

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 168  
5627179

BETWEEN	DEBRA HARLOW Applicant
AND	WESTERN PROPERTY MANAGEMENT LIMITED (IN LIQUIDATION) First Respondent
AND	TONY TEAGUE Second Respondent
AND	WEST MANAGEMENT LIMITED Third Respondent

Investigation: On the papers

Representatives: James Turner, Counsel for the Applicant  
Peri Finnigan and Boris van Delden, liquidators, for the  
First Respondent  
Garry Pollak, Counsel for the Second and Third  
Respondents

Determination: 27 May 2016

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**DETERMINATION OF THE AUTHORITY**

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**A. This matter is removed to the Employment Court to hear and determine.**

**Employment Relationship Problem**

[1] By statement of problem delivered to the Employment Relations Authority office on 20 May 2016 but not recorded as lodged, once the lodgement fee was paid, until 24 May 2016 Debra Harlow has sought a number of orders in pursuit of payments due to her under a determination of the Authority issued on 19 April 2016.<sup>1</sup>

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<sup>1</sup> *Harlow v Western Property Management Limited* [2016] NZERA Auckland 119.

[2] An earlier determination, issued on 15 January 2016, had found Ms Harlow was an employee of Western Property Management Limited (WPML), not an independent contractor, but declined to agree with her view that she was also jointly employed by WPML's director Tony Teague in his personal capacity.<sup>2</sup>

[3] The 19 April determination was issued by consent at the request of Ms Harlow and WPML. It recorded an agreement WPML would pay Ms Harlow arrears of wages, unpaid annual leave entitlements, unpaid public holiday and sick leave entitlements, lost remuneration (for wages lost after the end of her employment) and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) as well as paying a further sum towards her legal costs. Those payments were to be made within seven days of the agreement being signed, which was also on 19 April 2016, but their dollar value was to remain confidential to the parties. Through the consent determination those terms became the orders of the Authority.

[4] Ms Harlow's statement of problem in the present matter alleged WPML had not paid her the amounts by the due date. She sought a compliance order against "any or all of the respondents". She also sought an interim injunction to:

- (i) restrain WPML, Tony Teague or West Management Limited (WML) from breaching the consent determination; and
- (ii) freeze the bank account of WPML; and
- (iii) prevent or restrict Mr Teague from transferring assets of WPML to himself or WML; and
- (iv) require WPML, Mr Teague and WML to provide information about their bank account balances, assets, money, creditors and debtors.

[5] If a compliance order or an injunction was not granted she sought, as an alternative, an award of damages by "all or any of the respondents" for losses and costs resulting from breaches of the terms of the consent determination along with interest on the sums not paid when due.

[6] She also sought orders for a penalty to be awarded against WPML for breach of the determination and a penalty against Mr Teague and WML for aiding or abetting WPML's breach.

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<sup>2</sup> *Harlow v Western Property Management Limited & Tony Teague* [2016] NZERA Auckland 18.

**Removal to the Court**

[7] For reasons that follow I reached the view that this matter should be removed to the Employment Court for hearing and determination. I have done so under the provisions of s 178(1) and (2)(d) of the Act which allow the Authority to order removal of a matter on its own motion where the Authority is of the opinion that in all the circumstances the Court should determine the matter.

[8] By Members' Minute issued yesterday I invited the parties to provide any further information or their views in respect of the removal proposal by noon today. Counsel for Ms Harlow responded with an email noting the proposal. A response from the liquidators of WPML is referred to below. Garry Pollak advised the Authority by email this afternoon that he had been instructed to act for Mr Teague and WML. Mr Pollak said he was instructed on Tuesday, 24 May in relation to an urgent Employment Court hearing that occurred on Wednesday, 25 May and was to resume on Friday, 3 June but he was not in a position to respond further to the Authority until next week.

[9] The following aspects or circumstances of this matter were relevant to my opinion that the Court should determine the matter.

*Liquidation of WPML*

[10] Companies Office records show WPML was put into liquidation, by shareholder resolution, on 17 May 2016 – that is three days before Ms Harlow's statement of problem was presented to the Authority office and, because the lodgement fee was not paid, seven days before it was recorded as lodged.

[11] By email to an Authority officer yesterday counsel for Ms Harlow advised applications to the Authority and to the Court had been filed in haste on 20 May without knowing WPML was already in liquidation.

[12] On 25 May WPML liquidator Peri Finnigan of McDonald Vague advised the Authority by letter that, under s 248 of the Companies Act 1993, the liquidators did not consent to Ms Harlow commencing proceedings against WPML (in liquidation). This is the relevant portion of the statutory provision referred to:

**248 Effect of commencement of liquidation**

(1) With effect from the commencement of the liquidation of a company,—

...

(c) unless the liquidator agrees or the court orders otherwise, a person must not—

(i) commence or continue legal proceedings against the company or in relation to its property; or

(ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company: ...

[13] By memorandum to the Authority today the liquidators advised they did not object to removal of the entire matter to the Employment Court provided that was done without prejudice to their position that Ms Harlow's application, in respect of WPML, was lodged in breach of s 248(1) of the Companies Act and they had not consented to Ms Harlow commencing or continuing her proceedings against WPML (in liquidation). I agree the removal is without prejudice to the liquidators' position.

[14] It appears that WPML's liquidation, from 17 May 2016, and the position taken by the liquidators under s 248(1)(c)(i) of the Companies Act would prevent Ms Harlow succeeding in her application, whether taken as made on 20 May or 24 May, for a compliance order. There may be a different issue in respect of whether the liquidators would consent to Ms Harlow enforcing the remedies provided in the 19 April consent determination under s 248(1)(c)(ii) of the Companies Act. In respect of both subsection (1)(c)(i) and (ii) she also has the option of seeking an order of the High Court to commence proceedings or enforce remedies.

[15] However there are other aspects of the orders sought by Ms Harlow, for an injunction or damages, that mean the matter is not resolved simply by the answer that a compliance order was not available against a company in liquidation.

*Matters before the Court*

[16] From inquiries made to the Employment Court registry and from Mr Pollak's email today, the Authority understands aspects of this matter have been the subject of a hearing in the Court this week, due to continue next week. Although the Authority does not have any details of the contents of those hearings, the issue of whether an order should be made freezing WPML's bank account is a matter in the jurisdiction of the Court, not the Authority.<sup>3</sup>

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<sup>3</sup> Employment Relations Act 2000, s 190 (3).

[17] Any freezing order made, and management of the terms of such an order if adjustment is required during the course of proceedings, puts the parties to the time and expense of appearing in the Court for that purpose. Because there are some potentially complex jurisdictional and practical aspects in the particular circumstances of the claim made by Ms Harlow, it seems sensible to allow for the prospect that the Court can deal with all issues if it was able and minded to do so. If the Court was of the view that such a removal was not proper in this particular case, it could return the matter to the Authority for investigation.<sup>4</sup>

[18] There are some wider issues of jurisdiction and equity raised by Ms Harlow's claim, and its factual background, that may more appropriately be heard and decided by the Court. The scope and nature of those issues may be different from how they were pleaded in her statement of problem before being aware that WPML was already in liquidation. Those issues concern the ability of a former employee to enforce the terms of a consent determination, settled in this case around a month before a company's liquidation, or whether the failure to pay her is, like other disappointed creditors, simply a consequence permitted by the limited liability regime.

[19] Mr Teague had incorporated WML, of which he is the sole shareholder and director, in May 2015. In sworn oral evidence to an Authority investigation meeting held on 12 November 2015 Mr Teague was asked about the incorporation of WML and said he had no intention of liquidating WPML, of which he was also sole shareholder and director.<sup>5</sup> Ms Harlow's present application to the Authority attached a copy of a letter from Mr Teague to a WPML customer, dated 17 May 2016, advising that WML had purchased the business assets of WPML and the "restructuring of our business" would not impact its service to its customers.

[20] There are also other questions about whether Mr Teague and WML could be liable for a penalty for any alleged aiding and abetting of WPML in breaching the conditions of the consent determination and the settlement agreement terms on which that determination was based. A penalty is available under s 134(2) of the Act for aiding and abetting breaches of an employment agreement but the settlement agreement reached between Ms Harlow and WPML was concluded after her employment had ended, so it was not an employment agreement, and the remedy for

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<sup>4</sup> Employment Relations Act 2000, s 178(5).

<sup>5</sup> *Harlow*, above n 2, at [45].

breaching terms of the consent determination, in the Authority at least, is only a compliance order. While Mr Teague signed the settlement agreement as a director of WPML, neither he in his personal capacity nor WML was a party to that agreement or the determination, so it does not appear a compliance order would be available against them. In all those circumstances, including the apparent non-availability of a penalty, there are then questions about the extent to which damages might be available against at least Mr Teague if not WML.

[21] Whether some or any of those questions remained relevant and require resolution may more conveniently be addressed, in the first instance, in the matter as it is presently before the Court. Having reached this opinion I concluded the matter should be removed to the Court under s 178(2)(d) of the Act. The provisions of 2(a) concerning an other-than-incidental important question of law and 2(c) concerning related issues, in this case concerning control and access to assets of one or more parties, were also arguably applicable in reaching that conclusion but were part of “all the circumstances” considered under 2(d) rather than specific reasons. In exercising the statutory discretion to order the removal I also considered whether there were any reasons *against* doing so but concluded there were none sufficient not to make the order.<sup>6</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>6</sup> *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [29].