IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 221A/10
5318854

	BETWEEN	BLAIR ELLIOTT CORKRAN Applicant
	A N D	GRANT THORNTON as receivers for LIVINGSPACE PROPERTIES LIMITED (in receivership and liquidation) Respondent

Member of Authority:	Helen Doyle
Representatives:	Applicant in Person David Appleton, Consultant for the Respondent
Investigation Meeting:	17 December 2010
Date of Determination:	23 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Corkran says that he is owed holiday pay and four weeks' notice by Grant Thornton as receivers for LivingSpace Properties Limited (in receivership and liquidation) (LivingSpace) and payment for four days wages when he worked but was not paid towards the end of his employment.

[2] Simon Thorn, David Ruscoe and Tim Downes (the receivers) were appointed as receivers and managers of LivingSpace on 18 June 2010 and 21 June 2010 under the terms of security agreement dated 7 October 2009 and 18 March 2009 respectively.

[3] In response to Mr Corkran's claim, the receivers say that they have no liability in law towards Mr Corkran and further that there are three companies which could, on the face of the employment agreement that Mr Corkran entered into, be his employer.

These three companies are Hotel SO Corporation Limited (in receivership and liquidation), Hotel SO Operations Limited (in receivership) and LivingSpace. I shall herafter refer to the Hotel SO companies as the Hotel SO entities. The receivers do not accept that Mr Corkran was employed by LivingSpace.

[4] BDO Spicers (BDO), the receivers for the Hotel SO entities say that, based on their information, they understand that Mr Corkran is employed by LivingSpace.

[5] Mr Corkran was handed a letter on 29 June 2010 by the receivers of the Hotel SO entities advising that his services were no longer required by Hotel SO.

[6] Mr Corkran says that he was advised at a meeting with BDO receivers that his employment at Hotel SO was terminated with effect from 30 June and all outstanding wages would be paid out on the evening of 30 June. Part of Mr Corkran's problem is that wages were only paid up to 27 June and not up to 30 June as he was advised.

[7] On 1 July 2010, Mr Corkran having been aadvised that there was no work at Hotel SO turned up to work at LivingSpace and on 2 July, after working for approximately an hour, he was called to a meeting with a Daniel Godden who advised that his employment was terminated the previous evening, 1 July 2010. Mr Corkran also claims one day's wages for 1 July 2010.

[8] On 6 July 2010, Mr Corkran received a letter from Grant Thornton advising that, amongst other matters, his contract of employment was terminated effective from 18 June 2010. Mr Corkran has attached to his problem a series of emails between him and a person who works with Grant Thornton, Holly Pachnatz, setting out some concerns he had. Eventually, Ms Pachnatz emailed Mr Corkran and advised there were no records of his employment contract with LivingSpace and that they considered his contract was with the Hotel SO entities.

[9] After seeking some advice, Mr Corkran lodged his application against Grant Thornton Receivers with the Employment Relations Authority on 13 September 2010.

[10] The Authority proposed joining the Hotel SO entities to this proceeding. After receiving a memorandum from the solicitor for the receivers for the SO entities and relevant documents that were in the possession of the receivers, the Authority concluded that at this stage the companies would not be joined to the proceedings and

duly advised Mr Corkran and Mr Appleton that the Authority would proceed to determine the identity of Mr Corkran's employer.

[11] Mr Appleton, in anticipation of the investigation meeting to determine the identity of Mr Corkran's employer, provided the Authority and Mr Corkran with a memorandum about the jurisdiction of the Authority to investigate matters arising under s.32 of the Receivership Act 1998. In a carefully constructed submission, he submits that the Authority does not have jurisdiction to determine whether the notice given to Mr Corkran was unlawful under s.32 of the Receivership Act 1998.

[12] He does accept on behalf of the receivers that the Authority has jurisdiction to determine the identity of Mr Corkran's employer.

[13] Whilst, in his memorandum, Mr Appleton recognised that the Authority had jurisdiction to determine liability and the quantum of the claim that Mr Corkran had, Mr Appleton subsequently advised that LivingSpace had since been placed into receivership as has Hotel SO Corporation Limited.

Issues

[14] There are two issues for the Authority to determine:

- Who was Mr Corkran employed by;
- Does the Authority have jurisdiction to investigate and determine matters arising under s.32 of the Receivership Act 1993?

Who employed Mr Corkran?

[15] Where the identity of the employer is in question, the onus is on the employee to prove on the balance of probabilities who the employer was at the beginning of the employment relationship: *Colosimo v. Parker* 8 NZELC 98, 622.

[16] It is for the Authority to make an objective assessment of the evidence about the identity of the employer: *Weston v Fraser* 2008 5 NZELR 575.

How it started

[17] At the Authority's investigation meeting I heard evidence from Mr Corkran about the events leading to his employment. By way of context to his engagement,

Mr Corkran gave evidence about a period in 2007 when he was hired as an independent contractor to install bathrooms in Hotel SO and LivingSpace properties in Dunedin and Christchurch. After Mr Corkran had completed that work, he went back to running his own business and doing other work.

[18] In September 2008, Mr Corkran was approached by Gregor Ferguson a general manager who asked if Mr Corkran would be prepared to take over the maintenance role at Hotel SO as the previous technician was unable to continue to perform the role. Mr Corkran undertook that role for two months.

[19] In early December 2008, the maintenance technician at LivingSpace, Clive, resigned and Mr Corkran was again approached by Mr Ferguson and asked if he would be prepared to be the maintenance technician for four properties; Hotel SO in Christchurch and LivingSpace in Christchurch, Dunedin and Invercargill.

[20] Mr Corkran said that he agreed to the offer following which he became an employee and performed solely maintenance for the properties, whereas, beforehand he had been undertaking building work as well. Mr Corkran said in his evidence at the Authority investigation meeting that Mr Ferguson told him when he was employed that he was employed by LivingSpace.

[21] Gregor Ferguson presented Mr Corkran with an employment agreement in 2008. I shall turn shortly to the employment agreement because the issues in this case really arise because of the wording in the employment agreement.

[22] Mr Corkran's evidence is that he was 100% sure that he was employed by LivingSpace.

[23] There have been some difficulty on the part of both the receivers and the Authority in obtaining wage, time and holiday records, including IRD PAYE schedules, from the directors of LivingSpace.

[24] Mr Corkran has been able to provide some information and I was also provided with information from the solicitor who represented the receivers of the Hotel SO entities.

[25] It appears to be accepted, and was confirmed in the papers that I was provided with, that Mr Corkran was paid by LivingSpace from the start of his employment until

1 April 2010. Mr Corkran provided the Authority with a pay slip that confirms that was the position.

[26] Mr Corkran gave evidence that the payroll then changed to an electronic payroll and he was after 1 April 2010 paid by Hotel SO Corporation Limited (in receivership)

[27] Mr Corkran said that nothing else changed at that stage and he did not sign anything or agree to any change to his employer.

[28] The IRD records that Mr Corkran has been able to obtain through his accountant reflect that the employer or payer of Mr Corkran was LivingSpace for the period from 1 April 2009 to 31 March 2010.

[29] Mr Corkran was able to provide after the Authority investigation meeting a Kiwisaver enrolment letter dated 7 February 2009 advising that the Inland Revenue had received details of Mr Corkran's enrolment in Kiwi Saver from his employer LivingSpace.

[30] Mr Appleton was sent a copy of the letter but wrote to the Authority and advised that that was not conclusive and that the Authority should focus on the employment agreement between Mr Corkran and his employer.

[31] Mr Corkran said in his evidence that he spent 70% of his time working at Hotel SO and about a day and a half per week at the three LivingSpace properties, sometimes travelling to Dunedin.

The employment agreement

[32] The first or title page of the individual employment agreement has at the top left hand LivingSpace and underneath that, A Great Place to Live. It is then titled an individual employment agreement with Blair Corkran [sic] for the position of maintenance technician.

[33] The second page is headed *LivingSpace Properties Limited "the company"*. Underneath that it provides:

> *When you have signed that you accept the terms of our offer this will become the Individual Employment Agreement between us. It will come into force on the date specified in the First Schedule and will*

> *remain our agreement until it is replaced or either of us terminates the employment.*
>
> *In this Agreement, unless the context requires otherwise, the term "we" refers to the employer and the term "you" refers to the employee.*

[34] There is no clear reference to the contracting parties aside from a space for Mr Corkran to sign and another space for Russell Bent, the maintenance manager at Hotel SO/ LivingSpace, to sign.

[35] There is a footer at the bottom right hand corner of every page except for the title page including the first and second schedules that provides *LivingSpace Properties Limited Individual Employment Agreement (2007) Blair Corkran – start date 15 December 2008*.

[36] What has caused confusion is a clause on p.2 of the agreement headed *Remuneration*. That clause provides, amongst other matters:

> *The remuneration provided under this contract shall be deemed to fully compensate you for all time worked and duties performed under this agreement. It also recognises that Hotel SO Limited is your sole employer. If you are employed, directly or under contract, by any other party you are obliged to seek written approval from Hotel SO Limited.*

[37] Hotel SO Limited is an entity whose incorporation postdates the date of commencement of the employment of Mr Corkran and that employment agreement. That company has since changed its name.

[38] Mr Appleton also relies on the reference in the Second Schedule to the Hotel SO core requirements which sets out responsibilities to follow the expectations as outlined in the Hotel SO management employee handbook and in terms of the position itself under *scope of position – other* it provides that *whilst this position is at Hotel SO, you will be required to work at LivingSpace as and when required*. Mr Appleton refers to a secondment type arrangement between Hotel SO and LivingSpace.

Determination as to identity of the employer

[39] Mr Appleton, in his oral submissions following the evidence given by Mr Corkran, submitted that the correct approach was to interpret the individual employment agreement in accordance with well known interpretation principles.

[40] I accept that it is necessary to consider the employment agreement but it is also important to consider the evidence that is available with respect to payment, taxation and other matters that may on an objective analysis support a finding about Mr Corkran's employer.

[41] I shall start firstly with Mr Appleton's submissions as to the principles of interpretation. In *ASTE v. Chief Executive of Bay of Plenty Polytechnic* [2002] 1 ERNZ 491 at 500, Judge Colgan (as he was then), expressed the view that the interpretation of the collective agreement should not be construed in a narrowly literal way but should accord with business commonsense. Judge Colgan also made the following statement:

> *… The interpretation, rather than being based simply on dictionary meanings and grammar, should fulfil the purpose of the contract. Even if drafting is inept, the Court should be able to give effect to the underlying intent. Moreover, if a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find a more liberal interpretation which satisfies business commonsense and fulfils the parties' purpose.*

[42] Recognising that Hotel SO was not an incorporated company at the time Mr Corkran entered into his employment agreement, Mr Appleton submits that limited extrinsic material such as the Companies Registry can be considered. The two Hotel SO entities, were incorporated at the time of Mr Corkran's employment.

[43] The Supreme Court in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] NZSC 5 reaffirms the position that material extrinsic to a contract can be used to clarify the meaning of an agreement, whether or not the terms were ambiguous.

[44] It is difficult in this matter to reconcile a reference to Hotel SO Limited as the sole employer of Mr Corkran in the employment agreement with the references on the top of the second page and then on the foot of every page to LivingSpace Properties Limited.

[45] Although the employment agreement usually refers to the employer as *we*, there is also reference throughout the agreement to *the company* which could only refer, as it is written on the second page under LivingSpace Properties Limited to LivingSpace.

[46] For example, there is reference to the company under the termination of employment heading, in relation to serious misconduct and under the restructuring and redundancy employment protection clause.

[47] Although Mr Corkran was largely based at Hotel SO where he undertook most of his work during the week, location is not by itself determinative of an employment relationship.

[48] The evidence of Mr Corkran that his employer was LivingSpace is supported by his pay records until 1 April 2010 this year, IRD records such as they are and the KiwiSaver enrolment letter.

[49] There is no evidence to support that aside from payment there was any mutual agreement by Mr Corkran to a change to his employer after 1 April 2010 - *Mehta v. Elliott (Labour Inspector)* [2003] 1 ERNZ 451. His evidence that I accept is that prior to this matter before the Authority, he had never heard of Hotel SO Operations Limited and Hotel SO Corporation Limited.

[50] Whilst Mr Corkran's name did not appear on a list of employees of LivingSpace given to the receivers of that company that can in my view be explained by the change in the pay system.

[51] I am not satisfied that it is necessary to consider extrinsic material in this matter. I find that on an objective assessment of the evidence as supported by the documents that were provided to the Authority Mr Corkran was employed by LivingSpace.

[52] In those circumstances, I accept that Mr Corkran accepted an offer of employment in December 2008 with LivingSpace and not with another entity.

[53] In conclusion, I find that Mr Corkran has established on the balance of probabilities that his true employer was LivingSpace and that that did not change during his employment.

Does the Authority have the jurisdiction to investigate matters arising under s.32 of the Receivership Act 1993

[54] I do not intend to set out all the submissions made about jurisdiction given that I wish to have this determination to the parties before Christmas.

[55] In short however I accept that the sharp point of the jurisdictional issue is that the Authority has exclusive jurisdiction to make determinations about employment relationship problems.

[56] The potential liability of the receivers in the claim as it is framed now under s 32 of the Receiverships Act 1993 would not be about an employment relationship problem because there is no relationship between the receivers and Mr Corkran. That is so even if the receivers were found to be liable for wages and salary in terms of the issue as to whether notice was lawfully given.

[57] I accept Mr Appleton's submission and do not find that the Authority has jurisdiction. The Authoirty cannot investigate the cliam against the receivers further and the jurisdiction for such a claim is with the High Court.

Conclusion

[58] The claim against the receivers is dismissed. Mr Corkran should provide details of his claims for notice, holiday pay and four days unpaid wages to the liquidator for LivingSpace.

[59] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority