

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 367

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BETWEEN JOSIE RAIHANA MAY GARDNER
ANNELIES BUNNIK-ANDERSON
DONNA BATES
ERIN COOPER
CAROLINE THOMPSON
JASMIN SCHNURIGER
Applicants

AND PLATIMUM HEALTH LIMITED
(IN LIQ)
First Respondent

CONFIGURE EXPRESS LIMITED
Second Respondent

MICHAEL JOHN COOPER
Third Respondent

GREGORY CHARLES PETERS
Fourth Respondent

Member of Authority: Vicki Campbell

Representatives: Margaret Penny for Applicants
Gretchen Stone for Second and Fourth Respondents
No submissions received for First and Third
Respondents

Investigation Meeting: Determination on the Papers

Determination: 3 September 2014

DETERMINATION OF THE AUTHORITY

- A. Up to and including 30 June 2013 five of the six applicants were employed by Platinum Health Limited (in Liq).**
- B. Up to and including 30 June 2013 Ms Caroline Thompson was employed by Platinum Health WGTN Limited.**
- C. After 1 July 2013 the applicants were employed by Configure Trading Limited.**

Employment relationship problem

[1] The key issue for determination in this proceeding is the identity of the applicants' employer after 1 July 2013 until the date at which each of the applicants' employment ended.

[2] The parties have consented to the preliminary matter being determined on the papers following the filing of submissions and other documentation.

Background

[3] There are five corporate entities which I have identified as being relevant to this matter:

- (a) Platinum Health Limited (in Liquidation) - previously named ACRF Limited, its sole director is Mr Michael Cooper. The company went into liquidation on 28 July 2014.
- (b) Platinum Health WGTN Limited - previously named Green Tree Fitness Limited and Total Lawn Services Limited, its sole director is Mr Michael Cooper.
- (c) Configure Trading Limited (in Liquidation) - incorporated on 24 July 2013 the company went into liquidation on 4 March 2014. The directors are Mr Gregory Peters and Ms Rebecca Cupples.

- (d) Configure Limited - previously named CNE Gym Limited the sole director is Mr Gregory Peters.
- (e) Configure Express Limited - Mr Gregory Peters is the sole director of this company.

[4] Configure Limited operates a franchise business. The business enters into franchise agreements whereby the franchisees operate gyms throughout New Zealand trading under the name of Configure Express.

[5] Two franchised Configure Express gyms operate in Hamilton, one in Chartwell and the other in Hamilton City. A copy of the franchise agreements between Platinum Health Limited and Configure Limited have been provided to the Authority.

[6] Five of the six applicants had signed written employment agreements with Platinum Health Limited. The sixth applicant, Ms Thompson, signed a written employment agreement with Green Tree Fitness Limited which changed its name to Platinum Health WGTN Limited on 9 September 2013. Ms Thompson was initially employed in Palmerston North but moved to Hamilton in November 2012. Ms Thompson was not requested to sign a new employment agreement recognising a change of employing entity.

[7] There is no evidence before the Authority that the relationship between Ms Thompson and Platinum Health WGTN Limited was ever terminated or moved to Platinum Health Limited. While not determinative, the IRD records produced by Ms Thompson show that her wages and salary payments throughout her employment were met by Platinum Health WGTN Limited.

[8] On 29 June 2013 Mr Cooper advised Mr Peters that he would no longer be continuing with the franchise operations in Hamilton and the gyms were to transfer back to “you” with effect from 1 July 2013. Because of the contractual relationship between Platinum Health Limited and Configure Limited, together with Mr Peters role as a director of the latter company, I have interpreted the reference to “you” as notice to Mr Peters as an agent for Configure Limited.

[9] The employees employed to work at the two operations in Hamilton were given no notice of the impending transfer of the gyms back to Configure Limited, nor were they aware of any financial difficulties being experienced by Platinum Health Limited.

[10] On receiving Mr Cooper's email, Mr Peters took immediate steps to arrange for a new company, Configure Trading Limited to be incorporated. Mr Peters arranged for the second director of the new company, Ms Cupples to travel to Hamilton to discuss arrangements with staff on 4 July 2013.

[11] On or about 10 July 2013 the six applicants were offered individual employment agreements between the applicants and Configure Trading Limited. This was done in anticipation of the company being registered. The commencement date for the employment agreements is recorded as being 1 July 2013.

[12] Ms Gardner was the only one of the six applicants who accepted employment with Configure Trading Limited. Ms Gardner signed the agreement accepting employment on 19 July 2013. The other five applicants gave notice of their resignations on or about 14 and/or 15 July 2013. Ms Gardner gave notice of her resignation on or about 24 August 2013.

The Law

[13] It is common ground that the onus is on the applicants to prove the identity of the employer. Mere inference is not sufficient. The applicants must show that a mutual intention to form a contractual relationship must be established on the evidence, and it must be established on the evidence who was intended at the outset to be the employer party. Failure to notify or make the employee aware of the identity of the employer is not conclusive.¹

[14] In *Hutton v Provencocadmus*² the Court stated:

[78] "Section 5 of the Employment Relations Act (the Act) defines an "employer" as "a person employing any employee or employees". Section 6(1)(a) defines an "employee" as "any person of any age employed by an employer to do any work for hire or reward under a contract of service". In determining whether a person is employed by another person under a contract of service, the Authority is required to determine the "real nature of the relationship between them":s 6(2). The Authority must consider "all relevant matters, including any

¹ *Wilson v Bruce Wilson Painting and Decorating Limited & Anor* [2014] NZEmpC 83; *Colosimo v Parker* (2007) 8 NZELC 98,622 (EC).

² *Hutton v Provencocadmus Limited (In Rec)* [2012] NZEmpC 207.

matters that indicate the intention of the persons” and “is not to treat as a determining matter” any statement by the parties describing the “nature of their relationship” in making this assessment : s 6(3).

[15] In *McDonald v Ontrack Infrastructure Ltd*, the full Court confirmed that s 6 is not limited to determining issues of status (contractor or employee) but may be referred to in circumstances where the identity of an employer is in issue.³

[16] It is open to those controlling a business to select which company should be the employer, provided that the selection is consistent with the financial and administrative organisation of the business and is not otherwise a sham.⁴

Determination

[17] The starting point is the documentation evidencing any written agreement between the parties. As at 30 June 2013 five of the applicants had written employment agreements with Platinum Health Limited while Ms Thompson had a written agreement with Platinum Health WGTN Limited.

[18] New offers of employment were made by Configure Trading Limited on or about 10 July 2013 with a proposed commencement date of 1 July 2013.

[19] There are two possible outcomes in this matter. The first is that until such time as each of the applicants accepted an offer of employment from Configure Trading Limited, their employment with Platinum Health Limited continued. This is because there was no agreed transfer of the employment relationship to any other legal entity.

[20] The second, and most probable, is that after 1 July 2013 the employing entity was Configure Trading Ltd. Even though the company had not been registered, steps were in place to have the company registered and the intention was that the employees would be engaged by Configure Trading Limited.⁵

[21] Ms Cupples was a director of Configure Trading Limited, she was not a director of Configure Express Limited. Ms Cupples conducted all discussions with the applicants relating to employment agreements and signed the employment

³ *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223.

⁴ *Supra* n 2.

⁵ See Companies Act 1993 s 183 which allows for pre-incorporation contracts to be entered into.

agreements on behalf of Configure Trading Limited. Ms Cupples discussed the working arrangements with each of the applicants and was the person each of the applicants went to when they resigned from their employment.

[22] The fact that Ms Cupples was acting as the new employer is recognised by the applicants who have each stated that Ms Cupples appeared to be the new owner and met with each of the applicants to discuss timetables and rosters. Each applicant also states that Ms Cupples asked each of the applicants to complete forms providing their full name, contact details, IRD numbers and bank accounts.

[23] There is no dispute that Configure Express Ltd was the entity through which the applicants were paid. The applicants received pay slips from Configure Express Limited and Configure Express Limited accounted for each applicant's PAYE to IRD.

[24] The applicants submit the payroll records show that Configure Express Limited paid the wages each pay period and therefore Configure Express Limited was the employer. Payment of the payroll does not determine the employment status in the employment law context.⁶

[25] In *Hutton* the Court referred to the following statements of the Supreme Court of South Australia in *Golden Plains Fodder*⁷

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

...

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 group.

[26] While the identity of the person who pays an employee's wages is relevant to a determination of whether or not that person is the employer I agree with the submissions made on behalf of the second and fourth respondents that little weight can be placed on which bank account payments for wages and salaries are made from.

[27] The payroll function for a number of franchise operations is undertaken by Configure Express Limited. The untested evidence of Ms Geraldine Russell, who

⁶ Supra n 2.

⁷ *Golden Plains Fodder Australia Pty Ltd v Millard* [2007] SASC 391, (2007) 99 SASR 461 as cited by Inglis, J in *Hutton* at [96].

provided a sworn affidavit, is that each company within Configure Group has a control account in Configure Express Limited, which allows Configure Express Limited to transfer both income and expenses to the relevant company.

[28] Given that Platinum Health Limited give little or no notice that it did not intended to be bound by the Franchise Agreement with Configure Limited, Mr Peters took appropriate steps to ensure the employees affected by the decision of Platinum Health Limited continued to receive their wages and salary payments. I find the arrangement for Configure Express Limited to pay the wages and salaries of the applicants was put in place for administrative convenience.⁸

[29] The Franchise Agreement entered into by Platinum Health Limited was with Configure Limited. When Platinum Health Limited walked away from its Franchise Agreement, Configure Limited, through its sole director, Mr Peters, arranged for a new company to be established to take over the running of the franchise operations. That company was Configure Trading Limited.

[30] The incorporation process for Configure Trading Limited was completed on 24 July 2013. The employment agreements between Configure Trading Limited and the applicants were prepared in anticipation of incorporation. In accordance with s 182 of the Companies Act 1993 the employment agreements were valid and enforceable against Configure Trading Limited. The agreements were ratified on incorporation and I find it was the mutual intention of the parties that Configure Trading Limited would be the employer.

[31] Since the filing of these applications Platinum Health Limited was put into liquidation. As required, permission was requested from the liquidators for the applicants to proceed with their claims. That request was declined. The Authority has no jurisdiction to continue with proceedings against Platinum Health Limited.

[32] According to Mr Peters' untested affidavit evidence the fact that Platinum Health Limited was walking away from the franchise operations came as a complete surprise. He had to quickly make alternative arrangements in order to keep the businesses operating and to continue the employment of the affected employees.

⁸ Supra n 2 at [97].

[33] The facts do not establish that an employment relationship existed between the applicants and Configure Express Limited.

[34] On the balance of probabilities the employment relationship up to 30 June 2013 was between five of the applicants and Platinum Health Limited (In Liquidation), and between Ms Caroline Thompson and Platinum Health WGTN Limited.

[35] I find on the balance of probabilities that after 1 July 2013 until each of the applicants left their employment their employment relationship was with Configure Trading Limited, which is not a party to these proceedings.

[36] The applicants have provided no evidence to support their claim that either Mr Peters or Mr Cooper personally entered into an employment relationship with them.

[37] Costs are reserved.

Vicki Campbell
Member of the Employment Relations Authority