New Zealand Employment Relations Authority Decisions

Kelland v Megan Jaffe Real Estate Limited (Auckland) [2018] NZERA 29; [2018] NZERA Auckland 29 (30 January 2018)

Last Updated: 13 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 29
3019632

BETWEEN STEPHANIE KELLAND Applicant

AND MEGAN JAFFE REAL ESTATE LIMITED Respondent

Member of Authority: Robin Arthur

Representatives: Jane Latimer, Counsel for the Applicant

Adina Thorn, Counsel for the Respondent

Oral submissions: 26 January 2018

Determination: 30 January 2018

DETERMINATION OF THE AUTHORITY

A. The application by Megan Jaffe Real Estate Limited for removal of this matter to the Employment Court to hear and determine is declined.

B. Costs are reserved.

[1] Megan Jaffe Real Estate Limited (MJREL), a company operating a franchise of the Ray White real estate business, sought removal to the Employment Court of an application made to the Authority by Stephanie Kelland.

[2] Ms Kelland had asked the Authority for declarations that she was an employee of MJREL, having worked for it as a branch manager and as its compliance manager, and was unjustifiably dismissed from that employment on 15 August 2017. If those declarations were made, Ms Kelland also wanted orders awarding her remedies of lost wages and compensation.

[3] MJREL's reply to Ms Kelland's claim said she worked for the company as an independent contractor, not as its employee. This raised a preliminary question of whether the Authority had any jurisdiction to consider her claim.

[4] The Authority has statutory powers to investigate and determine claims from employees but not from people who really work as independent contractors. Where a person's employment status is contested, the Authority and the Employment Court have jurisdiction under s 6 of the Employment Relations Act 2000 (the ERA) to determine whether or not that person is an employee. Only if found to be an employee can the person then continue to pursue their claim, and any remedies sought, using the ERA's dispute resolution procedures.

[5] The parties were initially referred to mediation, held on 15 November 2017. It did not resolve their differences. On 19 January 2018 the Authority held a case management conference and gave timetable directions for an Authority investigation meeting to be held on 16 February 2018. The investigation meeting is for the purpose of hearing evidence and submissions about the preliminary jurisdictional issue of whether Ms Kelland was MJREL's contractor or its employee, not the substance of her claim.

[6] Four days after those timetable directions were given MJREL applied, on an urgent basis, for the entire matter to be

removed to the Employment Court. It also sought a direction setting aside the Authority's timetable directions until its removal application was determined.

[7] The criteria for removal to the Court are set by s 178(2) of the ERA:

The Authority may order the removal of the matter, or any part of it, to the court if—

(a) an important question of law is likely to arise in the matter other than

incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

The Authority's investigation of the removal application

[8] MJREL's application for removal was considered on an urgent basis. The parties' submissions were made orally by telephone conference. This determination has relied on those submissions and the following papers:

• MJREL's application setting out its grounds for applying for removal;

• memoranda lodged by both counsel;

- an affidavit in support of removal made by the Hon John Banks, a consultant to MJREL;

• an affidavit in opposition to removal made by Ms Kelland;

• Ms Kelland's statement of problem;

• MJREL's statement in reply; and

• relevant background documents lodged with those statements.

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

MJREL's grounds for removal to the Court

[10] MJREL sought removal on two grounds. Firstly, under s 178(2)(a), it said two important questions of law arose, other than incidentally. Secondly, it said the Authority should come to the opinion under s 178(2)(d) that in "all the circumstances" the Court should determine the matter.

[11] The first important question of law was said to concern the application of clause 13 in a written agreement between Ms Kelland and MJREL dated 15 July

2014. This document bore the labels "contract for services" and "independent contractor agreement". It was a standard form used by MJREL, and other franchise holders in the Ray White real estate business, to engage sales people as independent contractors. Clause 13 of that agreement was headed "mediation and arbitration". It provided three steps to resolve any disputes connected with the agreement – firstly, discussion between the parties; secondly, private mediation; and then thirdly, if still not resolved, independent arbitration under the Arbitration Act 1996.

[12] MJREL submitted that the extent to which that clause governed the relationship needed to be "unravelled". Although not developed in its written application for removal or its oral submissions, the substance of MJREL's proposition appeared to be that Ms Kelland could only use this agreed means of private resolution for any dispute she had about how her work for MJREL ended rather than trying to use the statutory resolution provisions that would apply to someone who was an employee. The important question of law would be about which dispute resolution process should prevail.

[13] The second important question of law was said to concern how s 51 of the Real Estate Agents Act 2008 (the REAA) applied to the nature of Ms Kelland's relationship with MJREL:

51 Employment status of salesperson

(1) A salesperson may be employed by an agent as an employee or may be engaged by an agent as an independent contractor.

(2) Any written agreement between an agent and a salesperson is conclusive so far as it expressly states that the relationship between the agent and the salesperson is that of employer and independent contractor.

(3) An agent who engages a salesperson as an independent contractor is liable for the acts and omissions of the salesperson in the same manner, and to the same extent, as if the agent had employed the salesperson as an employee.

[14] The 15 July 2014 agreement signed by Ms Kelland defined her as a "licensee salesperson" and "a licensee agent".

[15] At clause 17 the agreement said the parties acknowledged:

the licensee salesperson is an independent contractor in accordance with s 51 of the [REAA] and that nothing in this contract or the relationship of the parties shall be construed so as to constitute an employment relationship.

[16] The reference to REAA s 51 was particularly important because the effect of the REAA is also expressly referred to s 6 of the ERA. Section 6 governs how the Authority or the Court must determine whether or not a person has worked as an employee:

6 Meaning of employee

...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(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.

(4) Subsections (2) and (3) do not limit or affect the Real Estate Agents Act

2008 ... .

[17] MJREL submitted those two questions of law – about the arbitration clause and the effect of REAA s 51 – were important because the standard form agreement signed by Ms Kelland applied to "many hundreds" of Ray White salespersons. It said the majority of 1765 agents working for Ray White franchise businesses throughout New Zealand were engaged as independent contractors using that standard form. It said any findings concerning those terms would "potentially impact" all of them.

[18] MJREL also identified several factors as supporting the other ground the company advanced as supporting removal – that the Authority should be of that opinion after considering "all the circumstances" of the case. It submitted three relevant factors or circumstances would support such an opinion:

(i) Ms Kelland's claim involved a "substantial" sum and the case involved

"highly sophisticated parties with significant professional reputations"; (ii) MJREL's "position ... that it will inevitably challenge any

determinations of the [Authority] in the Employment Court"; and

(iii) Removal would avoid the time and cost involved in the "procedural shifts" and "the zig-zag of going between the Authority and the Court".

Ms Kelland's opposition to removal

[19] Ms Kelland opposed removal because, in her submission, her case would be determined by factual findings that did not engage, as decisive, any important questions of law. In short her case was that she was not working as a salesperson when MJREL terminated their relationship in 2017 so the terms of her written

agreement in 2014 did not describe the reality of what she did. She worked full-time as MJREL's compliance manager, providing support and advice to its sales people but not making sales. She was paid on the basis of an annual salary, not the "commission- only basis" referred to in the standard form written agreement.

[20] She submitted the circumstances of her work for the company were "unique and individual" so were highly unlikely to be applicable to all agents working as independent contractors under Ray White's standard form agreement.

[21] She said her case involved uncomplicated contractual and statutory interpretation and establishing relevant facts that would have no broad effect on or significance in employment law. She also criticised the *bona fides* of MJREL's removal application, made four months after its statement of reply was lodged and not until after the Authority had made agreed timetable directions for its investigation meeting of the preliminary jurisdictional issue.

Any important questions of law?

[22] In a recent decision, *Johnston v The Fletcher Construction Company Limited,* the Employment Court gave this summary of the case law on the nature or characteristics that, for the purposes of s 178(2)(a) of the Act, make a question of law important:1

A question of law need not be complex, tricky, or novel to warrant use of the descriptor "important". It may be important if the answer to the question is likely to have a broad effect, or assume significance in employment law generally. Previous cases have made it clear that it is not necessary for resolution of the question to have an impact beyond the particular parties. Rather, a question may be regarded as important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision in the case or a material part of it. The latter point cannot, of course, be taken too literally. For example, a legal question as to whether a dismissal is justified under s 103A may well not suffice. Nor is it necessary for there to be an absence of previous authority on the particular point.

Effect of the mediation and arbitration clause?

[23] The first question of law advanced by MJREL, concerning any possible effect of the clause 13 mediation and arbitration provision in its independent contractor

agreement, failed to meet that threshold. Simply put, the question was premature. It

1 [2017] NZEmpC 157 at [22], footnotes omitted.

would not arise once there was determination on the preliminary jurisdictional issue of whether Ms Kelland's relationship with MJREL was as an independent contractor or as an employee.

[24] If Ms Kelland were held to be an employee, she would have a statutory right of access to the ERA's dispute resolution procedures. This access could not be displaced or 'trumped' by any contrary terms of a written agreement because contracting out of the ERA's provisions is prohibited. Every employee must have access to a personal grievance procedure and therefore access to the Authority and the Court.2 ERA s 238 states the provisions of that Act "have effect despite any provision to the contrary in any contract or agreement".

[25] However if Ms Kelland were held to be an independent contractor, there would be no question of law to answer about the effect of the mediation and arbitration clause in her written agreement. In that scenario the ERA provisions could not apply. A determination that her status was an independent contractor would make any question as to the application of clause 13 superfluous and otiose.

[26] The only potential relevance of clause 13 to any material part of the present case was as a question of fact about the whole of the written agreement. The existence of the agreement would be relevant as a factor for consideration under the provisions of s 6 of the ERA set out earlier in this determination.

The effect of s 51 of the REAA on any assessment under s 6 of the ERA?

[27] MJREL's submission that the application of s 51 raised an important question of law was not compelling. It was unlikely any determination on the particular circumstances of Ms Kelland's case would have any effect on the "many hundreds" of sales people engaged as independent contractors under the Ray White standard form agreement, whose daily work involved selling houses and being paid on a commission basis. Her case rested on the notion that she was not working as a sales person but performed a different management role and how that operated had characteristics that were really more like an employee than an independent contractor. Those were factual questions and their answer would be confined to her particular or allegedly

unusual circumstances, different from the "many hundreds" working in sales roles in the way described in their contractor agreements.

[28] However an assessment was also required of whether any question about the application of s 51 of the REAA, through s 6(4) of the ERA, was an important question of law because it would be decisive or strongly influential in some part of her particular case.

[29] As is clear from the passage cited above from the Court's decision in the *Johnston* case, the mere existence of a legal test or a legal question, complex or otherwise, may not suffice to cross the s 178(2)(a) threshold. The following analysis from an earlier decision of the Court in *Centre for Advanced Medicine v Sprott* was to

similar effect:3

[17] I conclude that there is no important question of law in the case as it is presently framed. The answer to the question posed by Mr Curry will not be decisive. There is no question about the legal test to be applied by the Authority and the Court. However, even if the question were found to be important, the Court must consider whether the discretion to remove should be exercised. I conclude that the legal test which is relevant to this case is one which is applied daily by the Employment Relations Authority when investigating claims of unjustified dismissal. The Authority is a specialist institution which [citing ERA s 157]:

... has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

[18] Importantly, the Authority is well placed to assess factual disputes. As it is presently pleaded, this case appears to be one which will largely turn on the facts and therefore it is entirely appropriate for it to be dealt with by the Employment Relations Authority.

[30] Ms Kelland's case, and MJREL's response to it, also appears to be one which will largely turn on the facts. The relevant legal test has frequently been applied in Authority determinations about people who have worked in real estate sales. The following paragraphs sets out some analysis of those cases before returning to the point regarding whether the important questions in Ms Kelland's case are ones of law or ones of fact.

[31] In *Smith v Mark Stevenson First National Real Estate Ltd* the Authority held that the combined effect of s 51(2) of the REAA and s 6(4) of the ERA was that Ms Smith, who said she was employed as a property manager, was an independent contractor and not an employee.4 On that analysis, other tests usually applied under s 6 to assess whether someone was an employee were not relevant in Ms Smith's case. She was held to not be an employee under the Act, so the Authority did not have jurisdiction to consider her claim.

[32] In *Li v Dependable Property Management Ltd* the Authority held Mr Li, who had worked under the title of general manager and had signed an agreement which included words referring to that document as an 'employment contract', was held to be an independent contractor.5 The determination was reached after applying the usual tests under s 6 and without reference to the effect, if any, of s 51 of the REAA on the nature of his relationship with the company.

[33] In *Gibbs v City Sales Ltd* the Authority held s 6(4) of the ERA allowed s 51(2) of the REAA to 'override' the general rule in s 6 of the ERA that required the Authority to consider the real nature of the relationship and not to treat what the people involved say – including what is written in any contract or agreement – as determining the issue.6 It decided Mr Gibbs' written agreement, which described him as an independent contractor, meant the Authority had no jurisdiction to consider his claim.

[34] In *Kumandan v Eastzone Realty Ltd* the Authority considered the effect of a provision under earlier real estate industry legislation, s 51A of the Real Estate Agents Act 1976. The case concerned events before the REAA 2008 came into effect and it was the earlier section that was relevant and was referred to in the wording of s 6(4)

of the ERA at that time.7 The Authority concluded the application of the particular

section meant that it was "not necessary to apply the tests set out in s 6(2) and (3) of the [ERA]" in the circumstances of that case.

[35] In *Pollett v Browns Real Estate Ltd* the Authority considered the effect of the reference to the REAA in s 6(4) of the ERA and concluded:8

4 [2016] NZERA Christchurch 45.

5 [2015] NZERA Auckland 224.

6 [2013] NZERA Auckland 390 at [4].

7 [2011] NZERA Auckland 135 at [34].

8 [2011] NZERA Auckland 125 at [5].

... [I]f there is in existence an agreement of the kind referred to in either Act, the agreement prevails on the matter of whether a real estate salesperson is an employee or a contractor, and it is not necessary to embark on the analysis that would otherwise be required.

[36] The Authority found wording of written agreements made in 2009 and 2010 were "conclusive" as to Mr Pollett's status as an independent contractor, not an employee. When Mr Pollett sought leave to file an out of time challenge to that

determination, the Court considered the Authority's analysis.9 The Court made these observations on the merits of his case:

[17] Mr Pollett was a real estate salesperson with Browns. As such, his status was affected by s 6(4) of the Employment Relations Act 2000 which provides, in relation to determination of employment status, "Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 2008 ...". The Real Estate Agents Act 2008 succeeded its 1976 namesake which was also subject to s 6(4) of the Employment Relations Act. As the Authority concluded, the effect of s 6(4) is that, if there is in existence an agreement dealing with the engagement of a real estate salesperson, the provisions of this agreement will prevail on the question of whether the salesperson is or is not an employee so that the tests applicable in other fields under s 6 of the Employment Relations Act are not applicable.

...

[21] The March 2010 agreement between the parties provided similarly that Mr Pollett was engaged as an independent contractor to, and not as an employee of, Browns. That was deemed in law to be his status when the working relationship between the parties ended. It follows, as the Authority found, that Mr Pollett cannot contend that he was dismissed unjustifiably because, not being an employee, he is not entitled to that statutory cause of action under the Employment Relations Act.

[37] In *Elwin v Barfoot & Thompson Limited* the Authority found Mr Elwin was deemed to be a salesperson under the earlier Real Estate Agents legislation and therefore an independent contractor.10 However the Authority also applied the tests under s 6(2) and (3) and reached the same conclusion.

[38] What is apparent from a review of those cases is that there was no real question about what the legal tests meant or how they should be applied. What was decisive were questions of fact about whether or not the applicants, their roles and the

arrangements made with them for their work, met the criteria in those sections.

9 *Pollett v Browns Real Estate Ltd* [2011] NZEmpC 116.

10 ERA Auckland, 14 June 2007, AA 176/07.

[39] The inquiry in each s 6 case is intensely factual.11 And where those facts establish a person was engaged in and worked as a salesperson, s 6(4) gives effect to the REAA s 51(2) provision that a written agreement is conclusive.

[40] What is factually at issue in Ms Kelland's case is whether, at the time MJREL ended its relationship with her, she remained a salesperson or her role had become something different. It requires some analysis of whether she met the REAA definition of a salesperson (by the fact of holding a current licence), whether she did any sales work, and, if not, whether the nature of her actual work had so changed by then that the relationship was no longer subject to the terms of the written agreement.

[41] Although this determination has not set out much detail from MJREL's statement in reply, it is clear from its content that MJREL strongly contests the factual basis of Ms Kelland's claim.

[42] Findings on those contested facts will be decisive or strongly influential in deciding Ms Kelland's claim rather than questions of law. MJREL has not established grounds for removal under s 178(2)(a) of the ERA.

Removal under s 178(2)(d) – in "all the circumstances"?

[43] Having found no important questions of law warranted removal, the matter could still be removed under s 178(2)(d) if other factors and circumstances made it appropriate to do so.

[44] None of the circumstances advanced by MJREL, summarised in paragraph [18] above, were sufficiently compelling to reach an opinion that removal was warranted on those grounds.

[45] Firstly, it said removal was warranted because the sum sought by Ms Kelland was "substantial". Her statement of problem sought "reimbursement of lost salary" and "compensation for humiliation, loss of dignity and injury to feelings". Neither remedy sought was quantified. She now works for another Ray White franchise so the size of her lost salary claim will likely be mitigated by earnings from that

business. Any award of compensation would likely be in a range that other Authority

11 *Yang v L E Builders Ltd* [2012] NZEmpC 185 at [17] and *Singh v Eric James & Associates Ltd*

[2010] NZEmpC 1 at [16].

determinations and Court decisions make reasonably predictable. Allowing for that range in awards and if Ms Kelland were able to successfully pursue a claim in the employment jurisdiction, a likely outcome would be no larger or smaller than awards in other cases involving staff on similar salaries. Of itself, or in combination with other circumstances, it was not a

factor favouring removal.

[46] Secondly, the notion that the parties were "highly sophisticated ... with significant professional reputations" was not a factor favouring removal. Counsel for MJREL conceded, during oral submissions, that argument was not seriously pursued. There is no two-tier system in the employment institutions according a different forum based on parties' assessment of their sophistication or the value of their reputations.

[47] Thirdly, there were several reasons to doubt MJREL's submission that any determination of the Authority would "inevitably" be challenged in the Employment Court. For example, MJREL would not challenge a determination of the Authority that found in its favour on the jurisdiction issue. In that circumstance, it could not be said with such certainty that Ms Kelland would necessarily file a challenge. Of course she would be entitled to do so but, in advance of the evidence being heard and tested in an Authority investigation, her assessment of the prospects of success in the Court could only be guessed at this stage. She might instead, and again for example only, then seek to pursue resolution under the mechanisms provided in clause 13 of the written agreement. And, in another example, if Ms Kelland were successful in the Authority on the jurisdiction issue, the parties would likely be directed to further mediation. Again (and with many factors to weigh) it is far too speculative to conclude MJREL would "inevitably" file a challenge rather than resolve the matter at that point. Much would depend on the content of the determination. And it is not uncommon for parties in Authority matters to stoutly declare they will pursue challenges to the Employment Court, and appeals to the senior courts beyond, if any determination is unfavourable to their cause, but for those matters to then settle without further litigation.

[48] Fourthly, and related to the third point, the likely costs consequences if the matter was not removed were not established as likely to be disproportionate. This proceeding so far will require one day in the Authority on the jurisdictional issue – being the investigation meeting notified for 16 February 2018. If Ms Kelland is

successful, any further investigation meeting about her substantive claim would, in my assessment, be unlikely to require more than a two day investigation meeting, and quite possibly less. As the Court observed in the *Johnston* case regarding issues of cost and proportionality, much depends on the circumstances of each case. The likely trajectory of Ms Kelland's case, on any scenario arising from the preliminary jurisdictional determination, does not match the example given by the Court in *Johnston* of "a case which ... is likely to consume weeks of hearing time in the

Authority, requiring a more formal, procedure-laden approach ...".12

[49] Having considered those circumstances, and the others as best could be discerned from the papers presently lodged with the Authority, I did not reach the opinion that this was a matter the Authority should remove to the Court rather than investigate itself.

Outcome

[50] For the reasons given, MJREL's application for removal of this matter to the Court is declined. As a result its request for the withdrawal of the timetable directions for the Authority investigation meeting due to be held on 16 February is also denied.

Costs

[51] Costs are reserved.

Robin Arthur

Member of the Employment Relations Authority

12 *Johnston,* above n 1, at [39].
