**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 319/09
5108380 and 5108391

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| | BETWEEN | ANURA JAYASEKARA and GEETHA JAYASEKARA<br>Applicants |
| | AND | PACIFICARE TRUST, A REGISTERED CHARITABLE TRUST<br>First Respondent |
| | AND | THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED<br>Second Respondent |
| | AND | MANGERE COMMUNITY HUB, A REGISTERED CHARITABLE TRUST<br>Third Respondent |
| Member of Authority: | Robin Arthur | |
| Representatives: | Kuresa Tiumalu-Faleseuga for Applicants<br>Fialauia Toailoa-Amituanai for First Respondent<br>Alan Rowe for Second Respondent<br>No appearance for Third Respondent | |
| Investigation Meeting: | 19 and 20 February 2009 | |
| Determination: | 7 September 2009 | |

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**DETERMINATION OF THE AUTHORITY**

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[1] The Applicants, Anura Jayasekara and Geetha Jayasekara, are husband and wife. Mr Jayasekara worked full-time as Finance and Administration Manager of Pacificare Trust (Pacificare), a charitable trust operating a hospital and rest home in Mangere. Mrs Jayasekara worked part-time as a book keeper for Pacificare.

[2] Pacificare took over the business in August 2006 after Culverden Group Limited lost its certification to operate the hospital and rest home. Ministry of Health

inspectors had found Culverden was not meeting legal standards required for care of more than 100 elderly and mostly Pacific Island residents and patients.

[3] Pacificare bought the rest home and hospital business but not the land or buildings. Its purchase involved taking out term loans totalling around $1 million. Those loans were secured by a General Security Agreement (GSA) over Pacificare's assets executed in May 2007. This Agreement was between Pacificare and New Zealand Guardian Trust Company Limited (Guardian) as trustee of the Primero Trust.

[4] By October 2007 Pacificare has fallen behind on its loan repayments. Guardian decided to exercise its powers under the GSA to become a mortgagee in possession of the business and assets of Pacificare.

[5] Guardian appointed an accountant, Ian Knobloch, as its agent to enter, hold and operate the business and those assets.

[6] On 31 October 2007 Mr Knobloch went to the hospital and rest home and took possession of the business.

[7] At the time of the Authority's investigation meeting Guardian continued to operate the facility as a mortgagee in possession.

[8] As part of the arrangements for entering into possession Mr Knobloch engaged Mangere Community Hub (MCH), another registered charitable trust, to provide services needed to continue operation of the hospital and rest home while Guardian had possession of the business.

[9] MCH employed some of the existing Pacificare employees to continue working at the facility – including community support workers Akeena Kapi and Lesieli Nanai. Those two women also lodged claims in the Authority against Pacificare and Guardian. Those claims were investigated at the same time as the claims of Mr and Mrs Jayasekara. A separate determination on those claims is also issued today (AA 318/09).

[10] Mr and Mrs Jayasekara were not offered employment by MCH. Both say they

were told by Mr Knobloch not to report to work after he took possession of the business for Guardian on 31 October 2007. Both claim they were entitled to be employed by Guardian as it continued to operate the business for which they worked. They now seek orders for the payment of wages, holiday pay and redundancy pay they say is owed to them by Guardian.

**The investigation**

[11] For the purposes of its investigation the Authority received written and oral evidence from Mr Jayasekara, Mrs Jayasekara, Ms Kapi, Ms Nanai, former Pacificare chief executive Afa'ese Manoa, former Pacificare chairperson and board member Taufao Lurch, Pacificare chairperson Fialauia Toailoa-Amituanai and Guardian's agent, Mr Knobloch.

[12] On its own motion the Authority joined MCH as a respondent and notices were served at its registered address. No statement in reply was received from MCH and no representative attended the investigation meeting.

[13] During the investigation meeting the parties' representatives were provided with the opportunity to ask additional questions and provide oral closing submissions.

**Issues**

[14] As clarified through the investigation, the applications of Mr and Mrs Jayasekara requires the Authority to determine two issues:

(i) Were Mr and Mrs Jayasekara ever employed, or entitled to be employed, by Guardian; and

(ii) Regardless of whether it became their employer, was Guardian obliged to pay wages, holiday pay and redundancy compensation to Mr and Mrs Jaysekara from funds in a Pacificare bank account that Guardian took control of as mortgagee in possession?

**Did Guardian become the employer of Mr and Mrs Jayasekara?**

[15] Mr Knobloch accepted in evidence that he asked Mr Jayasekara to leave the

premises on the day of taking possession on behalf of Guardian. Mrs Jayasekara was not at work on the day. Mr Knobloch did not reply to letters sent by Mr and Mrs Jayasekara in the following days asking if they should report for work.

[16] Mr Jayasekara's evidence was that Mr Knobloch, for Guardian, "*acted and behaved as the employer*" by taking away his mobile telephone and computer and telling him to leave. He says it is unfair that Guardian – either directly or through Mangere Community Hub – subsequently had other people do the work Mr and Mrs Jayasekara had done previously for the business.

[17] Mr Jayasekara does not make any claim against Pacificare, saying it has not treated him unfairly but simply "*can't access the trust business*" in order to pay the money claimed.

[18] Pacificare's statement in reply refers to Mr and Mrs Jayasekara as "*still*" its employees and declares an intention to "*reinstate*" them "*once things are back to normal*".

[19] The relevant principle for determining the employment status of Mr and Mrs Jayasekara can be found in a case decided long ago by the English Court of Appeal. The case is referred to in a useful law journal article about mortgagees in possession that Mr Tiumalu-Faleseuga provided to support his oral closing submissions for Mr and Mrs Jayasekara.[1]

[20] While the decision in *Reid v The Explosives Company Limited* (1887) 19 QBD 264, 267 was specifically about what effect receivership of a limited liability company had on employment, Lord Esher, *obiter*, described the effect on employees of a mortgagee taking possession in this way:

> *If there were one mortgagee of a business he might, on the failure of the mortgagor to comply with the terms of the mortgage agreement, take possession of the business. What would be the effect of that on the servants of the mortgagor who had contracts entitling them to notice of dismissal? Would the fact of the mortgagee taking possession be equivalent to dismissal by the mortgagor? We have tried to test that by the case of an employer who has servants in the*

[1] Daniel Armstrong, "*The Mortgagee Remedies of Entry into Possession and Receivership: Ancient Equity meets Modern Statute*", [2000] VUWLRev 35.

> *same position and who shuts up his business. That would amount to a wrongful dismissal, and would give the servants a right of action. So the fact of a mortgagee taking possession of the business of the mortgagor would be equivalent to a dismissal of the servants, and as this would occur by the default of the mortgagor, it would be a wrongful dismissal and would give a right of action. (emphasis added)*

[21] Lord Justice Fry in the same case stated he was "*not prepared to lay down that every entry by a mortgagee is a dismissal of the servants of the mortgagor from his employment*" but "*to see whether that has happened we should look to the facts in each case*".

[22] Adapting the language and analysis of the judges in that Victorian-era case to the present day, I find Guardian's entry into possession of the Pacificare business had the effect of terminating the employment agreements of Mr and Mrs Jayasekara with Pacificare. That effect occurred because of failures by Pacificare, not Guardian.

[23] The situation for Mr and Mrs Jayasekara was as if Pacificare had suddenly 'shut up shop'. Pacificare had lost control of its assets. It had no other operation or workplace to which it could deploy and use Mr and Mrs Jayasekara's skills.

[24] No employment relationship was automatically created with Guardian, its agent Mr Knobloch or its contractor MCH. Guardian was free to either have its own staff work in the business or engage Pacificare's surplus staff – an option Guardian exercised through contracting with MCH to, in turn, employ those staff necessary for continued operation of the business.

[25] Those not considered necessary – such as Mr and Mrs Jayasekara – have to look to Pacificare to meet whatever entitlements was provided in their employment agreements for the end of their employment.

[26] Mrs Jayasekara had a detailed written employment agreement, signed in 2006, which expressly excluded any redundancy compensation entitlement but provided for two weeks written notice in the event of termination of employment. Redundancy was defined as a situation where her "*employment is liable to be terminated, wholly or mainly, owing to the fact that [her] position is, or will become, superfluous to the needs of [Pacificare]*".

[27] Mr Jayasekara had an earlier, briefer agreement without any express provisions regarding redundancy and notice. In that situation he has no entitlement to any payment in compensation for redundancy. He did however have an implied term entitling him to reasonable notice which I find, in light of the similar term in other employees' agreements, to be two weeks.

[28] For the reasons described above, the positions of both Mr and Mrs Jayasekara had become superfluous to the needs of Pacificare. While Pacificare never formally terminated the employment relationship (but rather expressed a hope it might continue), the positions of the Jayasekaras were redundant. Payment of the notice period, along with pay for annual leave and any overdue wages is what Mr and Mrs Jayasekara are due from their former employer, Pacificare.

[29] Although not the subject of submissions by any party I have considered whether the particular circumstances may be within the scope of Part 6A of the Employment Relations Act 2000 (the Act). That Part provides protections for specified categories of employees – including workers in hospitals and aged care residential homes – in certain "*restructuring*" situations.

[30] However I consider the definition of "*restructuring*" at 69B of the Act does not apply to the circumstances in the present matter. The act of a mortgagee going into possession under the terms of a GSA where the mortgagee continues to operate the business does not amount to contracting, selling or transferring of the business as defined in s69B(a). Neither is that agreement a "*contract*" or "*arrangement*" of the type referred to at s69B(b). It was not one made "*after*" the employer has been adjudged bankrupt or gone into receivership or liquidation – circumstances which do not apply and could not apply because:

(i) The GSA was made before Pacificare got into financial difficulties meeting its loan commitments; and

(ii) Pacificare is not an individual who could be adjudged bankrupt and is not a registered company that could go into receivership or liquidation.

**Must Guardian pay Mr and Mrs Jayasekara from funds in a Pacificare bank account of which it took possession?**

[31] Pacificare's financial performance statement at the end of August 2007 showed net assets of $1,990,892 against which – among other items – a current liability of $211,346 was identified as "*payroll accruals*".

[32] Mr Jayasekara's evidence was this showed Pacificare had sufficient funds to meet payroll liabilities – both for wages and paid annual leave. He said money for this purpose was kept in Pacificare's 02 ASB bank account (the 02 account).

[33] A statement for the 02 account shows a balance of $49,294.52 on 9 November with $16,123.58 being withdrawn on 13 November for "*PT wages*" for the week ending 11 November 2007. A statement dated 23 November shows the balance of $32,302.93 being transferred to the "*Agent in Possession*".

[34] The Jayasekaras' argument is effectively that money in the 02 account was held in trust by Pacificare for payment of wages and holiday pay. On that basis, they say, it should not have been taken by Guardian and used for any other purpose.

[35] Mr Knobloch confirmed in his evidence that he was responsible for the transfer of funds from the 02 account. That money had been applied to other obligations of operating Pacificare's business, including payments of overdue rent to the landlord and overdue loan instalments to Guardian.

[36] I accept that the GSA gave Guardian a security interest over the money in Pacificare's accounts (clause 4(c)(i)(B)). Guardian was entitled under the GSA to take and use that money in operating the business of which it took possession, including making payments to itself for loan costs (clause 24 and 30(f)(ii)).

[37] I do not accept the evidence of Mr Jayasekara gets anywhere near establishing that the funds in the 02 account were held on trust for payments to staff. Rather I find, from his own evidence, that while funds may have been accumulated in that account for staff costs, and particularly annual leave payments, it was also used for some payments to IRD.

[38] Neither does the property law legislation provide any prohibition on Guardian having used these funds. The Property Law Act 1952 applies here rather than the more recent Property Law Act 2007 (in operation since 2008). The 1952 Act's provisions regarding mortgagees in position would require Guardian to give some preference to payments of wages, holiday pay and redundancy compensation if Pacificare were a company (see s104PPA(2)(b)). However Pacificare is not a company and there appear to be no other relevant limitations in that legislation on Guardian's actions in respect of money due to the Jayasekaras.

[39] The net effect is that Mr Jayasekara and Mrs Jayasekara each remain entitled to payment for two weeks notice from Pacificare. Mr Jayasekara remains entitled to three days' wages for the days of 29, 30 and 31 October 2007. Wages records also identify Mr Jayasekara as being owed 18 days holiday pay and Mrs Jayasekara as being owed 24 days holiday pay.

[40] It is Pacificare, not Guardian, which must pay the amounts due to the Jayasekaras. However there was no evidence Pacificare had funds available to pay them. Pacificare remains entitled to whatever surplus may yet be accounted to it by Guardian from the operation, and any possible sale, of the hospital and rest home business. Mr Knobloch described that prospect as an equitable interest in the residue after paying what was owed under the GSA. Mr and Mrs Jayasekara have a call on any such funds along with any other creditors of Pacificare.

[41] Accordingly I make no order for payment of the amount due to Mr and Mrs Jayasekara at present. With no evidence Pacificare has other funds not possessed by Guardian, I could not sensibly specify a timeframe for payment as required for such an order.[2]

[42] I note Mr Jayasekara's entitlement may also be subject to deduction for what appears to be a debt of his own to Pacificare. Its records identified a wage advance of $4000 to him. He confirmed in evidence that he had received an advance. He had made some repayments but could not confirm the amount remaining due.

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[2] Section 137(3) of the Employment Relations Act 2000.

**Summary of determination**

[43] I have made the following findings:

(i) Mr and Mrs Jayasekara's employment with Pacificare ended with the entry of Guardian as mortgagee in possession of the business of Pacificare on 31 October 2007; and

(ii) Mr and Mrs Jayasekara were not employed by Guardian;

(iii) Any residual employment entitlements for outstanding wages, payment of notice and holiday pay are owed by Pacificare, not Guardian; and

(iv) Guardian is not obliged to meet those entitlements from funds it took for purposes permitted under the GSA; and

(v) Mr and Mrs Jayasekara are entitled to seek payment, along with other creditors, by Pacificare from any funds accounted to it by Guardian that are surplus to the requirements of the GSA.

[44] No specific orders are made at this point.

**Costs**

[45] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. In the event they are not able to do so, any application for costs should be lodged and served by no later than 28 days from the date of this determination. Other parties will then have 14 days from the date of that application being lodged to lodge and serve any reply they wish to make before the Authority determines costs. No application will be considered outside this timeframe without prior leave.

Robin Arthur
Member of the Employment Relations Authority