

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 64
5357076; 5336198; 5336194

BETWEEN	HENRY HADFIELD First Applicant
A N D	AARON MEREDITH Second Applicant
A N D	GEOFFREY RAUKAWA Third Applicant
A N D	WAINUIOMATA SHOPPING CENTRE LIMITED First Respondent
A N D	RCG LIMITED Second Respondent

Member of Authority:	Michele Ryan
Representatives:	D G Dewar and Katie Paterson, for the Applicants Tim Clarke, for the First Respondent John Burley, for the Second Respondent
Investigation Meeting:	5 December 2012 and 12 February 2013 at Wellington
Submissions Received:	Written and oral submissions on 12 February 2013
Determination:	29 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants Mr Henry Hadfield, Mr Aaron Meredith and Mr Geoffrey Raukawa worked at Wainuiomata Shopping Centre. Mr Hadfield was employed as a caretaker and Mr Raukawa as a security officer. Mr Meredith was employed on a casual basis and undertook both caretaking and security work.

[2] On 1 November 2010 the applicants were advised that their respective positions were redundant. Employment was terminated with immediate effect. Each applicant claims he is owed outstanding wages and holiday pay and says he was dismissed unjustifiably.

[3] There is a dispute as to the identity of the applicants' employer.

[4] The name "Wainuiomata Shopping Centre" was used interchangeably in evidence before the Authority. It was referred to as the name of the shopping centre located in Wainuiomata, and as an entity created by property management company, RCG Ltd (RCG), through which it performed managerial and financial transactions. A distinction also needs to be made between these descriptors and Wainuiomata Shopping Centre Ltd, an incorporated company.

[5] For ease of reference in this determination I have referred to Wainuiomata Shopping Centre as "the shopping centre".

[6] Bank accounts, employment agreements and documentation that were set up and/or drafted by RCG in the name of "Wainuiomata Shopping Centre" are referred to as "WSC". WSC is not an incorporated entity.

[7] The company, Wainuiomata Shopping Centre Ltd, incorporated by Mr Behrooz Kermani and subsequently managed by Mrs Shahin Kermani, Managing Director, is referred to as "Wainuiomata Ltd".

[8] The applicants claim that they were employed jointly by RCG and Wainuiomata Ltd at the time of their dismissal.

[9] At the time of the applicants' employment RCG was responsible for the management of the shopping centre. RCG denies it was the applicants' employer. It says it was an agent for Wainuiomata Ltd pursuant to a property management agreement (the management agreement) between it and Wainuiomata Ltd. RCG says Wainuiomata Ltd was the *"ultimate employer"*.

[10] Wainuiomata Ltd is the majority unit title holder of Body Corporate 81640. Body Corporate 81640 is the owner and landlord of the shopping centre. Wainuiomata Ltd also says it was not the applicants' employer, either individually or jointly with RCG. Wainuiomata Ltd says there is no express provision contained in

the management agreement that allowed RCG to enter into employment agreements on its behalf. It says RCG was the applicants' employer.

[11] Neither Wainuiomata Ltd or RCG agreed to attend mediation with the applicants, each on the basis that it says it was not the applicants' employer.

[12] This determination is confined to establishing whether Wainuiomata Ltd or RCG was the applicants' employer, or alternatively whether they were joint employers. Having determined the identity of the applicants' employer, Mr Hadfield, Mr Meredith and Mr Raukawa will then be able to pursue their respective claims.

The Authority's investigation

[13] In September 2011 the applicants initially lodged papers at the Authority citing Wainuiomata Ltd as the respondent.

[14] On 21 June 2012 the applicants applied to have RCG joined to the proceedings as second respondent. RCG opposed the applications for joinder.

[15] The investigation was conducted over two days on 5 December 2012 and 12 February 2013.

[16] The applicants each provided written and oral evidence as did Mrs Shahin Kermani of Wainuiomata Ltd, and Mr Paul Keane and Mr Desmond Wai, who are directors of RCG. Mr Ian Wright of Praesto Property Ltd (PPL) gave evidence in support of Wainuiomata Ltd.

[17] Mr Norman Beyer, who had been employed as Head Custodian at the shopping centre also gave evidence. In compliance with a summons issued by RCG, Ms Angela Corderoy, who had previously held the position of Centre Manager, attended the Authority's investigation and answered questions from each of the parties. Submissions were provided to the Authority at the end of the final day of investigation.

[18] The Authority was provided with extensive documentation. As permitted by s. 174 of the Act, this determination has not set out all information and evidence obtained but has stated the Authority's findings of facts and law and expressed conclusions on matters requiring determination.

Additional background information

[19] In 1998 RCG was appointed Property Manager of the shopping centre by its then owners. RCG was responsible for leasing, maintaining and managing the shopping centre. It employed a 'Centre Manager' to manage the work in accordance with RCG's obligations set out in a management agreement.

[20] By April 2005 the shopping centre had different owners. Another management agreement was agreed between RCG and the owners of the shopping centre on 1 April 2005. The new management agreement essentially duplicated the previous agreement of 1998.

[21] Later that year on 30 September 2005, Mr Behrooz Kermani incorporated Wainuiomata Ltd.

[22] On 16 March 2006 Wainuiomata Ltd purchased 94% of unit titles on deposited plan 81640 and became a majority unit title holder of Body Corporate 81640. The owner of the remaining unit title is an entity known as Barkat Trust.

[23] Wainuiomata Ltd and Barkat Trust assumed the benefits and obligations contained in the 2005 management agreement and together were deemed the 'Principal' to the agreement. It was unclear why Barkat Trust as a Principal to the management agreement (alongside Wainuiomata Ltd) was not also cited as a respondent.

[24] In October 2006 Mr Kermani died unexpectedly and his wife, Mrs Shahin Kermani became the sole director of Wainuiomata Ltd.

[25] Between late 2006 and September 2010 RCG representatives and Mrs Kermani held monthly meetings regarding management of the shopping centre. By mid to late 2010 Mrs Kermani had become dissatisfied with RCG. On 22 September 2010 she notified RCG (on behalf of the Principal) of its intention to terminate the management agreement with effect from 31 October 2010.

[26] Wainuiomata Ltd made arrangements to have another property management company, Praesto Property Ltd (PPL), commence management of the shopping centre from 1 November 2010.

[27] On 29 October 2010 RCG wrote to PPL informing it that the all funds held by RCG as regards the shopping centre would be forwarded to Wainuiomata Ltd's solicitors and all relevant records including staff records would be sent to PPL that day. Amongst other things the letter advised that staff wages had been paid up to 27 October 2010 and noted wages were next due on 10 November 2010.

[28] On 31 October 2010 the management agreement between RCG and Wainuiomata Ltd terminated.

[29] The following day PPL's director Mr Wright, instructed the Centre Manager to advise the applicants that there were no employment positions available for them and their employment was terminated.

[30] The applicants left the shopping centre and did not return to work.

[31] Following 1 November 2010 there was an exchange of correspondence between representatives of Wainuiomata Ltd, RCG and PPL as to the identity of the employer of staff who worked at the shopping centre. No resolution as to that issue was reached.

Analysis and discussion

The relevant principles

[32] There is no dispute that the applicants were employed pursuant to contracts of service and that the applicants were employees. The applicants say they were employed jointly by Wainuiomata Ltd and RCG. The onus lies with the applicants to establish that each had a contract of service with RCG and with Wainuiomata Ltd¹.

[33] Section 6(2) of the Employment Relations Act states:

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

[34] Section 6(3) qualifies s. 6(2) and states:

For the purposes of subsection (2), the Court or the Authority-

¹ See *Mehta v Elliot* [2003] 1 ERNZ 451; *Colosimo v Parker* [2007] 8 NZELC 98,622; and more recently confirmed in *Hutton v Provencocadmus Ltd (in Rec)* [2012] NZEmpC 207

- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of the their relationship.

[35] In *Three Food Six Ltd v Bryson*², a decision of the Supreme Court, McGrath J stated:

The Act thus requires an assessment of all matters relevant to the real nature of the arrangement. The parties' intentions concerning the status of the person engaged are expressly included among those relevant matters. ...

The contract will not, however, necessarily provide a complete picture of the real nature of the relationship under s 6(2). Evidence of the way that an engagement operated in practice may significantly contribute to it. It may do so for example by indicating that the reality of the relationship is not what the contractual label or other terms reveal.

[36] In the recent case of *Hutton v Provencocadmus Ltd (in Rec)*³ Judge Inglis noted:

It is common ground that it is possible to have joint employers⁴. Common control by the joint employers is usually a feature of such a relationship.⁵ Whether the plaintiffs can establish that PPL was joint employer with PCL requires objective consideration. Who would an independent but knowledgeable observer have said was the plaintiffs' employer?⁶

[37] An inquiry into the "real nature" of the relationship requires the Authority to examine all relevant matters that indicate the intentions of the parties.

[38] The Full Court in *McDonald v Ontrack Infrastructure Ltd & Allied Work Force Ltd*⁷ endorsed observations made in an Australian case; *Ermogenous v Greek Orthodox Community of SA Inc*⁸ as follows:

Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any perspective rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of

² [2005] ERNZ 372

³ [2012] NZEmpC 207

⁴ *Orakei Group (2007) Ltd (formerly PRP Auckland Ltd) v Doherty (No 1)* [2008] ERNZ 345

⁵ *Ibid*

⁶ *Mehta v Elliot* [2003] 1 ERNZ 451

⁷ [2010] NZEmpC 132

⁸ 119721 WCR (NSW) 113 at 117 from the joint judgement of Ken CJ and Hope JA.

the parties.

[39] A review of written employment agreements between the applicants and the alleged employer(s) is a useful starting point.

[40] If the written agreements do not evidence the parties' intentions the next inquiry is to examine objectively any other relevant matters that indicate the intentions of the parties. These may include an examination of the realities of the relationship such as who had practical and legal control with regards to activities normally regarded as incidental to an employment relationship including hiring, disciplinary matters, remuneration, and termination of employment.

The employment agreements

[41] With the exception of Mr Meredith, the applicants provided a copy of the individual written employment agreement relevant to him. Those agreements each expressly identified WSC at the employer.⁹

[42] The evidence of both Mr Keane and Mr Wai is that WSC was established by RCG as an entity through which RCG conducted business at it related to the shopping centre. Mr Keane and Mr Wai each acknowledged that WSC had been cited as "*the employer*" on employment agreements for staff working at the shopping centre since 1998.¹⁰ In this respect RCG's practice had not altered over several changes in ownership of the shopping centre and associated change to the Principal party to the management agreement. RCG says it maintained WSC as the named employer to ensure continuity of management for the shopping centre.

[43] In support of Mr Keane's and Mr Wai's views that WSC was an "*entity in its own right*" separate to RCG and Wainuiomata Ltd, Mr Keane referred to WSC obtaining GST and PAYE numbers. Mr Keane says WSC was treated for tax purposes as a trust by the Inland Revenue Department. However, in *Hutton*¹¹ the Court accepted that the purpose of the PAYE regime is to provide a mechanism for IRD to collect income tax and does not determine employment status in the employment law context.

⁹ Mr Meredith did not produce a copy of his employment agreement but it is not disputed that he was employed by the same entity as Mr Hadfield and Mr Raukawa.

¹⁰ The exception to the practice was the Centre Manager employment agreement(s) whereby the employer was cited as RCG

¹¹ *Ibid* at 3, para [95]

[44] Section 5 of the Employment Relations Act defines an employer as “a person employing any employee or employees...”. The Employment Relations Act does not define “person” however the Interpretation Act 1999 provides that a person includes a corporation sole, a body corporate, and an unincorporated body¹².

[45] Mr Keane and Mr Wai both acknowledged during cross examination that WSC had not been incorporated nor was it a partnership or an unincorporated society.

[46] There was no evidence to support an argument that WSC was a person as defined by the Interpretation Act.

[47] I find that the entity WSC was not an entity that is recognised in law as having capacity to enter into contractual relations such as employment agreements. I conclude that WSC cannot have been the applicants’ employer as expressed in the applicants’ employment agreements.

[48] Submissions of behalf of Wainuiomata Ltd also referred to RCG’s practice of maintaining WSC as the name of the employer despite changes to the identity of Principal party to the management agreements.

[49] It was clear from the evidence given by Mr Wai and Mr Keane that no arrangements were made by RCG to notify shopping centre employees or have employees consent to a change of employer when the Principal changed. I consider the evidence is persuasive in that it tends to reflect a pattern by RCG to create legal relations with staff at the shopping centre separate to its arrangements pursuant to management agreements.

[50] However I can only give limited weight to that evidence. The applicants were not employed during a period when the Principal to the management agreement changed. I am required to examine the identity of the applicants’ employer at the time they were employed, not the identity of the employer of staff at the shopping centre prior to the applicant’s respective engagements.

Was there other information contained in the employment agreements which indicates the identity of the applicants’ employer?

¹² Section 29 Interpretation Act 1999

[51] Given that the applicants' written employment agreements do not expressly refer to an identity that can be regarded as an employer, the Authority must examine other relevant matters including documentation or conduct which evidences the parties' intention.

[52] There is no reference within the applicants' employment agreements to RCG's involvement as limited to that of an agent or intermediary for Wainuiomata Ltd, or that Wainuiomata Ltd was the employer.

[53] RCG refers to a notation contained at the bottom of the front page of Mr Hadfield's and Mr Raukawa's respective employment agreements, and to the Centre Manager's signature at the conclusion of the each agreement which states "*for and on behalf of the Employer*". The notation states "*Managed by Retail Consulting Group Ltd*" and provides contact information. The notation is in a similar font size and position as to where footnotes are usually placed.

[54] Neither the front page notation or the sign-off segment provide further additional information which might indicate the intentions of the parties, the identity of the employer, or on whose behalf RCG is managing the shopping centre. This evidence does not advance my inquiry.

Other relevant matters

The applicants' awareness of alleged employer

[55] The evidence of Mr Hatfield, Mr Meredith and Mr Raukawa was uniformly consistent; each applicant considered he had been employed by the shopping centre. The applicants each stated that that when their employment began they were not told who the owners of the shopping centre were or that their employer was someone other than that recorded on the employment agreements. I consider it was a reasonable of the applicants to make this assumption given the express reference in the employment agreements to WCS as "*the employer*".

[56] The applicants' testimony was endorsed by Ms Corderoy who was the Centre Manager of the shopping centre during the period over which Mr Hadfield and Mr Raukawa each commenced working. Ms Corderoy was employed by and reported to RCG.

[57] Ms Corderoy says RCG was largely responsible for the hiring and firing of employees but agrees she was involved with recruiting staff and ensuring employment agreements were signed. She says she often advised prospective tenants that the shopping centre was owned by Wainuiomata Ltd however she does not recall advising employees including the applicants that the shopping centre was owned by a body corporate or that Wainuiomata Ltd was the employer.

[58] Mr Norman Beyer worked at the shopping centre from mid-2001 until 2010. His written evidence states that he had “*always been employed by [Wainuiomata Ltd]*” and that he [and other employees] “*were never employees of RCG*”.

[59] I am unable to accept Mr Beyer’s evidence on the point given that Mr Beyer commenced working at the shopping centre in 2001, approximately five years before Wainuiomata Ltd became incorporated. Further, Mr Beyer stated in oral evidence that he was unaware of the existence of Wainuiomata Ltd until mid-November 2010, after the applicants had been dismissed. I find Mr Beyer’s evidence contradictory and am unable to give weight to it.

Payment of wages

[60] There is an inference drawn from RCG’s evidence that payments of salaries and wages were made with funds owned by Wainuiomata Ltd and therefore Wainuiomata Ltd was the applicants’ employer.

[61] At the time of its appointment to manage the shopping centre in 1998, RCG established several bank accounts in the name of WSC. Separate to payments into the Rent Account, tenants paid levies which were variously deposited into an Operating Expense account (OPEX), a Promotional Fund Account and a Maintenance Fund Account.

[62] Services such as cleaning, lighting, security, and payment for contractors and/or wages for employees were paid by monies contained in the OPEX account. Payment of RCG’s management fee by the various Principals was also paid into the OPEX account. From time to time owners of the shopping centre also deposited additional “*top up*” payments into the OPEX account to set off levies sent directly to the owners of the shopping centre by some tenants.

[63] RCG accepts that it had exclusive control of and access to the WSC accounts but says that all funds contained in the various accounts, with the exception of its management fees, was owned by the owners of the shopping centre including Wainuiomata Ltd, for the duration of the respective management agreement between them.

[64] Mr Keane and Mr Wai referred to the monthly meetings held with Mrs Kermani and to Month End Management Reports prepared by RCG for those meetings.

[65] Each report contains a loss and profit summary of transactions associated with the WSC OPEX account. The loss and profit summary in each of the reports provided to the Authority included line entries generally labelled as “*staff salaries*” and “*PAYE due*”.

[66] Mr Keane says it was always clear that people engaged to work at the shopping centre were Wainuiomata Ltd employees and that it should have been obvious to Mrs Kermani that the “*staff salary*” insert was reference to Wainuiomata Ltd employees. He accepted that none of the Month End Management Reports indicated who “*staff salaries*” were paid to or who employed the recipient of the payments. Mrs Kermani says she presumed that reference to “*staff salaries*” was in respect to RCG staff or contractors. Mr Keane and Mrs Kermani each acknowledged that the question as to who employed and paid staff did not arise during their meetings nor was it discussed.

[67] In *Hutton* Judge Inglis referred to *Golden Plains Fodder Australian Pty Ltd v Millard*,¹³ a decision of the full Court of the Supreme Court of South Australia, which held:

The payment of wages by a particular entity is not conclusive of the existence of an employment relationship¹⁴.

...

Payment of wages and issuing a taxation group certificate by one entity is important but not conclusive as to the identity of the employer. It may reflect no more than financial convenience between entities within one corporate group¹⁵.

¹³ [2007] SACS 391; (2007) 99 SASR 461 (SC)

¹⁴ *Ibid* at p474

¹⁵ *Ibid* at p479

[68] The accounts through which payment of staff salaries was made, and with whose funds does not appear to have been addressed by RCG and Wainuiomata Ltd. In this respect I regard the evidence as to salary payments as neutral indicia. The identity of the payer of wages in this matter does not establish the identity of employer.

Who had practical control and direction over the applicants?

[69] It is clear from the evidence that Wainuiomata Ltd did not instruct or determine how RCG should manage staff who worked at the shopping centre.

[70] Mr Wai says it was always understood by Mr Kermani at the time of Wainuiomata Ltd's incorporation and during the period of time he was Managing Director of Wainuiomata Ltd that the staff who worked at the shopping centre was employed by Wainuiomata Ltd. I can give only very limited weight to Mr Wai's hearsay evidence where I am not able to obtain direct evidence from Mr Kermani as to his understanding as to who was the employer.

[71] There is no real dispute that the applicants were fully integrated into RCG's business. Mr Keane and Mr Wai accepted in evidence that RCG had exclusive control with regard to the recruitment of the applicants, the way each of them performed their work, the level of remuneration paid, matters associated with discipline and performance and all other incidentals relating to employment.

[72] Mr Keane and Mr Wai both say however, that the control exercised by RCG as regards the applicants was solely as the agent of Wainuiomata Ltd in accordance with the commercial relationship between them as recorded in the management agreement.

[73] A number of documents were produced which evidenced written communications to shopping centre staff that were under the banner of RCG letter head¹⁶. The matters related to approval of leave, issuance of written warnings in regards to disciplinary and performance matters, and changes to working hours with various employees. I note also that Mr Meredith provided details of his IRD, contact and bank numbers on a form headed "**RCG LIMITED**", and below the heading "**NEW EMPLOYEE FORM**".

¹⁶ Examples include: RCG logo headers, 28/07/2000 to M.L; 3/07/2005 to MM; 25/05/2010 to NB; leave applications x 2 by NB; 7/03 2009 to DP.

[74] No reference was made in these documents that RCG was acting on behalf of another entity, be it WSC or Wainuiomata Ltd.

[75] On balance I consider these types of communications reveal RCG as directly managing activities associated with an employment relationship and tend to indicate the real nature of the employment relationship as between RCG and the employees.

The status of the agency agreement

[76] The management agreement between Principal parties and RCG was developed without legal assistance and was authored by RCG.

[77] The relevant provisions of that agreement are as follows:

1. SUBJECT to the provision of clause 4.1 hereof the Principal hereby appoints the Property Manager its sole managing and leasing agent for the purposes and on the terms and conditions hereinafter contained.
2. SUCH appointment shall commence on 1 November 2004 and continue until 31 October 2007.
 - 2.1 A RIGHT OF RENEWAL will be available to the Property Manager for a term of three years after the expiry date on the initial term detailed in clause 2 above.
 - ...
 - 4.8 TO let supervise and renegotiate from time to time contracts for cleaning of the common areas, and exterior, security of the property, servicing of the fire equipment, repair and maintenance of common areas and any car parks, any gardening and plant replacement, etc to such specifications and upon such terms and conditions as the Principal shall from time to time require.
 - ...
6. (a) NOTWITHSTANDING "any other provisions herein contained it is hereby acknowledge [*sic*] and agreed that the Property Manager shall be deemed to be the agent of the Principal in respect of all discussions, correspondence and agreements made by the Property Manager with third parties in pursuance hereof PROVIDED THAT the Property Manager shall not be permitted to bind the Principal in respect of any offer/agreement of lease or variation thereof without first obtaining the approval of the Principal to the terms and conditions of same.

[78] RSG submits that clause 6.(a) expressly authorised it to enter into employment agreements with the applicants as the agent of the Principal including Wainuiomata Ltd.

[79] Wainuiomata Ltd disputes RCG's submission. It says that the management agreement did not provide RCG with express authority to employ staff on its behalf.

[80] Wainuiomata Ltd points to clause 4.8 and says the management agreement provided limited authorisation for RCG to engage cleaning and security contractors on terms required by the Principal. It says RCG's purported authority to employ staff to work at the shopping centre exceeded the scope of its actual authority.

[81] Wainuiomata Ltd says clause 4.8 is a specific provision and in accordance with principles of contract interpretation should be given greater weight than the general provision contained at clause 6.(a). I do not accept this proposition as applicable to the management agreement between it and RCG. I regard the words "*Notwithstanding any other provisions herein contained*" at the beginning of clause 6.(a) provide a clear indication that clause 6.(a) is not limited by other provisions contained within the agreement. In this regard I accept submissions on behalf of RCG that it was authorised to enter into agreements as the agent of the Principal of the management agreement.

[82] However, whatever the terms of agency agreed in a commercial setting between RCG and Wainuiomata Ltd, it is clear that the existence of the agency was not explicitly or impliedly referred to in the employment agreements with the applicants. In this respect I consider the doctrine of 'undisclosed principal' is relevant.

Undisclosed principal

[83] The doctrine applies, in an employment law context, when an ostensible employer asserts it has been acting as an agent for another which it says is the true employer, but has not disclosed to the employee(s) the fact of the agency.¹⁷

[84] The law provides that the both the agent and the principal may be jointly and separately liable.

¹⁷ *Cuttance v Purkis* [1994] 2 ERNZ 321

[85] There is no evidence to indicate that RSC made it known to the applicants that RCG was an agent for Wainuiomata Ltd and that it was their employer. It was clear from each of the applicants' testimony that they were wholly unaware of Wainuiomata Ltd until after their respective employment engagements were terminated.

[86] I am unable to conclude that RCG discharged the onus of making the identity of Wainuiomata Ltd known to the applicants. RCG is not able to avoid scrutiny as to its actions or discharge liability as an alleged employer on the basis of its role as an agent in these circumstances.

Did Wainuiomata Ltd become the applicants' employer by assignment?

[87] The applicants say RCG was their employer throughout the course of employment. Submissions on their behalf appear to propose that when Wainuiomata Ltd notified RCG that it was terminating the management agreement, the obligations contained within the management agreement, including those of an employer, were assigned to Wainuiomata Ltd as Principal to the management agreement.

[88] I do not accept this argument. As a matter of law, a contract of service is not assignable without mutual consent by the parties to it¹⁸. There was some evidence from the applicants that they were told by RCG on or about 1 October 2010 that their employment positions would continue on 1 November 2010 under new management however there is no evidence that arrangements were made to transfer the applicants' to Wainuiomata Ltd's employ nor of the applicants' agreement to be employed by Wainuiomata Ltd.

Financial arrangements between RCG and Wainuiomata Ltd

[89] RCG's evidence was that it was impeded by Wainuiomata Ltd to deal appropriately with the applicants when Wainuiomata Ltd instructed all records and funds be transferred to its representatives on 29 October 2010. At that time Wainuiomata Ltd owed almost \$68,000 to the OPEX account in which salaries were also paid.

¹⁸ *Heritage Expeditions Ltd v Fraser* [2011] NZEmpC 157

[90] There is an inference that these funds could have been utilised to pay the applicants wages and notice entitlements. However the management of funds between RCG and Wainuiomata Ltd is not a matter in which the Employment Relations Authority has jurisdiction to determine.

Did the identity of the employer change?

[91] Taking an objective view I consider an independent but knowledgeable observer would conclude that RCG was the applicants' employer at the time their respective employment began and that RCG remained the employer up to and including 31 October 2010.

[92] RCG had exclusively exercised practical and directional control in all aspects of the applicants' employment until termination of the management agreement. As an employer it had obligation to negotiate the transfer of the applicants' employment to Wainuiomata Ltd or PPL. If no employment positions were available RCG was obliged to give notice of redundancy to the applicants and make arrangements to pay outstanding entitlements and notice. RCG did not comply with those obligations.

[93] I do not accept RCG's submissions that it cannot have been the applicants' employer at the time employment was terminated because it was not involved in the act of termination. Nor do I draw any inference that PPL's notification to the applicants of termination establishes it or Wainuiomata Ltd as the applicants' employer. I accept Mr Wright's evidence that telling the applicants they were no longer employed was an unpleasant but necessary courtesy.

[94] RCG's omission to inform the applicants of termination cannot be regarded as a defence available to it against a claim that it was the applicants' employer. The obligation to advise the applicants that employment had ended remained with RCG.

Summary of findings

[95] The applicants' employment agreements did not provide for an identity that can legally be regarded as an employer. While there is no evidence of intentionally misleading conduct on the part of RCG I consider it was mistaken in its views that its actions were solely as an agent acting on behalf of a principal in accordance with the management agreement. It did not advise the applicants at the time employment commenced that its relationship with the applicants was only as an agent for another.

It is clear that RCG exercised significant practical and directional control over the applicants in all the usual indicia inherent to a relationship of employment.

[96] I find that “the real nature” of the relationship between the applicants and RCG was that RCG was the employer of the applicants through their period employment at the shopping centre and at the time they were dismissed.

[97] I also consider that although Wainuiomata Ltd authorised RCG to act as its agent I was not provided with evidence which could be objectively regarded as evidencing an express or implied intention to engage in an employment relationship with the applicants. Nor is there any evidence that Wainuiomata Ltd shared common control with RCG in the practical realities of the applicants’ employment.

[98] I conclude that Wainuiomata Ltd did not have an employment relationship with the applicants and it was not the applicants’ employer either individually or jointly with RCG.

Costs

[99] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority