

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Jeannette Brown (Applicant)

**AND** Allied Real Estate (1997) Limited. t/a LJ Hooker Oriental Bay  
(Respondent)

**REPRESENTATIVES** Geoff O'Sullivan and Sarah Mann, Counsel for Applicant  
Paul May, Counsel for Respondent

**MEMBER OF AUTHORITY** P R Stapp

**INVESTIGATION MEETING** Wellington 11 June 2002

**DATE OF DETERMINATION** 24 July 2002

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

1. Jeanette Brown has lodged an employment relationship problem and claimed that she was an employee of Allied Real Estate (1997) Limited trading as LJ Hooker (Allied Real Estate). She claims that she was unjustifiably dismissed from her employment. She claims that her dismissal was not a genuine redundancy and that her dismissal was procedurally unfair.
2. Allied Real Estate denies the claims. It claims that Mrs Brown was a contractor.

**The facts**

3. Jeanette Brown commenced her engagement with Allied Real Estate (1997) Limited in the position of property manager on 24 May 2000 at the Oriental Bay office without a licence. Also working out of that office was another staff member, Megan McKinstry whose role satisfied the requirements of a licence in the office as required under the Real Estate Agents Act. Prior to her engagement Mrs. Brown ran her own company which specialised in property management services. She took approximately 18 tenancies to Allied Real Estate when she commenced her engagement. Mrs. Brown completed her qualifications in July 2001 and by October 8 2001 was licensed.

4. Mrs Brown was handed a contract before she started and wanted a few days to consider it. During this time Steve Fejos (the principal of Allied Real Estate under the franchise of LJ Hookers) gave her another contract. She signed this contract (document 1). At the time Mrs Brown says she was confused about the nature of the contract that she signed. Initially she discussed the contract with her husband, Christopher Brown. Subsequently she discussed the contract with the IRD where she spoke with a supervisor who she says dealt with GST specifically. She also was concerned enough to discuss the matter with her sister in law who she says is a chartered accountant. She says her sister in law advised her that she was an employee and GST was irrelevant. She says that she checked with Mr Fejos as to whether she was required to invoice him. She says he said no. This is consistent with the evidence where the company prepared invoices.
5. The contract that Mrs Brown signed made provision for a three month trial period, after which time, and assuming both parties were satisfied, a permanent position might be offered. Indeed, Mrs Brown was given a letter from Mr Fejos dated 30 August 2000. This letter confirmed the three-month trial period had lapsed. It also confirmed that he was pleased to offer a full-time permanent position with Allied Real Estate (1997) Limited on the terms stated in the employment contract (document 1).
6. Upon receipt of the letter dated 30 August 2000 (document 3) Mrs Brown believed that her employment status was secure and that she was an employee and any confusion she felt in regard to the contract had been alleviated. Mrs Brown's contract made provisions for holidays and sick leave. She did not pay the GST and nor did she claim for GST. She was not required to invoice Allied Real Estate and her fortnightly salary statements outlined that PAYE was being deducted from the fortnightly salary payment, as did her commission statements. Deductions were also made from her salary for ACC (documents 24, 25, 26, 27, 28, and 29).
7. On 21 September 2001 there was a staff meeting at the Hotel Raphael in Oriental Bay. Mrs Brown was not able to attend that meeting. Mr Fejos later approached her where he informed her that he had purchased the Willis Street branch of LJ Hooker where Simone Wootton was engaged to add to his Allied Real Estate portfolio. It is disputed whether he told her that all staff would be keeping their jobs at the Willis Street branch. Mrs Brown says that she learnt that the receptionist from the Willis Street branch had been dismissed. In the same period Mrs Brown says she heard numerous rumours about the relocation of the property management function to Willis Street. Mrs Brown accepts that Mr Fejos told her that he was

thinking of relocating the property management section to the Willis Street office because of the foot traffic. She also says that she was told that she might be moved to the Willis Street office to work with the Willis Street office staff, one of who was employed as the property manager of the office.

8. On Monday 8 October 2000 Mr Fejos requested Mrs Brown to put together a report on how she thought the merger of the two offices might work (document 5). Mrs McKinstry was apparently also asked to provide a report and she provided Mr Fejos with an oral report. Mrs Brown provided Mr Fejos with her plan on the merger on Thursday 11 October 2001. That evening Mr Fejos decided to make Mrs Brown's position redundant.
9. Mr Fejos and Mrs Brown agreed to meet at 5.00pm on Friday, 12 October 2000. The meeting on 12 October went ahead when all other staff had gone. It was at this meeting that Mr Fejos told Mrs Brown that he was terminating her engagement from Allied Real Estate. It is common ground that he handed her a letter explaining why he was terminating her engagement (document 6, 12 October 2001). Mr Fejos and Mrs Brown dispute when he gave her a second envelope with a cheque-either in the office as Mrs Brown complains, or at the car as Mr Fejos contends.
10. About a week after the termination of her engagement Mrs Brown received a telephone call from Mr Fejos that she has taken exception to when Mr. Fejos allegedly called her "girlie" and allegedly threatened her, which he denied. Mrs. Brown was offered alternative employment elsewhere but did not take it up because she considered she was not able to under the terms of a restraint clause in her contract. However she took customers with her to continue managing their properties. The restraint was lifted on 23 January 2002.
11. The other people involved, Simone Wootton and Megan McKinstry were offered ambiguous agreements as property managers on 14 October 2001 that were accepted by them on 22 and 24 October respectively.

### **The current proceedings**

12. The Statement of Problem was lodged in the Authority on 12 December 2001 and the relevant documents, including the 18 May 2000 contract, Code of Conduct, Mrs Brown's report, property management commissions, and a letter dated 16 November 2001, were provided for the Authority. The Statement in Reply was lodged on 20 December 2001. The Statement in Reply gave a very brief account of the relevant facts that relied solely on a dispute about whether Mrs Brown's position was an independent contractor with reference to the Real

Estate Agents Act 1976 and the Employment Relations Act 2000. No other details or documents were provided. The parties attended mediation and the matter remained unresolved. Thus the Authority has been asked to provide a determination. The issue in this matter is primarily whether Mrs Brown's engagement with Allied Real Estate (1997) Limited trading as LJ Hooker Oriental Bay, was as a contractor or an employee. If there is a determination that Mrs Brown was an employee then the issue is whether she was genuinely made redundant and whether Mr Fejos followed a fair procedure.

13. At the commencement of the investigation meeting, Mr Fejos' representative announced that for the company, the primary issue was whether Mrs Brown was a contractor and that on his instructions the issue of the redundancy/dismissal and its justification would be conceded. The outstanding issue therefore would be one that was in regard to the quantum of any remedies that Mrs Brown would be entitled to if she had a finding in her favour. However, in the course of the Authority's questioning Mr Fejos maintained that any redundancy was justified and the procedure that he followed was fair. Therefore, this was an issue that the Authority had to take up.

### **Determination**

14. It is an undisputed fact that the applicant held the position of property manager for Allied Real Estate (1997) Limited. She acted as an agent in respect of the leasing and letting of land. Accordingly, I hold that the applicant, in her position, comes under the definition of a "real estate agent" under the Real Estate Agents Act 1976. The amendment to the Real Estate Agents Act in 1992 resulted in the enactment of s.51A. This section was enacted in order to affirm all parties' right to chose what kind of relationship they wanted to enter into.<sup>1</sup>
15. Under s.51A of the Real Estate Agents Act a salesperson engaged after the commencement of the Real Estate Agents Amendment Act 1992 would only be deemed to be an independent contractor if both parties expressly agreed. Mrs. Brown was engaged on 24 May 2000. It is an argument between the parties as to whether there was any express agreement between them as to Mrs. Brown's status. Except for one clause, the contract failed to expressly state that the relationship was an independent contractor. There are numerous references to employment within the contract and indeed the contract itself is referred to as an "employment contract". The reference in clause 1.2, which refers to an independent contractor, is in complete contrast to the numerous references to employment outlined both before and after clause 1.2. Indeed

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<sup>1</sup> *Challenge Realty Ltd v. CIR* [1990] 3 NZLR 42 (CA)

the contract itself is distinctively different to the draft contract that would apply to independent contractors in the industry and used by Mr. Fejos for his other agents. Mrs. Brown's contract even makes provision for disputes and grievances to be resolved under the Employment Contracts Act 1991.

16. I hold that the applicant and the respondent did not expressly agree that their relationship was one of agent and independent contractor. I have reached this conclusion by assessing the contract, the letter dated 30 August 2001 and the basis upon which Mrs Brown was paid (notwithstanding that an arrangement had been made by Mr Fejos to include GST). The fact of the matter was that the GST was purportedly taxed as PAYE or withholding tax.
17. Another factor is that Mr Fejos now says that the contract was a mistake. He says that he skim read the letter that he signed without fully understanding its implications and that flowing from this, his PA got the method of payment wrong, albeit it was consistent with what he believed was required for an independent contractor in the industry. I hold that Mr. Fejos' evidence is not plausible considering his experience in the industry and supposed understanding of contractual arrangements.
18. The tests that are otherwise applied in regard to determining whether a person is an employee or an independent contractor rely on the real nature of the relationship. The Authority is required to consider a range of matters when undertaking such a determination.<sup>2</sup> They are useful as clues in this case to understanding what was agreed.
19. The intention of the parties is still relevant. However, recent case law (see footnote) indicates that not just the contractual relationship between the parties is taken into account, but requires consideration of –
  - a) What was the intention of the parties?
  - b) What other matters are relevant?

Any statements by either of the parties that describe the nature of the relationship are not to be treated as determinative. It is accepted by the parties that the contract that was entered into between Mrs Brown and Allied Real Estate was ambiguous. It is Mrs Brown's contention that the contract was clear and that it was a true intention of the parties in the nature of a contract of service, particularly after it was confirmed (document 3).

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<sup>2</sup> *Koia v Carlyon Holdings Ltd* (20 August 2001 Goddard CJ, Travis and Colgan JJ AC 56/01) and *Hook v JB's Contractors Ltd* (22 March 2001 J Wilson AA21/01)

20. Section 6 (2) of the Employment Relations Act 2000 reads as follows:

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

21. Further, s.6(4) of the Act provides:

*“Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 1976.”*

22. Factors for the Authority to use to help indicate the intention of the parties include:

- a) The oral declarations of the parties’ intentions.
- b) The parties’ conduct.
- c) The context of the commercial environment in which the contract was made. Emphasising custom and practice within the specific industry may be of relevance.
- d) The degree of control that the company exercised over the individual.
- e) Whether or not the individual was in business on his or her own account taking in regard such matters as equipment, degree of financial risk and degree of responsibility for investment in management (*Lee Ting Sing v. Chung Chi-Keung* [1990] 2 AC 374).
- f) The extent of the work being integrated into the business organisation.

23. The contract that the applicant and the respondent signed agreeing to the terms of their relationship included numerous references to employment. These references included –

- the title of the document being contract of employment;
- a reference within clause 2 stipulating when the applicant’s employment would commence;
- the reference to remuneration and the income the applicant would receive;
- the reference within clause 4 outlining that the contract of employment allowed for an initial three month trial period;
- clause 5 outlining the strict requirement of the applicant having to be flexible with her working hours;

- clauses 6 and 7 referred to the applicant's entitlement under the Holidays Act 1981 in respect of public holidays, annual leave and special leave;
  - clause 8 outlined that the applicant had to devote her full time and energies to her position and was not entitled to engage in any other business or activity which might prejudice her ability to carry out her responsibilities;
  - clause 10 referred to the confidentiality and referred to the applicant's relationship with the respondent being one of employment with the company;
  - clause 13 made provision for privacy. This indicated the degree of control which the respondent held over the applicant in regards to retaining all personal information concerning her employment;
  - clause 14 made provision for the termination of the applicant's employment, specifically referring to the circumstances of redundancy;
  - clause 14 referred specifically to the applicant's relationship with the respondent being one of employment;
  - clause 17 made provision for a restraint of trade. This referred to the applicant's employment with the respondent;
  - clause 19 outlined the applicant's right to take a personal grievance against the respondent. Such a right is only available to an employee. Further, specific reference was made to the Employment Contracts Act 1991.
24. Another factor was the Code of Conduct attached to the applicant's contract that made numerous references to her relationship being one of employment with Allied Real Estate.
25. The letter dated 30 October 2001 (document 3) was headed "Employment Property Manager". The letter read as follows:
- "As discussed, the initial three month trial period of your employment as property manager as stated in the employment contract has elapsed. I am pleased to now offer you a full-time, permanent position with Allied Real Estate (1997) Limited on the terms stated in the employment contract."*
26. The letter made it clear to the applicant that she was an employee so that any prior concerns she might have had about her status were alleviated at that point. I accept that if Mr. Fejos had wanted Mrs. Brown to be an independent contractor he had the opportunity to utilise a

clearer contract based on custom and practice in the industry, despite her not raising her concerns with him.

27. The method of pay and the conduct of Mr. Fejos indicate the nature of a relationship in the nature of employment.
28. There are a number of elements of “control” in her relationship that are relevant. These include the leases associated with the company and not her own. Allied Real Estate paid for her mobile phone costs associated with her work and she was provided with a pager also.
29. Mrs. Brown was expected to devote hours as necessary to her duties, including being flexible and using weekends to lease and manage properties for the company.
30. The Company’s policy document is evidence of the manner of instructions relating to Mrs. Brown carrying out her duties. The policy document made provision for how appraisals, listings, keys, contracts, buyers, signboards, photography, floor time, deposits and equipment were to be handled.
31. Full control on financing and accounting was vested in the company. The company had the risk with the business and Mrs. Brown was not in business on her own account. Mrs. Brown was guaranteed a certain level of income. She reported to Mr. Fejos.
32. Another clue is the tax arrangements. Mrs. Brown provided her IRD number upon starting. She did not have to provide invoices, which were generated by the company. She was provided with a fortnightly salary, a salary where reference was made to PAYE deductions (exhibits 25,26,27,28 and 29). The evidence is contradictory in regard to the deduction of withholding tax and PAYE (exhibits 28, 29, 30). The reference to GST in the contract and other documents is not determinative of the matter.
33. Finally Mrs. Brown’s role was integrated in the office of Allied Real Estate for property management with another employee who was licensed, a requirement for the office. Mrs. Brown was not free to act as a property manager for more than one licensed Real Estate Agent. She attended property management meetings on the running of the office/division profitably. She was purportedly involved in reporting on changes to the agency’s office at Oriental Bay and Willis Street. Mrs. Brown’s role as an employee was further confirmed in her termination, being a letter dated 12 October 2001 that she was redundant and paid out in accordance with her contract on notice (document 6).

34. I conclude that Mrs. Brown was an employee. There was no express agreement for Mrs. Brown to be a contractor.
35. At the outset of the investigation Mr. Fejos' representative conceded the issue related to the quantum of compensation that she should be paid, in the event that Mrs. Brown was an employee. However Mr. Fejos resiled from that position when the Authority questioned him. The response to the alleged personal grievance never raised a justification for the termination (in the alternative) as an issue in the Statement in Reply.
36. I now turn to the reason for the termination. It is clear that this related to redundancy because Mr. Fejos purchased another office and decided to close down the property management functions of the Oriental Bay office, which Mrs. Brown worked in (exhibit 6). Document 6 expressly makes Mrs. Brown redundant. There is an argument about the numbers of staff and their roles required for the change.
37. It is a fact that Mrs. Brown was asked to provide a written report on the property management merger (document 5). Mr. Fejos relies upon the request for Mrs. Brown to provide this report as consultation and that she knew the division was making a loss and that work was needed to turn it around and the solution was raising more properties or cutting costs. It was not clear from Mr. Fejos the extent of any management meetings and what Mr Fejos told Mrs Brown in regard to consulting her about the financial situation and the changes envisaged. Indeed there is a dispute between Mrs. Brown and Mr. Fejos about any promises made that he would not close the doors and reduce the numbers working. He denied saying that the Willis Street staff would keep their jobs. There was a dispute in the investigation about Mrs. Brown's knowledge of what she was aware of and why the report was required. Nothing turns on these differences except that in part I agree that the report could be a consultation in regard to the commercial decision being taken. However the evidence does not support Mr. Fejos being open in regard to the consequences to do with Mrs. Brown's employment and that she had clear options put to her to comment on. This is despite whether or not she knew much about the profitability and need for more properties or cost cutting. In fact he decided to dismiss her the evening before telling her she even faced the prospect of being made redundant. In such circumstances this could not be open to a fair and reasonable employer and of course any selection process appears tainted, the outcome of which is now subject to some disagreement. Also the lack of proper consultation and the circumstances of the decision calls in to doubt that Mr. Fejos's selection criteria he says he applied (paragraph 25 Fejos evidence in reply) was in his mind at the time. He certainly did not tell Mrs. Brown and consult her on it. She

has queried his decision and he never covered it in his evidence in chief. I hold that Allied Real Estate therefore cannot justify the decision to make Mrs. Brown redundant and show that the decision was fair. Mrs. Brown has a personal grievance.

38. I now turn to the remedies to resolve the employment relationship problem. Mrs. Brown is seeking compensation for lost salary and commission and compensation for humiliation loss of dignity and injury to feelings. Mrs. Brown is entitled to remedies because the redundancy was not proven to be genuine because of the nature of the consultation and issues about selection and she has given evidence of being upset.
39. I have decided that Mrs. Brown's loss of wages should be restricted to 16 weeks (3 months and 3 weeks). Mrs. Brown applied her restraint of trade provision in her contract that restricted her prospects of working in the area for 12 months, unless she obtained Mr. Fejos's permission. She says she could not bring her self to "beg" for his permission. Even although their relationship was affected by Mr. Fejos's telephone call Mrs Brown was still able to email him and on this basis I hold it would have been reasonable for her to raise the matter as she subsequently did with her lawyer (document 8). She left this matter until involving her lawyer in January. She was prepared for further contact if necessary in a business setting having regard to her email. She conceded in her email that Mr. Fejos made a business decision that was not unexpected that she says was to try and pacify the situation that is consistent with the tenor of the email. However she also did not dispute the employer's right to restructure the business. In doing so I have weighed up her claims that Mr. Fejos apparently gave commitments not to reduce staff that was not supported by any other evidence and her report on the changes involved. She did not take up the opportunity of another job offer that arose during the restraint period. Her employer finally decided not to enforce the restraint on 23 January 2002. Mrs. Brown was managing some properties after she left. Mrs. Brown was able to take property management customers with her albeit the income was very low (\$69.80 per week [Brown paragraph 56]). Mr. Fejos made no attempts to enforce the restraint. It is reasonable to expect that Mrs. Brown could have contacted Mr. Fejos directly or through her lawyer much earlier on the restraint. She is now pursuing her own business opportunities. Her decision and the circumstances that required her to mitigate her loss cannot be held against the employer to meet the claim for the total loss of some 32 weeks sought. Thus I have limited the claim to 16 weeks.
40. I calculate her loss having regard to the annual income being not less than \$50,000 under the individual contract of employment clause 3 (document 1) given the nature of the

commissions. At \$961.53 for 16 weeks I assess her loss as \$15,384.61 less \$1,116.80 (see Mrs. Brown's evidence paragraph 56). Her loss has been \$14,267.81. I order Allied Real Estate (1997) Limited to pay Mrs. Brown the sum of \$14,267.81 in the absence of any actions on her part, giving rise to her grievance.

41. I now turn to the claim for compensation for humiliation loss of dignity and injury to feelings. Mrs. Brown has claimed \$30,000. Her evidence simply does not establish this claim. However I am satisfied hearing from her and Mr. Brown that she was upset in regard to the events at the time and her upset was linked to her dismissal and how it was effected. She I hold was upset leaving the office and telephoning Mr. Brown and at home. I am mindful of the ranges of compensation and in particular how the Court of Appeal has dealt with compensation for redundancy where redundancy was justified. In this matter I consider the facts warrant an award in the \$8,000 range. I order Allied Real Estate (1997) Limited to pay Mrs. Brown the sum of \$8,000 under s.123 (c) (i) of the Act.

42. Costs are reserved.

P R Stapp  
Member of Employment Relations Authority