

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 482
5280234, 5280277, 5280279,
5280284, 5280285 and 5293977

BETWEEN	AYLA HUTTON AND 113 OTHERS Applicants
AND	PROVENCOCADMUS LIMITED (In Receivership) and PROVENCO PAYMENTS LIMITED (In Receivership) and PROVENCO RETAIL AUTOMATION LIMITED (In Receivership) and CADMUS PAYMENTS SOLUTIONS LIMITED (In Receivership) and PROVENCO TECHNOLOGY LIMITED (In Receivership) Respondents

Member of Authority:	Alastair Dumbleton
Representatives:	Philip Skelton, counsel for Applicants Tim Clarke, counsel for Respondents
Investigation Meeting:	23, 24 and 25 March 2011
Determination:	8 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants were employed within the ProvencoCadmus group of companies until August 2009 when the holding company, ProvencoCadmus Ltd (PCL), was placed into receivership. PCL had several trading subsidiary companies that provided a range of electronic payment solutions and point of sale equipment in New Zealand and overseas.

[2] Upon appointment the receivers, KordaMentha, terminated the applicants' employment with PCL. They were immediately re-employed by PCL (In Receivership) until 19 August 2009 when that employment ended.

[3] On termination from PCL the applicants were owed wages, holiday pay and redundancy compensation due to them as preferred creditors in the receivership of the ProvencoCadmus group. In total the former employees are owed approximately \$1.6m.

[4] Under the Receiverships Act 1993 and the Companies Act 1993 employees are given preferential creditor status up to a specified amount in relation to wages, holiday pay and redundancy entitlements. At the time of the receivership in this case the amount was \$16,420 per employee. The applicants' preferential claims are not in dispute as the receivers have accepted that the amounts claimed are due and owing.

[5] Claims have been brought to the Authority by 114 former employees of the ProvencoCadmus group of companies. To resolve those claims counsel for the applicants and the respondents are agreed that the sole issue for determination by the Authority is the identity of the applicants' former employer or employers.

[6] The five respondent companies contend that prior to receivership the applicants were employed by ProvencoCadmus Ltd only, whereas the applicants contend they were employed by that company jointly with one or more of its subsidiary companies. Included among the subsidiaries are Provenco Payments Ltd (PPL), Provenco Retail Automation Ltd (PRAL), Cadmus Payment Solutions Ltd (CPSL) and Provenco Technology Ltd (PTL). The applicants claim that PPL jointly with PCL in particular was their employer.

[7] Identifying who the applicants' employer was will determine whether they must be paid out their preferential claims, for in a receivership the claims of employees as preferential creditors have priority over the claims of other creditors only to the extent that the appointing creditor has a security interest over a company's accounts receivable and inventory. In this case the receivers appointment was by a trading bank creditor pursuant to a power covering accounts receivable and inventory at the date of the receivership. PCL, the parent company contended by the respondents to have been the sole employer, had no inventory or accounts receivable against which preferential creditor claims are to be paid. This is because PCL was a

holding company whose only major asset was its shareholding in the subsidiary trading entities it fully owned.

[8] As Mr Skelton counsel for the applicants submitted, the contest in this case is therefore between whether the bank creditor is entitled to retain the proceeds of the accounts receivable and inventory held in some or all of the operating subsidiary companies at the date of the receivership, or whether those assets should be applied to meet the preferential claims of the employees.

[9] During its investigation the Authority received a considerable volume of documentary evidence. It also heard from 18 of the applicants and one witness for the respondents, a KordaMentha insolvency practitioner.

ProvencoCadmus Ltd

[10] PCL was incorporated in August 1980. At the time of receivership it was the holding company of a number of trading subsidiary companies within the ProvencoCadmus Group. That group was the product of a merger in May 2008 between the Provenco Group and the Cadmus Group.

[11] Following the merger, in August and September 2008 the applicants were presented with an intended written employment agreement naming PCL solely as their intended employer. It was signed by all but one of the applicants. At the time of their termination in 2009 none of them had a written agreement with PPL, PRAL, CPSL or PTL.

[12] The 2008 merger and consequent restructuring including execution of written employment agreements with PCL, occurred about 12 months before the receivership. The change of employer in 2008 was motivated by the merger and there is no suggestion that its purpose was to defeat future preferential creditor claims in the event, as subsequently happened in 2009, that the ProvencoCadmus group of companies was placed in receivership.

[13] Although the applicants purported to enter into employment agreements with PCL, payroll services were provided to them by PPL. That company paid their salary or wages and deducted the appropriate income tax which was paid to the Inland Revenue Department. PPL clearly identified itself as performing that function by having its name shown on the pay slips regularly given to the applicants.

Identity of the employer

[14] When the Authority is required to identify the particular employer of any employee, s 6 of the Employment Relations Act 2000 may be applied. Under that provision which defines “employee,” the Authority must determine “the real nature of the relationship” between parties. In doing so the Authority must consider all relevant matters, including any matters that indicate the intention of the persons. It is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[15] In this case for the applicants it is submitted that when the real nature of the relationship is considered having regard to “all relevant matters,” it can convincingly be argued that the applicants were employed by PPL jointly with PCL, because the former was a 100% wholly owned subsidiary of the latter and was the legal entity through which PCL’s business had been carried on.

[16] As submitted by counsel for the applicants Mr Skelton:

.....[PPL] was the company that had the customers, generated the revenue, for whom the employees provided their services, who paid the employees, who accounted for their tax, who paid their ACC levies, etc. *Provenco Payments Limited* was not simply an “employer of record” it was the company that in fact carried on a multi-million dollar business. Contrast *ProvencoCadmus Limited* – a holding company that did not trade in its own right.

[17] The Authority was referred to the Employment Court judgment in *Orakei Group (2007) Limited v. Doherty* [2008] ERNZ 345 as being the most recent authority in New Zealand on joint employment. There is no dispute that in law a person may be employed in the same employment by two or more companies, although there must be a sufficient degree of relationship between the legal entities contended to have had the status of joint employers. Common control by the joint employers is an element usually to be found where there is such a relationship.

[18] The Authority was also referred to the decision of the Federal Court of Australia in *Gothard, in the matter of AFG Pty Ltd (in receivership and in liquidation) v. Davey* [2010] FCA 1163. In relation to the relevant principles of law the following statements, taken from paras [52] to [64] of *Gothard*, may be applied to the circumstances of this case:

- It is open to persons controlling a business in which a group of companies is involved to select an entity within the corporate group to be the employer. However if such a selection is to be made, the arrangement must be consistent with the financial and administrative organisation of the business in order to be effective.
- The determination of the entity that entered into a contract is based upon an objective assessment of the state of affairs between the parties;
- The Courts have also held that actual subjective intention is a factor the law takes into account in determining whether a contract exists.
- The beliefs of the employees as to the identity of their employer is admissible and is entitled to weight;
- In determining the identity of a disputed employer, the Court is entitled to consider “the reality of purported contractual arrangements”;
- The “reality of purported contractual arrangements” can extend to the identity of a contracting party and ... it can be found that a purporting contracting party was not in reality party to the contract even where a written contract gives it as the party;
- The documentation may have been brought into existence for other purposes, for example, tax minimisation or the reduction of insurance premiums, without reflecting the reality of the parties relationship;
- Aspects of the practical realities of the relationship which have been considered relevant include a consideration of the entity which:
 - (a) had practical and legal control and direction of the employees;
 - (b) made decisions about hiring;
 - (c) made decisions about disciplinary issues;
 - (d) made decisions about the level of remuneration;
 - (e) actually paid remuneration;
 - (f) communicated with employees about leave;
 - (g) made decisions about termination of employment.

[19] The judgment of the Court in the *Gothard* case (above) at para.[61] refers to another case where it was held that the fact that an employee’s salary was paid by a particular company and the tax group certificates issued to her showed that company

as her employer, was not conclusive evidence of the fact that it was the employer. The Court was satisfied that the arrangement was one of financial convenience to the group of which the company was part, with the result that those facts were “neutral indicia” in determining the issue of which company was the employee’s employer in the legal sense during the relevant period. That case was *Australian Insurance Employees Union v WP Insurance Services Pty Ltd* (1982) 42 ALR 598.

[20] Also referred to in *Gothard* is a case where it was held that despite the introduction of a particular company name as the name on the pay slips and group tax certificates, the preferable analysis was that the employees had remained employed by another company which had made their services available to the named company upon the latter agreeing to pay their wages and attend to the tax deductions on its behalf. That case was *Textile Footwear and Clothing Union of Australia v Bellechic* [1998] FCA 1465.

[21] In an another case it was held that insofar as documents such as pay advice slips, group certificates and superannuation documents may have referred to a new or different employer, an implied assignment did not arise; *Romero v Auty* (2001) 19 ACLC 206.

Principles applied to applicants’ circumstances

[22] All 114 applicants have alleged that their employer was a combination of ProvencoCadmus Ltd (PCL) and at least one other company, Provenco Payments Ltd (PPL). Some 30 applicants have alleged they had a third joint employer, either Provenco Technology Ltd (PTL) – 2 applicants - or Provenco Retail Automation Ltd (PRAL) - 28 applicants.

[23] Since the investigation meeting two applicants, Mr Brett Kennelly and Mr Roy Jury, have relinquished their claims against PCL (in receivership) or any other company in the ProvencoCadmus group. They have accepted an amount as the maximum entitlement payable to preferential claimants.

[24] Evidence was given by 18 applicants. From August 2008 on various dates each had signed an individual employment agreement which named only ProvencoCadmus Ltd (PCL) as their employer. Until the receivership in 2009 each of the 18 had worked within the Payment Solutions business unit.

[25] Prior to the merger of the Provenco group of companies and the Cadmus group the applicants had been employed by and worked for the trading entities that formed part of those two groups of companies. They had not been employed then by the listed public companies, either Provenco Group Ltd or Cadmus Technology Ltd. After the merger and upon agreeing to become employed by PCL the applicants continued to perform work for the benefit of the trading companies such as PPL, PTL and PRAL. The applicants were paid by PPL which also complied with income tax and accident compensation legal requirements in their name.

[26] PPL was one of about 14 trading companies listed as part of the ProvencoCadmus Payment Solutions business unit. That unit was the operational framework within which the business of PCL was conducted and had been established expressly to allow PCL's board of directors to "oversee its operations." The framework was set out in a Charter adopted by the Board of PCL, which delegated to a Group CEO the responsibility of managing the group. The business unit (comprising 14 or more trading companies) had its own CEO who reported directly to the Group CEO. The unit also had a Chief Finance Officer, Chief Operations Officer and several General Managers including one for Human Resources. Further down, the structure included Manager positions in respect of several operational roles or functions of the business unit.

[27] The Delegation of Authority Manual for the Payment Solutions business unit makes it clear that the unit was a conglomeration of trading companies managed and administered as a distinct entity or body set up to allow ProvencoCadmus Ltd (PCL) through its board of directors to have oversight of the operations.

[28] On that basis it seems logical and natural that PCL was chosen to be the employer of the applicants. The choice was made by the Human Resources General Manager, Mr Steven Corrick. He said that he had not given the selection of the employer party to the employment agreement much thought at the time, but it is clear his choice was not arbitrary, random or inadvertent but was a conscious and deliberate one in the sense that PCL was intended to be the employer in 2008.

[29] The evidence is also clear that at the time they accepted employment with PCL the applicant witnesses were primarily concerned not to be disadvantaged in their conditions of employment as a result of entering into a new contract. The name of the employer was not important to them at that time and only became so a year later

when, following the receivership of PCL, they sought to recover their entitlements by commencing an investigation in the Authority. This was acknowledged by Mr Corrick who said during the meeting held by the Authority to investigate his claims, “in hindsight, now the identity of the employer is critical.”

[30] Inevitably there is an element of hindsight that has lead the applicants to say, in pursuit of their claims, that PCL was a joint employer with trading companies such as PPL which were within the Payment Solutions business unit. Despite their understandable expression of intention given in the course of this case, I must find that in 2008 they intended to become employed by PCL and by that company alone. Their execution of the contract itself is the best evidence of that. In principle intention is usually to be ascertained from a contracting party’s written expression found in the contract.

[31] Although it is acknowledged by counsel for the respondents Mr Clarke that the restructuring process was not handled well in 2008, the applicants have not sought any remedy based on any alleged breach by their employer occurring at the time of entry into the written employment contract with PCL. No remedy has been sought based on any alleged breach of good faith requirements including the duty not to mislead or misrepresent. The Authority has not been asked to cancel the PCL employment agreement or set it aside because of some flaw in the way it was obtained by PCL. The applicants accept that they did enter into an employment agreement with PCL as one of the employer parties in that kind of relationship.

[32] Taking an objective view of the relevant circumstances and in considering the reality of the purported contractual arrangements, I find that the selection of PCL as the employer, albeit without too much consideration given by Mr Corrick, was consistent with the financial and administrative organisation of the business.

[33] I consider that practical and legal control and direction of the applicants came from senior managers within the business unit rather than from within any of the trading entities comprising that unit. It is clear from the unit’s Delegation of Authority Manual that the unit’s managers from CEO down made decisions about hiring, disciplinary issues, remuneration and other HR matters. The business unit was the entity through which PCL ran the business and kept oversight of the operations. The unit’s CEO reported directly to the ProvencoCadmus Group CEO. The

witnesses said that all or most of their work had been for the Payment Solutions business.

[34] The applicant's did not claim to have performed work specifically or integrally for PPL or any of the other trading entities within the Payment Solutions business unit. The applicants were not under the control or direction of a particular trading entity as distinct from the business unit. Although work the applicants performed is likely to have improved the trading position or value of a particular entity it must also have tended to improve the value of PCL's holdings in those companies.

[35] The Chief Financial Officer of the business unit Mr Mathew Gibson, and the General Manager Human Resources Mr Corrick, were employees of PCL under written agreements. I infer that all those who held senior management positions within the business unit, from CEO Mr Julian Beavis down, had agreed to become employed by PCL after the merger in 2008. That was how PCL administered the trading companies.

[36] Taking an objective view I do not find that the payroll function performed by one trading company of the unit, PPL, displaces PCL as the sole employer. I consider that that aspect, which the applicants have relied heavily on, does not reflect the reality that they were employed solely by PCL and were managed and administered through the business unit rather than any particular trading company such as PPL. The applicants were integrated into the unincorporated ProvencoCadmus Payment Solutions business unit rather than into any of the corporate entities the unit had oversight of. Although the Payment Solutions business unit was PCL's headquarters group, PCL logically and legally was the sole employer of those including the applicants who worked in or for the unit.

[37] PCL did not, I find, either expressly or impliedly, assign to PPL, PRAL, CPSL or PTL its status and function as employer, whether in whole or in part.

[38] A determination of "the real nature of the relationship" leads me to conclude that PCL was the sole employer party to the employment agreement.

Determination

[39] For the above reasons I find that ProvencoCadmus Ltd (PCL) alone was the employer of the applicants.

Costs

[40] Costs are reserved. If the parties are unable to resolve the question themselves, any application on behalf of the respondents is to be filed in the Authority within 21 days of the date of this determination. Any reply on behalf of the applicants is to be filed within a further 21 days.

A Dumbleton
Member of the Employment Relations Authority