



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2018](#) >> [\[2018\] NZEmpC 28](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Megan Jaffe Real Estate Limited v Kelland [2018] NZEmpC 28 (29 March 2018)

Last Updated: 9 April 2018

IN THE EMPLOYMENT COURT AUCKLAND

[\[2018\] NZEmpC 28](#)
EMPC 26/2018

IN THE MATTER OF	of an application for special leave to remove matter to the Employment Court
BETWEEN	MEGAN JAFFE REAL ESTATE LIMITED Applicant
AND	STEPHANIE KELLAND Respondent

Hearing: 2 March 2018 (Heard at Auckland)
Further written submissions filed on 5 and 6 March
2018

Appearances: M Donovan and A Thorn, counsel for applicant J
Latimer, counsel for respondent

Judgment: 29 March 2018

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The applicant, Megan Jaffe Real Estate Ltd (MJREL/the company), operates a franchise of the Ray White real estate business. Ms Kelland worked within the company for a number of years. Difficulties arose, culminating in proceedings being filed in the Employment Relations Authority claiming that Ms Kelland was an employee and had been unjustifiably dismissed.

[2] The claim gives rise to a threshold jurisdictional issue, namely whether Ms Kelland was an employee of the company at the relevant time. If not, neither the Authority nor the Court has jurisdiction to consider her claim, and it must be pursued elsewhere.

MEGAN JAFFE REAL ESTATE LIMITED v STEPHANIE KELLAND NZEmpC AUCKLAND [\[2018\] NZEmpC 28](#) [29 March 2018]

[3] The parties attended mediation on 15 November 2017, after the company's statement of reply had been filed. Mediation did not resolve matters and a case management conference in the Authority followed (after the Christmas break), on 19 January 2018. An investigation meeting was scheduled for 16 February 2018. Four days after the Authority had made directions as to when the investigation meeting would take place and the way in which it was to proceed, the company applied for removal of the entire matter to the Court.

[4] The Authority declined the application for reasons fully set out in a determination dated 30 January 2018.¹ The company then filed an application for special leave to remove the matter to the Court under [s 178\(3\)](#) of the [Employment Relations Act 2000](#). The Authority consequently vacated its scheduled investigation meeting to enable the application for special leave to be dealt with in this forum.

[5] It was agreed that the present application would be dealt with on the basis of (untested) affidavit evidence filed both in support of and in opposition to the parties' respective positions, and legal submissions.

Analysis

[6] The [Employment Relations Act](#) makes provision for the Authority to remove matters to the Court and, if the Authority declines to do so, for the Court to order removal by way of special leave. The grounds on which these two different applications must be considered are set out in [s 178](#):

178 Removal to court

...

(2) 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

1 *Kelland v Megan Jaffe Real Estate Ltd* [2018] NZERA Auckland 29.

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

(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs

- (a) to (c) of subsection (2).

...

[7] The approach to [s 178\(2\)\(a\)](#) in the context of special leave applications was recently dealt with in *Johnston v The Fletcher Construction Co Ltd*.²

[8] The application for special leave in this case identified three primary grounds:

- That an important question of law is likely to arise other than incidentally;
- that significant professional reputations are at stake making it appropriate for the Court to deal with the claim rather than the Authority; and
- that a challenge is inevitable.

[9] During the course of hearing it became apparent that the company was pursuing only one ground, namely that an important question of law was likely to arise other than incidentally ([s 178\(2\)\(a\)](#)). I deal with the other two identified grounds for completeness below.

Important question of law?

[10] The applicant says that the proceedings will involve important questions of law; the respondent says that they will not.

[11] The two identified questions of law can be summarised as follows:

2 *Johnston v The Fletcher Construction Co Ltd* [2017] NZEmpC 157.

- Does [s 51](#) of the [Real Estate Agents Act 2008](#) apply, whether or not Ms Kelland was acting as a salesperson at the time of her departure from the company?
- What is the status of the heads of agreement signed by Ms Kelland and what, in particular, is its relationship with the contract of services agreement?

[12] I deal with each in turn.

[13] At the heart of Ms Kelland's case is an argument that, while she signed an agreement which described her as an independent contractor, at the relevant time her role had changed and she was an employee. It follows, she says, that she is entitled to pursue a personal grievance. As Mrs Latimer, counsel for the respondent, points out, questions as to which side of

the independent contractor/employee divide a worker falls on are not unusual and are generally determined by an application of well settled law to the facts.

[14] The applicant says that [s 51](#) of the [Real Estate Agents Act](#) adds a legal complexity which warrants the grant of special leave, including because the application of that provision in this case is likely to have a substantial knock-on effect.

[15] It is common ground that Ms Kelland signed two documents at the outset of her relationship with the company – a heads of agreement (dated 8 July 2014) and a document entitled “Contract for Services”. The heads of agreement recorded that Ms Kelland would work as a “licensee salesperson” in accordance with the contract for services agreement.

[16] The contract for services agreement is said to be a standard form document used by Ray White Real Estate Ltd, for its salespeople.³ It refers to Ms Kelland as a “Licensee Salesperson”. The agreement goes on to state that “[i]t is acknowledged that the Licensee Salesperson is an independent contractor in accordance with [section 51](#) ... and that nothing in this contract or the relationship of the parties shall be construed so as to constitute an employment relationship.”

[17] [Section 51](#) of the [Real Estate Agents Act](#) provides that:

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.

...

[18] At this point it is convenient to note that [s 6](#) of the [Employment Relations Act](#) defines “employee” (unless the context otherwise requires) as meaning “any person of any age employed by an employer to do any work for hire or reward under a contract of service.” [Section 6\(2\)](#) provides that in deciding whether a person is employed under a contract of service the Court or the Authority must determine the real nature of the relationship between them. This includes consideration of all relevant matters including any statement describing the relationship. While [s 6\(3\)](#) provides that such a statement is not to be treated as determinative, [s 6\(4\)](#) states that [s 6\(2\)](#) and (3) “do not limit or affect” the [Real Estate Agents Act](#). That means that [s 51\(2\)](#) comes into play.

[19] In a nutshell Ms Kelland accepts that she signed an agreement describing her as a salesperson who was an independent contractor, and in ordinary circumstances [s 6\(4\)](#) would head-off an inquiry into the real nature of her relationship with the applicant (by virtue of [s 51\(2\)](#)). However, she claims that the agreement did not

3. Mr Smith, who is the Chief Executive of the Ray White Group in New Zealand, deposes that there are three classes of licence under the [Real Estate Agents Act](#), one of which is agent (the other two are branch manager and salesperson). Ms Kelland was and continues to be registered under the [Real Estate Agents Act](#) as an agent. [Section 6](#) of the Act provides that a person must not carry out any real estate agency work unless they are licenced or exempt from the licensing requirement.

apply to her at the relevant time because she was no longer working as a salesperson, her role having morphed into something else.

[20] [Section 51](#) has been traversed in a number of cases in the Authority, and was referred to by the Court in dealing with an application for leave to extend time to pursue a challenge in *Pollett v Browns Real Estate Ltd*.⁴ There the Court made the following observations:

[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](#)...”. ... 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](#).

(emphasis added)

[21] Taken to its logical conclusion, the company’s argument as to [s 51\(2\)](#) is that, having signed an independent contractor

agreement as salesperson, Ms Kelland was, for as long as she worked with it in *any* capacity, locked in as an independent contractor by virtue of [s 51\(2\)](#). While I accept that this raises a question of law, it is not a question which appears (at least at this stage) to be a difficult one to answer.

[22] Determination of the case will otherwise require an analysis of the nature and scope of the role Ms Kelland was actually undertaking at the time her working relationship with the company came to an end. If she was acting solely as a salesperson then that is likely to be the end of the matter. Conversely, if the facts point to her undertaking a wholly different role (as she says) the result is likely to be different. If the factual inquiry points to some sort of hybrid role at the relevant time then legal issues will no doubt arise as to the impact of that. At this point it cannot

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

be said with confidence that such issues are likely, or unlikely, to arise. It is simply possible.

[23] Mr Donovan further submitted that the definition of salesperson within [s 4](#) of the [Real Estate Agents Act](#) would inevitably come into play.⁵ “Salesperson” is defined as meaning a person who holds, or is deemed to hold, a current licence as a salesperson under the Act. I understood Mr Donovan to be submitting that an important question of statutory interpretation will arise as to what the words “deemed to hold” mean for the purposes of [s 4](#). If, properly interpreted, Ms Kelland was deemed to be a salesperson then that would, it was said, impact on the application of [s 51](#).

[24] It is well established that deeming is a statutory technique to extend a word or definition beyond its ordinary meaning, or to make clear something which might otherwise be debatable.⁶ And it has previously been observed that “the hypothetical must not be allowed to oust the real further than obedience to the statute compels.”⁷ In this case, it appears that [s 167](#) (which sets out the circumstances in which a person will be deemed to hold a licence as a salesperson and which is a transitional provision) provides the answer to the question of statutory interpretation that has been posed.⁸

[25] Mr Donovan referred to an earlier judgment of the Court in *McLean v Buy West Realty Ltd*, where Judge Shaw had dealt with the issue of whether a branch manager could be deemed to be a salesperson.⁹ *McLean* was decided under the previous legislation, and was described at the time as a test case. Mr Donovan suggests that the same descriptor could equally be applied in the circumstances of the present case, given that the definition of “salesperson” has been amended since

5. “[S]alesperson” is defined as meaning “a person who holds, or is deemed to hold, a current [licence](#) as a [salesperson](#) under this Act”; “agent means a real estate agent who holds, or is deemed to hold, a current [licence](#) as an agent under this Act”; “licence means a licence granted under this Act to act as an [agent, branch manager, or salesperson](#)”; “licensee means an [agent, a branch manager, or a salesperson](#)”.
6. Peter Spiller *Butterworths New Zealand Law Dictionary* (7th ed, LexisNexis NZ Ltd, Wellington 2011).
7. *Polydor Ltd and RSO Records Inc v Harlequin Record Shops Ltd and Simons Records Ltd* [1980 1 CMLR 669 (Ch D)] at [11].

8 See [Real Estate Agents Act 2008, s 167\(1\)](#).

9 *McLean v Buy West Realty Ltd* [2006] NZEmpC 100; [2006] ERNZ 908, (2006) NZELR 193 (EmpC).

Judge Shaw’s decision in *McLean*. I doubt that this is so. In *McLean*, the question was focussed on whether a branch manager was an “officer of a company”, thereby falling within the deeming provision. That is not the question in the present case. Further, the definition contained within the 2008 Act appears to have been simplified. I do not accept that the mere fact of legislative amendment supports the argument for special leave, much less having regard to the nature of the amendment in the present case.

[26] I am not satisfied that an important question of law is likely to arise in relation to s 51, and I am not persuaded that a decision in the particular circumstances of this case is likely to have the broader impact contended for. Even if I was satisfied that the grounds in s 178(2)(a) had been made out I would not have granted leave in the particular circumstances (and for reasons I touch on below).

Heads of Agreement

[27] The applicant’s second proposed question of law relates to the status of the heads of agreement dated 8 July 2014. I understood the applicant to be submitting that an important question of law arose because of inconsistencies between this document and the contract for services which Ms Kelland signed.

[28] I do not accept that the documentation, or the application of it, gives rise to an important question of law. Any issues as to inconsistencies will likely be worked through in the usual way, and predominantly on the basis of the evidence given.

Conclusion on s 178(2)(a)

[29] I am not satisfied that the grounds in s 178(2)(a) have been made out. The application for special leave is accordingly declined.

[30] For completeness, I would not otherwise have exercised my residual discretion to grant special leave in the particular circumstances. There is little doubt that numerous factual issues will arise for determination. There have already been significant delays in dealing with the case (the parties are at odds over whether the

applicant is responsible for those delays) and the Authority is poised and ready to undertake a prompt investigation. If the applicant is dissatisfied with the result it can challenge, including on a non-de novo basis. There is, conversely, no surety that there will be a challenge in the event that the company succeeds.

Other matters

[31] While the application referred to the inevitability of challenge and damage to reputation as additional grounds for the grant of special leave they were not, as I have said, pursued in argument. I deal with them for completeness.

‘Challenge-inevitability’

[32] ‘Challenge-inevitability’ is not one of the grounds provided for in s 178(3). Rather, the provision refers (in terms of the Court’s powers to deal with an application for special leave) back to the grounds specified in s 178(2)(a)-(c). The broader grounds in s 178(2)(d) are notably absent. As observed in *Johnston*:¹⁰

[39] Section 178(2)(d) leaves open the possibility that there will be some cases, not clearly falling within (a)-(c), which might otherwise appropriately be removed to the Court where the Authority considers it appropriate to do so. Section 178(2)(d) is to be interpreted in light of its text and its purpose. The overarching point will be whether a particular case is best suited for resolution by the Authority’s investigative processes or by the more formal adversarial processes of the Court. This may engage issues of cost and proportionality. A case which, for example, is likely to consume weeks of hearing time in the Authority, requiring a more formal, procedure-laden approach, and where the unsuccessful party is likely to wish to pursue their statutory right of de novo challenge, may well be better suited for hearing in the Court. Much will depend on the circumstances of each case.

[33] There are some cases which, for a variety of reasons, will almost inevitably be challenged by the unsuccessful party and which it can confidently be predicted will wend their way through the appellate pathways. This case is not in that category. That is not to say that it will not ultimately be challenged; simply that it does not immediately impress as a case that might warrant the application of such resources. The key point is that mere assertions that a relatively straightforward case

¹⁰ *Johnston v The Fletcher Construction Co Ltd*, above n 2. (footnotes omitted)

will be subject to a challenge cannot suffice. If it were otherwise, s 178(3) would provide an automatic route through to the Court on a ground which is not articulated by the provision itself.

Damage to reputation

[34] Damage to reputation is not a ground for special leave. Even if it was I would not have ordered removal on this basis in this case. Nor would I regard it as supporting removal in any event. It is not uncommon for proceedings in the Authority to raise concerns about possible damage to reputation. Like the Court, the Authority has a number of mechanisms available to it to address such issues, where appropriate. As the Authority Member observed when declining the original application to remove the matter to the Court, precisely the same concerns identified in relation to reputational damage in the Authority would arise in the Court. In these circumstances it is difficult to see how such potential damage bolsters an argument for removal.

Conclusion

[35] The application for special leave is declined.

Costs

[36] Costs are reserved. If they cannot be agreed, the respondent is to file and serve any submissions in support of an application for costs within 15 working days of the date of this judgment; any response from the applicant within a further 15 working days; and anything strictly in reply within a further five working days.

Christina Inglis Chief Judge

Judgment signed at 2.30 pm on 29 March 2018

NZLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.nzlii.org/nz/cases/NZEmpC/2018/28.html>