Determination Number: AA 210/01
File Number: AEA 503/01

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND OFFICE**

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| **BETWEEN** | Dean Curlew (Applicant) |
| **AND** | Harvey Norman Stores (NZ) Pty. Limited (Respondent) |
| **REPRESENTATIVES** | Chris Patterson, Counsel for the applicant<br>Jane Latimer, Counsel for the respondent |
| **MEMBER OF AUTHORITY** | James Wilson |
| **INVESTIGATION MEETING** | 23 November 2001 |
| **DATE OF DETERMINATION** | 4 December 2001 |

DETERMINATION OF THE AUTHORITY

1. In a statement lodged with the Authority on 24 July 2001, the applicant, Dean Curlew, said that the problem he wished the Authority to resolve was:

> *A declaration be made that I was an employee of Harvey Norman Stores ('my employer');*
>
> *I was unjustifiably dismissed in my employment with my employer; and*
>
> *I have had holiday pay and payments for working statutory holidays withheld from me by my employer.*

2. In their statement in reply to Mr Curlew's application the respondent, Harvey Norman Stores (NZ) Pty Ltd (Harvey Norman), said:

> *The applicant was not an employee of (Harvey Norman) and thus the Employment Relations Authority has no jurisdiction over this matter apart from determining for purpose of s6 Employment Relations Act 2000, whether or not the applicant was an employee at the relevant time.*
>
> *The respondent was not unjustifiably dismissed.*
>
> *The applicant was not entitled to holiday pay or payments for working statutory holidays.*

3. As Harvey Norman correctly point out, if Mr Curlew was not an employee of Harvey Norman the Authority has no jurisdiction to determine whether or not the termination of his contract was justified. For this reason, following an initial telephone conference with the parties, it was agreed that, before considering whether or not Mr Curlew had been unjustifiably dismissed, the Authority should first hold an investigation meeting to determine whether or not Mr Curlew was an employee.

**Background**

4. Before coming to New Zealand Mr Curlew was employed within the Harvey Norman organisation in Australia. In June 1997 he was employed by Harvey Norman in New Zealand and in September that year he entered into what was referred to as a "consulting contract". Initially Mr Curlew became the joint "proprietor", with a Mr Mather, of the computer department in Harvey Norman's Wairau Park store. Some two years later (late 1999?) Mr Curlew became the sole "proprietor" of the computer department in the Porirua store.

5. In early 2001 Mr Curlew "transferred" to the Mt Wellington store. On 16 February 2001 Harvey Norman formally terminated Mr Curlew's "consulting contract".

6. Although I have referred to Mr Curlew entering into a contract with Harvey Norman, Mr Curlew in fact signed the contract on behalf of a company called Curly Ltd. Curly Ltd is, in turn, a trustee of the Paekakariki Trust. Curly Ltd "employed" Mr Curlew to carry out the services it has contracted to provide to Harvey Norman as set out in the consulting contract. According to Harvey Norman's General Manager -- Finance and Administration, Mr Neil Berryman, this arrangement applies to all Harvey Norman's store "proprietors" in New Zealand.

7. The consulting contract entered into between Curly Ltd and Harvey Norman provides that Curly Ltd, as *contractor* is to provide:

> *specified services for marketing, management and related services to the Business in the Store upon the terms and subject to the conditions of this agreement.*

The *specified services* are set out in a schedule to the contract as:

> *Management services relating to the Business.*
>
> *Marketing services relating to the Business.*
>
> *Research and advisory services relating to the Business.*
>
> *Any other services required for the successful conduct of the Business.*

*The Business* is defined as:

> *All functions relating to the merchandising of computer equipment and services.*

The contract provides that the *contractor* was to be paid a "fee" which was to be the greater of a retainer (approximately $60,000 plus GST per annum) and 25% of the net profit of *the Business*. (While Mr Curlew was joint proprietor at the Wairau store this percentage was 12.5%).

**Legal considerations**

8. Section 6 of the Employment Relations Act 2000 (the Act) sets out the definition of employee. Subsections (2) and (3) provide that:

> *(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*

9. As the Employment Court said, in *Koia v. Carlyon Holdings Ltd* (AC 56/01, 20 August 2001, unpublished), when reviewing section 6:

> *As can be seen, the accent is on the real nature of the relationship between the parties. This is what has to be ascertained for the purpose of deciding whether a person is employed by another person under a contract of service. Section 6(3) requires the Court to consider all relevant matters, including any matters that indicate the intention of the parties. Thus, intention is still relevant but it is no longer decisive. It is only one of the relevant matters that the Court must consider. Such matters may include control of working or evidence of carrying on business on one's own account and other factors……. The statutory provision goes on to say that the Court may not treat as decisive any statement by the parties describing the nature of their relationship.*

10. Later in *Koia* (supra), the Employment Court said:

> *As has been stated often enough, anything that can be done by an employee under a contract of service can also be done by an independent contractor under a contract for services. Moreover, the manner of remuneration of the employee or contractor can vary -- it may be by periodic payment according to the number of hours worked or it may be by way of commission on sales or business generated or it may be by piecework rates.*

11. In determining the *real nature of the relationship* it is helpful to consider the Privy Council's judgment in *Lee Ting Sang v. Chung Chi-Keung* [1990] 2 AC 374 where their Lordships said:

> *What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases. Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J in Market Investigations Ltd v. Minister of Social Security [1969] 2 QB 173, 184 -- 185:*
>
> > *'The fundamental test to be applied is this: 'is the person who has engaged himself to perform the services performing them as a person in business on his own account?' If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.'*

**The law applied to Mr Curlew**

11. On behalf of Mr Curlew, Mr Patterson made detailed submissions suggesting that despite the labels and the wording of the consulting contract, the *real nature* of Mr Curlew's relationship with Harvey Norman was that of an employee. In summary the main points of Mr Patterson's argument are:

- Although Harvey Norman intended that Mr Curlew be a contractor, and all the labels in the contract indicated this, the Employment Relations Act requires that the *intention of the persons* is only one of the matters to be considered. The Act also says that the "labels" (*any statement by the persons that describes the nature of the relationship)* are *not to be treated as a determining matter.*
- The level of control exerted including dress codes, hours worked, terms and sale and credit, financial and management systems, use of the Harvey Norman name, trademarks etc., advertising and promotional material and so on, indicate that Mr Curlew was an employee.
- Mr Curlew's duties and responsibilities were to manage the computer department. His duties were integral to Harvey Norman's business.
- As Mr Curlew received a base retainer irrespective of the level of profit he carried no financial risk other than not achieving his *performance based bonuses* (Mr Patterson's description)
- Mr Curlew was not *in business for himself.* The staff of the computer department were employees Harvey Norman. The stock was owned by Harvey Norman. Unlike the circumstances in *Koia* (supra), Mr Curlew did not purchase goodwill and there was no goodwill to on-sell.

12. On behalf of Harvey Norman, Ms Latimer also made detailed submissions in respect to Mr Curlew's status. In these submissions she also discussed the *intention of parties*, the level of control, the level of integration and whether or not Mr Curlew was *in business on his own account*. Not surprisingly, she draws the conclusion that Mr Curlew was a contractor not an employee.

13. As quoted in *Lee Ting Sang* (supra) the level of control, while it should be considered, *can no longer be regarded as the sole determining factor*. In Harvey Norman's case, the level of control they exerted over Mr Curlew was no more than that evident in many franchise businesses. While Harvey Norman are not a franchise business they operate in many respects in a similar fashion. Harvey Norman are, naturally, keen to maintain their good name and business. As with many franchisers, they require those that provide services using the franchise identity to meet certain standards and operate in certain uniform and recognisable ways. These requirements do not, of themselves, make all franchisees employees.

14. In deciding the *real nature* of Mr Curlew's relationship with Harvey Norman, it is necessary to consider two relevant matters. The first is the intention of the parties. The second is whether or not Mr Curlew was *in business for himself* (the fundamental test).

**The intention of the parties**

15. There is absolutely no doubt that **Harvey Norman intended to enter into a contract for services** i.e. that Mr Curlew be a contractor. Mr Curlew says that he always regarded himself as an employee. He said in his statement of evidence that, when he signed the consulting contract he did not seek legal advice nor was he fully aware of the legal implications of the contract. He said that he was not offered the opportunity to seek legal advice and that he had signed the contract at the same meeting it was presented to him. However, when pressed on this point at the investigation meeting, Mr Curlew acknowledged that Harvey Norman had offered him the opportunity to seek independent advice. He said that he chose not to as the contract appeared to be non-negotiable.

16. Before entering into this contract Mr Curlew had been employed in the Harvey Norman organisation both in Australia and New Zealand. He entered into this contract with the full intention of making the most of the financial opportunities it provided. While he may not have been aware of the potential risks he had ample opportunity to seek advice. **I find that Mr Curlew's intention was to enter into a *contract for services*.**

**Was Mr Curlew in business for himself?**

17. During my investigation Harvey Norman requested that I hear evidence from two other Harvey Norman "proprietors" -- Mr Papadopoulos and Mr Thompson. In addition to being proprietors in their own right Mr Papadopoulos and Mr Thompson are contracted to Harvey Norman to provide advisory and supervisory services to Harvey Norman and to other proprietors. Mr Patterson objected to the admissibility of the evidence of these two witnesses on the basis that:

> *…the above stated evidence should be excluded on the basis of relevancy and fairness. Mr Curlew claims Harvey Norman employed him. That relationship was an individual employment relationship. Harvey Norman's relationship with third parties including Messrs Thompson and Papadopoulos is irrelevant. The belief that Messrs Thompson and Papadopoulos have regarding the status of their relationship with Harvey Norman is also irrelevant.*

18. Despite Mr Patterson's objection I chose to hear from both Mr Thompson and Mr Papadopoulos. Both men have entered into similar "consulting contracts" as Mr Curlew. I accept Mr Patterson's argument that Mr Curlew's relationship with Harvey Norman may have been different in some respects and a similarity between the respective relationships with Harvey Norman should not be assumed. However both Mr Papadopoulos and Mr Thompson were able to provide some insight into how their particular relationships with Harvey Norman operated. As it happens Mr Curlew's own evidence, particularly the details he outlined when questioned at the investigation meeting, provided a clear picture of the day-to-day workings of his relationship with Harvey Norman. (In this regard Mr Curlew's verbal evidence was, on several key points, at variance with his written statement of evidence). His evidence was for the most part merely confirmed by that given by Mr Papadopoulos and Mr Thompson.

19. In deciding whether Mr Curlew was in business on his own account it is necessary to review some aspects of the day-to-day operations of the Harvey Norman computer department.

- Although the staff, once appointed, were employees of Harvey Norman, Mr Curlew decided how many staff to employ, the mix and type of staff and how much they were to be paid. Mr Curlew was responsible for staff training, assessment, discipline and dismissal. All staff costs, including the cost of recruitment, training and costs incurred in defending or settlement of disputes were a charge against the business. Mr Curlew could, if he chose, employ fewer and/or cheaper staff thus increasing the business's (and therefore his) profit.
- The decision on the stock to be purchased, including both which items and the number and/or volume of each, was made by Mr Curlew. While a committee of proprietors made some decisions on the stock to be purchased. the proportion of stock purchased through this committee was relatively small. Purchase via the committee was not compulsory and, in any event Mr Curlew was a member of the committee. Once purchased the stock became the property of Harvey Norman.
- Mr Curlew had the freedom to lay out the computer department in any way he saw fit. This included in-house signage and advertising.
- While Harvey Norman supplied stationery for use with the in store computers (sales dockets, credit forms etc), all other stationery and miscellaneous purchases were within Mr Curlew's control.

20. The decisions Mr Curlew was able to make affected the level of his income. He was able to *profit from the sound management in the performance of his task* (*Lee Ting Sang*, supra). Mr Curlew's decisions were business decisions. **Mr Curlew was in business for himself.**

## Determination

21. When Harvey Norman and Mr Curlew signed their "consulting contract" both parties intended that it be a contract for services. Mr Curlew was in business for himself. **The real nature of Mr Curlew's relationship with Harvey Norman was one of contractor and principal. Mr Curlew was not an employee and the Authority therefore has no jurisdiction to determine whether or not the termination of his contract with Harvey Norman was justified.**

## Costs

22. Costs are reserved in the hope that the parties may be able to reach an amicable agreement on this matter. The parties are reminded that prior to the investigation meeting, Mr Patterson had made application for an interim order with respect to costs in favour of Mr Curlew. My expectation is that the parties will take account of Mr Patterson's application, and Ms Latimer's response, when discussing the issue of costs. If the parties are unable to reach agreement on this matter the respondent may file and serve an application in respect to costs within 21 days of the date of this determination. The applicant will then have a further 14 days in which to respond. Should such application be made I will assume that Mr Curlew/Mr Patterson wishes to pursue his interim application. That being the case it is my intention to determine both cost applications together.

James Wilson
Member of Employment Relations Authority