On 15 November 2023 YFG objected to the submission of Ms Erceg's further claims and evidence to the Authority.

[76] For the sake of transparency, none of Ms Erceg's further claims or evidence was considered as part of this determination.

Costs

[77] Ms Erceg was self-represented. As a result, there was no issue as to costs. However, it is appropriate YFG reimburse her the Authority filing fee of \$71.55 which is also to be paid within 28 days of the date of this determination.

Alex Leulu
Member of the Employment Relations Authority