# Employment Court of New Zealand



## Hutton v ProvencoCadmus Limited (in receivership) [2012] NZEmpC 207 (6 December 2012)

Last Updated: 15 December 2012

**IN THE EMPLOYMENT COURT AUCKLAND**

**[2012] NZEmpC 207**

**ARC 92/11**

IN THE MATTER OF de novo challenge to a determination of the

Employment Relations Authority

BETWEEN AYLA HUTTON AND 111 OTHERS SET OUT IN SCHEDULE 1

Plaintiff

AND PROVENCOCADMUS LIMITED (IN RECEIVERSHIP)

First Defendant

AND PROVENCO PAYMENTS LIMITED (IN RECEIVERSHIP)

Second Defendant

Hearing: 30 July to 3 August 2012 (Heard at Auckland)

Counsel: Mr P Skelton and Ms A Borchardt, counsel for plaintiff

Mr T Clarke and Ms Maxfield, counsel for the first and second defendant

Judgment: 6 December 2012

**JUDGMENT OF JUDGE CHRISTINA INGLIS**

### Introduction

[1] The key issue for determination in this proceeding is the identity of the plaintiffs' employer and whether, as at the date of receivership of the first and second defendants, the plaintiffs were employed jointly by them.

[2] The proceedings were commenced on behalf of 112 named plaintiffs. The focus of the proceedings currently before the Court is on six of the plaintiffs. The



intention was to avoid the expense and time involved in preparing what are effectively 112 separate claims by having an initial hearing to determine the claims of six of those plaintiffs. This judgment accordingly relates to the six "test case" plaintiffs.

[3] The six plaintiffs contend that they were jointly employed by the defendants. By way of amended statement of claim,1 they also allege that the first defendant breached s 12 of the Fair Trading Act 1986 (the FTA) by engaging in misleading or

deceptive conduct. The defendants submit that the first defendant was the sole employer of each of the plaintiffs, and deny any breach of s 12 of the FTA.

[4] There is no dispute that the plaintiffs have preferential claims totalling $1.6 million.2 Under the provisions of s 312 of the Companies Act 1993, and the Seventh Schedule to that Act, employee preferential claims (up to a maximum of $16,420) are to be paid out in priority to the claims of any person under a security interest to the extent that the security interest is over all or any part of the company's accounts receivable and inventory at the date of the receivership.

[5] The identity of the employer/s is relevant for one simple reason – the first defendant has no assets from which the plaintiffs' preferential claims can be met. The second defendant does. The receivers are holding money in trust pending the outcome of the proceedings.

[6] I pause to note that there is no suggestion that the restructuring that occurred, and which forms the background context to these proceedings, took place with the intention of defeating preferential claims in the event that receivers were appointed.

**Employment Relations Authority determination**

[7] In the Employment Relations Authority (the Authority), the plaintiffs proceeded against a raft of subsidiary companies within the ProvencoCadmus group

of companies. In this Court, the claim is that the plaintiffs were employed by the

1 See [2012] NZEmpC 127.

2 Subject to a dispute as to the extent to which interest is payable.

parent company (ProvencoCadmus Limited (PCL)) and one subsidiary company only – Provenco Payments Limited (PPL).

[8] The Authority determined3 that when the plaintiffs signed their employment agreements, the intention was that they be employed by PCL alone. It found that this was consistent with the financial and administrative organisation of the business. The Authority determined that the practical and legal control and direction of the plaintiffs came from senior managers within the Payment Solutions business unit rather than from within other trading entities in the corporate structure and that this was the entity through which PCL ran the business and maintained oversight of its operations. The Authority concluded that the payroll function performed by PPL was neutral in determining who the employer was, and did not displace PCL as the plaintiffs' sole employer. It also found that PCL did not assign to any subsidiary its status and function as employer.

[9] The plaintiffs challenged the Authority's determination on a de novo basis.

**Background facts**

[10] The ProvencoCadmus Group was the product of a merger between the Provenco Group and the Cadmus Group that took place in May 2008. Both of these groups were active in the electronic funds transfer point of sale (EFTPOS) market in New Zealand. The merger was aimed at reducing costs and streamlining the business under the auspices of one newly merged company.

[11] As a result of the merger, Cadmus was amalgamated into Provenco and ceased to exist. Two business units of the newly merged company (PCL) were formed – Vantex and Payment Solutions. PCL acted as a holding company for a number of trading subsidiaries in the ProvencoCadmus Group. PPL was one of the trading subsidiaries, and sat within the Payment Solutions business unit. Following the merger, the plaintiffs entered into written individual employment agreements

citing PCL as employer.

3 [2011] NZERA Auckland 482.

[12] PCL was placed into receivership on 3 August 2009. On 17 August 2009 receivers were appointed in relation to seven of PCL's subsidiaries, being Provenco Limited; PVO Payment Holdings Limited; Cadmus Payment Solutions Limited; Turton Holdings Limited; Provenco Retail Automation Limited; Provenco Technology Limited; and PPL. Vantex was subsequently sold.

[13] The receivers terminated the plaintiffs' employment with PCL and immediately re-employed them with PCL (in receivership) until their employment ended. The plaintiffs were owed wages, holiday pay and redundancy compensation as preferred creditors at this time.

[14] PCL had no inventory or accounts receivable against which preferential creditor claims could be paid. Its assets consisted solely of its shareholdings in its trading subsidiaries. The receivers took the view that as PCL did not have any debtors or stock available for realisation there were no funds available for distribution to preferential creditors. At the time of the receivership, PPL had trade debtors, stock, and other assets.

[15] The merger between Cadmus and Provenco (which occurred in May 2008) raised a number of issues from a practical and legal perspective. It involved drawing two separate groups together, and it is clear that the process was relatively complex and time consuming.

[16] In February 2008 a contractor (Ms Balchin) was engaged jointly by Provenco and Cadmus to act as integration manager, to assist the companies through the merger process. She was not involved with the Vantex side of the business. Ms Balchin is highly experienced in matters relating to human resources management and organisational change, having provided advice to a number of large organisations in relation to such issues over many years. Amongst other things, Ms Balchin was responsible for facilitating the process to redesign the organisational structure for the new organisation.

[17] Ms Balchin liaised with the General Manager Human Resources within the

Payment Solutions business unit (Mr Corrick) in respect of important steps that

needed to be taken to bring the integration process to a conclusion. Mr Corrick is one of the plaintiffs in these proceedings, although not one of the six test case plaintiffs.

[18] It is clear that Ms Balchin was intimately involved with the design of the new organisational structure. She held regular structured meetings with senior executives from both Provenco and Cadmus, who together comprised the Integration Team. The Integration Team began meeting on a fortnightly basis but this moved to weekly meetings, and then meetings every couple of days.

[19] Ms Balchin prepared an Integration Milestone Plan. It was used as a guideline or checklist, setting out numerous integration activities. Mr Corrick and another Human Resources Officer, Ms Patterson, assisted with its preparation. The first version of the Integration Milestone Plan was dated 18 March 2008. The Integration Milestone Plan was updated from time to time by Ms Balchin, noting (amongst other things) the completion of various tasks.

[20] The Integration Milestone Plan differentiated between pre-merger and post- merger activities. The pre-merger activities were directed at allowing the merged company to undertake a proper consultative process immediately following amalgamation. The plan was signed off at the highest level, by the Chief Executive Officers of both Cadmus and Provenco.

[21] One of the key integration activities was to move employees4 onto one standard employment agreement with one employer. Ms Balchin described the rationale for this as follows:

Q. What was the rationale for trying to move everyone onto one employment agreement with one employer?

A. Very much to simplify the activities, so the organisation didn't have multiple contracts with varying terms and conditions of employment. And it was also quite important to actually rationalise the terms and conditions of employment as well because they varied across the two entities and this was a mechanism to actually do that and then take it up for agreement.

4 Other than Vantex employees.

Q. And did you leave open the possibility that people could be employed by other entities?

A. No we did not consider that. Q. Why not?

A. Because it wasn't going to achieve the objective of bringing the two organisations together and it added complexity in terms of how the organisation would be managed going forward.

Q. In terms of your dealings with the people on the Integration Project was there anything that suggested that people might think contrary to that?

A. To my knowledge no.

[22] One of the early steps identified in the Integration Milestone Plan was the need to establish a "Newco" delegated authority policy and delegations, to be completed by the time of the merger and to integrate the payroll within the first 30 days of the merger. The first version of the Integration Milestone Report also noted, under the heading "Human Resources Activities":

"legal entity and pro forma employment contract agreed" – soon after date of merger;

"terms and conditions analyse, review and recommendations complete" –

immediately before the date of merger;

"documentation of employee letters/contracts completed" - for subsequent completion;

Consultation in relation to the organisational structure - to commence within

10 days of the merger announcement.

[23] An independent report undertaken for the Directors of Cadmus and Provenco dated 17 March 2008 records that one of the key elements of the merger of the Cadmus and Provenco companies was:5

Following the Merger Provenco will continue to be listed on the New Zealand Stock market (NZSX) under a *new name that is still to be decided (the merged company)*.

[24] A version of the Integration Milestone Report noting key tasks for completion

by early April notes, as a top priority, "determine who is the employing entity" and

Mr Corrick as bearing responsibility for progressing this task. It also records, in

5 Emphasis added.

relation to this task, "final review with legal advisors", again with Mr Corrick

identified as being responsible.

[25] In an email dated 27 February 2008, Mr Corrick advised Ms Balchin that he believed he now had a straight forward answer to the question of the employing entity and whether new agreements were necessary or not. In evidence Mr Corrick suggested that the "straight forward" answer he had been referring to was that the identity of the employer was not a decision that needed to be made right away. Rather, staff could continue on their existing employment agreements in the interim and that no formal documentation was required immediately. Ms Balchin had no recollection of this. She made the point that there was a need to have everything in place, including clarity as to who the employer was going to be, so that the remainder of the process could be moved through without delay. It seems unlikely that if the issue had been placed on the back-burner, as Mr Corrick suggested, it would have resurfaced in another group of Milestones and in correspondence to an external legal adviser (Mr Chris Patterson) the following month.

[26] On 26 March 2008 Mr Corrick emailed Mr Patterson in relation to a proposed meeting the following Monday (31 March) confirming that Mr Patterson may be used as an employment law advisor in relation to the pre/post merger. A draft employment agreement (which Mr Corrick indicated he "would like to use for our Newco") was attached to enable Mr Patterson to give advice on it at a forthcoming meeting. Mr Corrick also set out, in some detail, the issues that he wished to discuss with Mr Patterson, including the presentation that Mr Corrick would be giving on Tuesday (1 April) to the executive teams of both companies, "providing an overview of the People approach and recommendations" and covering such issues as "the employing entity and significance for employment agreements."

[27] Mr Corrick sought to suggest that the reference to "significance" in his email to Mr Patterson was meaningless (because he had no idea what the name of the employing entity would be at that stage). He said that while legal advice was sought from Mr Patterson, no advice was taken on the issue of who the employing party would be.

[28] I was not drawn to Mr Corrick's evidence on this point. It is inherently unlikely that he would express interest in obtaining legal advice on meaningless issues. Ms Balchin gave evidence that the identity of the new employer was discussed at a meeting with Mr Corrick and Mr Patterson, although she could not recall the precise nature of the conversation. She was clear that the identity of the employer was a deliberate, conscious decision which came out of a detailed and planned process.

[29] Mr Patterson did not give evidence. I preferred Ms Balchin's evidence as to the importance attached to the identity of the employer, and that it was the subject of active consideration and advice. Her evidence in this regard was consistent with the contemporaneous documentation. It is clear that by 1 April 2008 legal advice had been sought and received in relation to various issues arising in respect of the merger, including the employment agreement.

[30] It is evident that the meeting with the executive teams took place as scheduled. What is not clear is what precisely occurred during the meeting. Ms Balchin could recall attending the meeting but could not recall the details of what was discussed. She said that they would have discussed some of the advice that had been provided in terms of who the employing entity would be. Mr Corrick could not recall any discussion about the employing entity. It is probable that the issue was traversed, as it is expressly identified in the presentation slides that were prepared for the meeting (entitled "Recommendations for discussion and validation"). Under the heading "Employment Agreement" the following questions, and answers, were posed:

Do we need to issue a new agreement? – Yes

Why? – because staff will effectively be carrying out work for NewCo

(trading company).

[31] Reference is also made to:6

- Merger occurs and *NewCo* comes into existence, we will begin the formal restructuring process.

6 Emphasis added.

- The *new IEA will be offered to staff who are successful in obtaining a position in NewCo*.

[32] Mr Corrick did not accept that references in the April version of the Integration Milestone Report, which referred to "The first milestone legal entity and pro forma employment agreement agreed. First task to determine who is the employing entity", to be completed by Mr Corrick by 4 April, that had a tick in the "completion" field and a line drawn through it, reflected the fact that the task had in fact been completed. He suggested that it was completed to the extent that the clause had been looked at but not in terms of confirming the nature of the employing entity. I found his explanation strained.

[33] It is evident that a comprehensive consultation process with staff was planned and undertaken. Staff were advised that the merger was taking place and information was provided. Ms Balchin's evidence, which I accept, was that it was very much stressed to staff that they were moving to one organisation, and that that organisation was the newly merged entity.

[34] A number of staff meetings were held to discuss the restructuring. It remained unclear (with the passage of time) precisely what had been said during these meetings. Mr Corrick could not recall any issues being raised about the identity of the employer. However, it is notable that a question and answer form prepared for staff emphasised the fact that there would be a new employer, and that it would be the newly merged entity. Mr Bhana, the insolvency practitioner responsible for the receivership on a daily basis, gave evidence that a copy of these questions and answers was sourced from Mr Patterson's legal files. This tends to support Ms Balchin's evidence that legal advice was sought in relation to the employer issue, along with the proposed terms and conditions of employment.

[35] The following questions and answers were identified:7

Question 1: What is happening and how might this affect my role?

Answer: *We have two companies that are going to be brought together under one new entity. Everyone will initially be employed within the new entity.* Post merger we will then be preceding towards finalising the

7 Emphasis added.

structure of the new company. This will involve confirming certain positions and carefully assessing the ongoing need for other positions.

Question 2: What happens next and what do I need to do?

Answer: We have prepared a timeline for the merger and a proposed timeline for the finalisation of *the new company post merger* structure all of which is available on our intranet which you should read.

Question 32: Will I get a new employment agreement with the merged company?

Answer: *Employees of the merged company will eventually get a new employment agreement*. However, this does not need to be done immediately.

[36] The merger took place on 8 May 2008.8

[37] Integration of the payrolls of the various companies had been identified as a key Milestone task at an early stage. I accept that the decision to integrate the payrolls was, as Ms Balchin said, made for practical reasons and was designed to:

... simplify process, prevent duplication of activities within the one organisation, and to have a consistent – an integrated HRIS information platform.

[38] On 9 June 2008 Ms Balchin emailed Mr Corrick and Mr Gibson (the Chief Financial Officer of the Payment Solutions business unit) suggesting a meeting to look at integrating the payroll systems of the respective companies. That meeting took place on 17 June 2008 and the outcomes of it were summarised in an email from Ms Balchin dated the same day. Ms Balchin noted that one of the issues that required attention was: "which company name, IRD number and company bank account will be used for the combined payroll." She said it also needed to be confirmed that the payroll would be set up in the new functional organisational structure, so that activities within the organisation were categorised and combined by function (including sales, payments, marketing, operations and human resources).

[39] Ms Balchin recalled attending meetings at which discussions occurred relating to the integration of the payroll onto one system. Mr Corrick, Ms Patterson

8 A certificate of amalgamation reflects that Cadmus Technology Limited and Provenco Group Limited amalgamated to become Provenco Group Limited, which changed its name on amalgamation to ProvencoCadmus Limited.

and Mr Gibson were also in attendance. She said (and I accept) that the discussions centred on entirely practical matters and that she could not recall any discussions in which it was suggested that PPL should perform the payroll function because it was alleged to be the employing entity. Nor could she recall any discussions at these meetings about the identity of the employer. From her perspective another company could have performed the payroll function, or it could have been outsourced. Mr Gibson could not recall the meetings relating to the payroll, but did accept that any of the companies could have performed the payroll function.

[40] It is apparent that the integration process was moving into its final stages in June 2008. Sometime that month a draft individual employment agreement was prepared. Mr Corrick prepared a report in June 2008 noting that a "new ProvencoCadmus Employment Agreement" had been prepared based on the old Provenco employment agreement and that the only significant difference for staff on the old Cadmus individual employment agreement was the offer of redundancy payments. Mr Corrick suggested that the references to ProvencoCadmus were not to PCL, as new employer, but rather reflected some sort of shorthand. However, I am satisfied that the reference was to PCL, the newly merged company, as the new employer.

[41] A Delegation of Authority Manual was issued by the ProvencoCadmus Chief Executive, Mr Doyle, on 3 July 2008. It was directed at establishing a framework within which the company's business and its subsidiaries were to operate, "so that the Board can to oversee its operations." The Manual records that the Board had delegated to the Group Chief Executive Officer of the Payment Solutions business unit responsibility for managing the business of the Group. It set out approved authorisation levels for the Payments Solutions business unit, and it was said to apply to 14 trading subsidiaries, including those in New Zealand, Australia and Malaysia. PPL was one of the subsidiaries.

[42] The delegations flowed down from the Board, to the (Group) Chief Executive Officer of PCL, to the Chief Executive Officer of the Payment Solutions business unit (reporting directly to the Group Chief Executive Officer), and below. The delegations distinguish between the executive team, which included the Group Chief

Executive Officer (Mr Doyle) and the Chief Executive Officer, Payment Solutions business unit (Mr Beavis, who had signing authority "across all costs centres"), and the management team, the members of which had limited authorisations. The replacement of staff or the recruitment of staff to new positions required the authorisation of the Chief Executive Officer, Payment Solutions business unit.

[43] A further question and answer document for staff was prepared, entitled "The New ProvencoCadmus Individual Employment Agreement for New Zealand Employees". While undated it appears that this document was created around July, as it refers to a template agreement posted on the intranet (which occurred that month).

[44] The question and answer document was in the following terms:9

Q. Do we need to have a *new* employment agreement?

A. Yes, because staff are *effectively carrying out work for ProvencoCadmus*

*Limited which is a new subsidiary*.10

Q. What are the differences between the previous Provenco and Cadmus individual employment agreements and the *new* one?

A. Briefly, the *new* ProvencoCadmus individual employment is a standard type of employment agreement used by most businesses today. It is an *agreement between employees and the company* setting out the terms and conditions of employment and it identifies the expectations of *both parties* in the employment relationship.

Clauses in the employment agreement outline matters such as, hours of work, holidays, sick and bereavement leave, pay, confidentiality, intellectual property and when employment ends.

For Cadmus employees, the introduction of a redundancy compensation clause is a significant change.

Q. Can I see a copy of the *new* individual employment agreement?

A Yes, there is a copy of the template on the intranet for you to look at.

...

Q Can I have my *new* employment agreement checked by my adviser?

9 Emphasis added.

10 The reference to it being a new subsidiary is plainly in error, as PCL was the parent company.

A Yes, in line with the Employment Relations Act 2000, we recommend that you seek independent advice on your *new*

individual employment agreement.

[45] As noted above, the proposed new individual employment agreement was placed on the intranet, to enable staff to consider it.

[46] Ms Balchin completed her engagement on 31 July 2008. She said that while she was not ultimately involved in the decision that PPL would perform the payroll function for staff employed by PCL, it was not uncommon in her experience, for employees in a large group of companies to be employed by a holding company and for the payroll function to be performed by a subsidiary.

[47] The change over in payrolls occurred in early August 2008, and the payroll services were performed by PPL. PPL paid the salary/wages, deducted PAYE income tax which was paid to Inland Revenue, and paid any ACC levies. PPL's name appeared on the payslips. A separate payroll function was provided through PCL for a limited number of people, including the Chairman of the Board, Group Chief Executive Officer, Group Chief Financial Officer, Executive Assistant, receptionist and employees within the Magnet Design Team. These people provided services directly to PCL, and revenue generated by the Magnet Design Team was directly attributable to PCL.

[48] Ms Balchin said that it was clear in her mind from discussions that the employing company was to be one company and that the identity of that company (PCL) was known from around the date of the merger. Her firm understanding by the time she left the organisation at the end of July 2008 was that the employing entity was PCL. Mr Skelton, counsel for the plaintiffs, suggested to Ms Balchin that this could not be correct because all employees would have been transferred onto the PCL payroll if that had been the case. He made the point that a small number of PCL employees (including Mr Gibson), who were on the parent company payroll, were transferred onto the PPL payroll following the restructuring in June 2008. This, he put to her, reflected the fact that they were now managing and running the new Payment Solutions business from 1 July 2008. Mr Gibson's evidence was that the underlying rationale for the restructuring was for PPL to become the principal

trading business in New Zealand. Ms Balchin responded to Mr Skelton's proposition

in the following way:

A. From an organisation structure in terms of how we structured the organisation as I said before it was a functional organisational structure so we were looking at it in terms of these are the functional activities that sat together with payments, operations and my understanding was that we were looking at setting them up on the payroll according to those cost centres and those functions and it was about allocation of cost.

Q. ... They didn't allocate the costs to the parent company and by paying them through the parent company payroll did they?

A. That is correct. But often organisations will allocate costs according to functions... My experience in terms – often with payroll I might be – my employment contract might be with a holding company but my costs might be allocated to the function which might be HR, it might be operations or another entity.

[49] While Mr Gibson was involved in decisions relating to the payroll function, and where it would be located, he was unable to recall specific details of what was discussed or agreed. Ms Balchin's evidence was consistent with the documentation, including an email dated 9 June 2008, referring to earlier consideration of integration of the payroll systems following the restructure and seeking confirmation that "payroll will be set up on the new functional organisation structure with cost centres established by function." I accept Ms Balchin's evidence.

[50] On 6 August 2008 Mr Corrick sent an email to staff updating them on the new individual employment agreement, and advising that it was intended to print and send the agreements out to staff the following week. He said that the delay in getting them to staff had been occasioned by a desire to ensure that they were consistent across all staff, and that:11

The important thing to remind you all about is that *the IEA will be a standard document for everyone in our newly merged business*. However, you need not be concerned that you haven't yet received this document since you will already be covered by an existing IEA providing your terms or employment. If you want to see the *new* IEA template, this has been available for viewing for a few weeks now on the intranet.

[51] On 8 August 2008 an email was sent to "Cadmus staff" advising that Ms

Makaea (payroll administrator) had taken over responsibility for "processing the

11 Emphasis added.

Payroll for all ProvencoCadmus staff effective from 11th August", and requesting receipt of leave application and Inland Revenue forms (amongst other things). Mr Corrick sent out a further email later that day, having first passed a draft through Mr Gibson.12 It emphasised that the "ProvencoCadmus" payroll operated slightly differently from the Cadmus payroll (including in relation to the timing of payments), but that there would be no change to how Provenco staff had previously

been paid. Notably all references in the email were to ProvencoCadmus. No mention was made of PPL and no issues were raised by any of the six plaintiffs about the identity of the employer or the placement of the payroll function with PPL.

[52] There was a staff meeting to discuss the proposed individual employment agreement on 15 August 2008. Each of the six plaintiffs had, as at this date, written individual employment agreements naming the following party as employer:

- Mr Khan: PPL;

- Mr Reilly: PPL;

- Mr Crocker: Provenco Retail Automation Limited;

- Mr Shipman: Provenco Retail Automation Limited;

- Mr Barnes: Cadmus Payment Solutions Limited;

- Mr Marter: Cadmus Payment Solutions Limited, "its associates and

subsidiaries and it[s] parent companies".

[53] None of the witnesses was able to recall the details of what was traversed at the meeting on 15 August 2008. However, it is apparent that the discussions focused on issues staff had about the specific terms and conditions of the proposed new agreement. In response to these issues, Mr Corrick notified all New Zealand ProvencoCadmus staff by email on 22 August 2008 that he had prepared a summary document that was placed on the intranet for reference purposes. This document, referred to as the "Key Differences" document, is central to the plaintiffs' claim of

misrepresentation.

12 Apparently in response to queries from staff arising out of Ms Makaea's email.

[54] The "key differences" document is entitled: "Key Differences between the new Individual Employment Agreement (IEA) and older IEAs." It stated, in its introductory paragraph, that:13

The comments below compare the two most recent IEA agreements for

Provenco and Cadmus with the *new IEA template*.

Note that the *new IEA* is essentially based on the most recent Provenco IEA, so changes from that agreement are minimal.

This comparison will not highlight every small difference in wording, but will *note key changes or differences in the operation of the standard clauses*.

[55] There followed a table setting out a comparison of the clauses of the new IEA standard clauses, the "old Provenco standard clauses", and the "old Cadmus standard clauses", relating to:

- remuneration (cl 3);

- hours of work (cl 4);

- holidays (cl 5);

- sick and bereavement leave (cl 6);

- termination of employment (cl 7);

- redundancy (cl 8);

- restraint of trade (cl 10);

- intellectual property (cl 12);

- conflict of interest (cl 13);

- securities trading (cl 18); and

- privacy (cl 20).

[56] Concerns were subsequently raised by a number of employees about the proposed clauses relating to restraint of trade, conflict of interest, medical termination, and payment for redeployment. In the event, those clauses were struck out by way of an addendum, dated November 2008. The addendum, entitled "Addendum to ProvencoCadmus Individual Employment Agreement", refers to the opportunity to seek advice and that "the Company" has considered and responded to all issues

raised. It is signed by Mr Corrick as General Manager Human Resources,

"for and on behalf of ProvencoCadmus Limited".

13 Emphasis added.

[57] I pause to note that Mr Khan and Mr Reilly were employed by PPL, under written employment agreements, at this time. As I understood the case for the plaintiffs, the remaining four test plaintiffs became employees of PPL from 1 August

2008 as a result of PPL taking over the payroll function. There were no written agreements to this effect. The defendants submitted that even if the four plaintiffs became employees of PPL at this point, this arrangement (and the pre-existing arrangement relating to Mr Khan and Mr Reilly) was superseded by events that subsequently occurred.

[58] Letters were sent to staff (including the six plaintiffs) attaching proposed new individual employment agreements. These agreements clearly cited PCL as employer. The letters, and the individual employment agreement annexed to each, followed the earlier communications with staff about the integration process and what was to occur following the merger. Staff were informed of their right to seek independent advice on the agreement if they wished. Relevantly, the letters were

sent to staff on PCL letterhead, and were in identical terms. Each letter stated:14

**Position** Following the recent restructure process *your position is [...] with*

*ProvencoCadmus Limited.*

**Employment Agreement** Attached is a copy of our *new* standard individual employment agreement for your consideration. While you will already have a current employment agreement, this *new IEA is intended to standardize the basic terms and conditions for everyone following the recent merger and restructure.*

You are entitled to seek independent advice on this agreement if you wish.

...

If you have any further questions relating to this please do not hesitate to contact HR.

[59] The new standard individual employment agreement enclosed with each of the letters was headed up, in bold letters:

**ProvencoCadmus Limited**

**Individual Employment Agreement**

**Between:**

14 Emphasis added.

**PROVENCOCADMUS LIMITED** (we, us, our)

**AND**

**[staff member's name]** (you and your)

We agree to employ you, and you agree to accept employment, on the terms set out in this agreement. *If you are already employed by us, these terms replace any earlier understanding or agreement you have with us.*

[60] Clause 21, "Acceptance" stated that:

To signify your understanding and acceptance of the terms and conditions of this employment agreement please sign where indicated below, initial each page and return one copy to us for our files.

**This Employment Agreement is signed for and on behalf of**

**ProvencoCadmus Limited by:**

**Neil Livingston/Chief Operating Officer [date] Declaration**

I declare that I have been provided with a copy of the intended employment agreement and informed that I am entitled to seek independent advice about it, that I have been given a reasonable opportunity to seek that advice, and that the Company considered and responded to all issues that I raised.

[employee sign off/date]

[61] The draft individual employment agreement (referring to PCL) annexed to the letters to staff is dated July 2008.

[62] Notably, the new agreement included a requirement that employees, while employed by PCL, comply with the policies, rules and procedures published by the company from time to time in the PCL Policies Manual (cl 2.2) and, in relation to restraints, stated that the restraint in cl 10.5 "also extends to all our related companies in ProvencoCadmus Limited...". The new agreement made no mention of any other company, or purported joint employer.

[63] Mr Corrick followed up the letters on 3 November 2008, asking staff to sign and return their new individual employment agreements. The vast majority of staff did subsequently sign their agreements, including each of the six test case plaintiffs. Their agreements were in the form identified above.

[64] Mr Khan signed his agreement on 3 September 2008; Mr Reilly on 27

November 2008; Mr Crocker on 10 December 2008; Mr Shipman on 25 November

2008; Mr Barnes on 30 September 2008; and Mr Marter on 12 December 2008. None of the six plaintiffs, and no other staff member, raised any issues about the identity of the employer named in the individual employment agreements.

[65] The following year, on 24 July 2009, and a few days before PCL went into receivership, Mr Corrick emailed Ms Bowman and Mr Beavis annexing a revised version of the draft agreement, substituting the name PPL for PCL. His evidence was that it was intended that this formulation would be used for new staff. Mr Corrick said that it was part of a move to realign all contractual documentation to PPL, including individual employment agreements. Ultimately the new agreement was never utilised, given events that occurred at the end of July. Mr Corrick accepted in cross examination that the documentation was forward focused and that there would have been no need to change the reference in the agreement to PPL if PPL was already the employer.

[66] On 3 August 2009 (15 months after the merger had taken place, and several months after each of the named plaintiffs had signed their respective employment agreements with PCL), PCL was placed in receivership. Receivers were appointed and held an initial meeting with staff on 3 August 2009. A further meeting was held two days later, on 5 August 2009. Staff were advised that, as they were employees of PCL, they had preferential creditor status in PCL's receivership and that the initial indications were that PCL did not have the capacity to meet preferential claims. No one responded by saying that they were employed by PPL. Two weeks later, on 17

August 2009, PPL was placed in receivership.

[67] On 17 August 2009 the receivers met with staff. Each staff member was given a letter terminating their employment. The letter referred to termination of employment with PCL. The letter was in the following terms:

**ProvencoCadmus Limited (In Receivership) – Termination of**

**Employment**

As you are aware, ProvencoCadmus Limited ("the Company") went into

receivership on 3 August 2009...

The Receivers, after considering the Company's financial position and its present and anticipated trading prospects regret to advise that we must terminate your employment with the Company.

We hereby give you notice of termination of your employment with the

Company effective from 17 August 2009.

Any claims that you may have for outstanding wages, holiday pay, redundancy compensation, etc, or in respect of any other matters, must be brought against the Company. Claims for outstanding wages, holiday pay and redundancy will be dealt with on a preferential basis to a maximum of

$16,420 (gross). All other claims will rank as unsecured.

[68] The six named plaintiffs received a further letter from the receivers also dated

17 August 2009, advising that the intention (following the placement of PCL into receivership) was to trade the business with a view to realising its business assets. The plaintiffs were offered employment with PCL (in receivership) by way of letter which was in the following terms:

The Company in receivership [PCL] now wishes to offer you employment on similar terms to those that you previously enjoyed under your individual employment agreement with the Company, which was terminated on 17

August 2009 ("your previous employment agreement").

The essential details of the employment which is now offered to you include the following:

(a) The employment will be between you and the Company in receivership;

...

(g) Your employment may be terminated on one day's notice.

...

This offer of employment is made on behalf of the Company in receivership, which will be your employer...

Please note that you are entitled to a reasonable opportunity to seek independent advice about this individual employment agreement before signing it. You should ensure that you have read and fully understood the terms and conditions of this agreement before signing it.

Should you wish to accept employment on these terms, please sign ... In the interim, the Company in receivership will continue to employ you on the basis of this letter of offer.

Joint Receiver

for and on behalf of ProvencoCadmus Limited (In Receivership)

[69] Each of the six named plaintiffs signed the employment agreement offered by the receivers on behalf of PCL (in receivership).

[70] On 17 August 2009 a letter was sent to Mr Corrick by a staff member advising that PPL had paid staff for the last 12 months, intimating that legal proceedings might follow, and requesting a response on behalf of "all employees of PCL." No mention was made of PPL as employer. Mr Bhana says he did not receive this correspondence and was unaware of it.

[71] On 18 August 2009 Mr Patterson (who had earlier been instructed by Mr Corrick, in his capacity as Human Resources Manager, for advice on matters relating to the integration process) wrote to the receivers raising a claim of joint employment on behalf of various employees of PCL (in receivership), including Mr Corrick.

[72] In his letter Mr Patterson advised his understanding that it had been:

... made clear to all employees during the merger and subsequent restructuring process from May 2008 that there were two main operating divisions within ProvencoCadmus, being Payment Solutions and Vantex (recently sold). The respective CEO's of each division carried divisional titles indicating the trading companies for which they, and their employees, provided services (eg Julian Beavis is CEO, Provenco Payments). Despite New Zealand employment agreements following the merger being issued by the employer "ProvencoCadmus Limited", it appears that all employees in the Payment Solutions division were in fact carrying out services for the Payment Solutions business and the relevant trading company (eg ProvencoCadmus Payment Solutions Ltd.)

In these circumstances where ProvencoCadmus employees are jointly employed by trading companies (not in receivership) some fundamental issues are raised regarding the powers of receivers to determine employment of staff, at least insofar as they are employed by one of the trading subsidiaries.

[73] The receivers' solicitors responded the same day advising that receivers had also been appointed for Cadmus Payment Solutions Limited, Provenco Limited, Provenco Technology Limited, PVO Payment Holdings Limited, and PPL. They requested that Mr Patterson provide any information to suggest that the individuals that he was now representing were employees of another subsidiary company (including the further companies in receivership). Mr Patterson responded on 27

August 2009 with a list of staff "formerly employed by ProvencoCadmus and or its

various subsidiaries prior to their respective receiverships", and advised that orders would be sought from the Authority "determining that ProvencoCadmus and/or its subsidiaries jointly employed" each of the identified employees. The letter did not respond to the invitation to provide information in support of the individuals' claimed joint employment status.

[74] The request on behalf of the receivers for information relating to the factual basis on which each of Mr Patterson's then clients were relying in support of their claim that they were jointly employed, and the subsidiary they alleged was the joint employer, was reiterated by way of letter dated 28 August 2009 and again on 2

September 2009. There was no evidence that such information was provided. Rather, grievances were filed in the Authority alleging that the plaintiffs were jointly employed by PCL (in receivership) and one or more of a number of subsidiary companies (being PPL (in receivership), Provenco Retail Automation Limited (in receivership), Cadmus Payments Solutions Limited (in receivership) and Provenco Technology Limited (in receivership)).

[75] On 2 October 2009 the receivers advised the plaintiffs of their preferential claims but said that, based on the assets available to the receivers, it was highly unlikely that funds would be available for distribution.

**Legal framework**

[76] Employees' preferential claims are paid out of the company's accounts receivable and inventory.15 The amounts of the plaintiffs' preferential claims are not in dispute. The receivers accept that these amounts are due and owing to the plaintiffs, except that their preferential claims are capped at $16,420, which was the prescribed amount at the commencement of the receivership.16 They also contend that, contrary to the submissions advanced by the plaintiffs, no interest is payable on

these amounts.

15 Sections 2 and 30(2) Receiverships Act 1993; cl 1(2) of sch 7 of the Companies Act 1993.

16 Clause 3(1) of sch 7 of the Companies Act 1993; Companies (Maximum Priority Amount) Order

2006.

[77] The plaintiffs accept that the onus is on each employee, on the balance of probabilities, to establish the identity of employer.

[78] Section 5 of the Employment Relations Act 2000 (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 Court is required to determine the "real nature of the relationship between them": s 6(2). The Court must consider "all relevant matters, including any 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).17

[79] It is common ground that it is possible to have joint employers.18 Common control by the joint employers is usually a feature of such a relationship.19 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?20

[80] A useful starting point is the documentation evidencing any written agreement between the parties.21 This is generally a good indicator of the parties' intention. At the date of receivership, there was a written employment agreement, and that was between each of the six plaintiffs and the first defendant. Two of the six plaintiffs (Mr Khan and Mr Reilly) had a previous written employment agreement with PPL. They signed an agreement with PCL on 3 September and 27

November 2008 (PCL in receivership) respectively. The agreement made it clear, on its cover page (which each of the plaintiffs initialled) that the agreement replaced

any earlier agreement.

17 In *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223, the full Court confirmed that s 6 is not limited to determining issues of status (contractor or employee) but may be reverted to in circumstances where the identity of an employer is in issue.

18 Both parties rely on *Orakei Group (2007) Ltd (formerly PRP Auckland Ltd) v Doherty (No 1)*

[2008] ERNZ 345 at [53] for this proposition.

19 *Orakei* at [56]-[58].

20 *Mehta v Elliott (Labour Inspector)* [2003] NZEmpC 110; [2003] 1 ERNZ 451 at [22].

21 See *McDonald* at [41].

[81] Each of the six plaintiffs signed a declaration, as part of their agreement, that they had been provided with a copy of the intended agreement, been advised of their right to seek independent advice, and that the company (PCL) had considered and responded to all issues they had raised. The time between being given the draft agreement and signing the agreement ranged, in relation to each of the six plaintiffs, over a number of weeks. They each accepted that they had been given a sufficient opportunity to seek, and receive, legal advice. Each of the six plaintiffs accepted that they could have declined to sign the agreement with PCL. Further, an addendum to Mr Marter's agreement recorded PCL as employer. No mention is made in the written employment agreements of PPL.

[82] The existence of a written employment agreement with PCL, and its express terms (including making it clear that it replaced any previous employment agreement), is a factor that points towards a unitary employment relationship with PCL.

However, the absence of a written employment agreement is not determinative. As was observed by the Ontario Court of Appeal in *Downtown*

*Eatery (1993) Ltd v Ontario*, if this factor was determinative it:22

would be too easy for employers to evade their obligations to dismissed employees by imposing employment contracts with shell companies with no assets.

[83] The Court also observed that:23

... although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work as an injustice in the realm of employment law.

[84] While there is some general force in this observation, it does not allow the

Court to retrospectively recreate contractual reality.

[85] 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.[24] As I have

22 *Downtown Eatery (1993) Ltd v Ontario* (2001) 200 DLR (4th) 289 (ONCA) at [37].

23 At [36].

24 *In the matter of C & T Grinter Transport Services Pty Ltd (In Liquidation) & Grinter Transport Pty*

said, there is no suggestion that PCL was chosen as the employing entity in order to avoid any obligations to potentially affected employees. At the time the employment agreements with PCL were entered into, it was not anticipated that PCL would go into receivership.

[86] The issue of who the employer would be was the focus of consideration and PCL was deliberately chosen as the employing party. Ms Balchin's evidence as to the decision-making process was supported by the contemporaneous documentation. And it is clear that one name was given to Mr Corrick to put on the draft individual employment agreements and that name was PCL. I am satisfied that the decision was that PCL was to be the employer, and sole employer, and that this was consistent with the financial and administrative organisation of the business. It is clear from the Delegation of Authority Manual that the Payment Solutions business unit (of which PPL was one part) was the entity through which PCL ran the business, and kept an oversight of operations. The unit's Chief Executive Officer reported directly to the PCL Chief Executive Officer. The unit's managers had delegated authority, from the PCL Chief Executive, to make decisions about various matters relating to staff management.

[87] While Mr Corrick said that he believed that PPL was joint employer with PCL, that sits uncomfortably with the fact that he took no steps to include reference to PPL in the written employment agreements that he drafted. He was an experienced human resources practitioner and a qualified lawyer. It is clear that he appreciated the importance of naming parties to a contract correctly, and that he had a grasp of basic contractual principles. When asked in cross examination why, if he had considered that PPL was joint employer, the employment agreements had not been drafted to expressly refer to this, he was uncertain, saying that the identity of the employer was not given much thought and that, with the benefit of hindsight, it would have been preferable to have specifically named PPL. I do not accept that the employing party issue was given cursory consideration, and I return to the benefits

of hindsight later.

*Ltd (In Liquidation) (Controller Appointed)* [2004] FCA 1148 at [20], cited in *Gothard, in the matter of AFG Pty Limited (Receivers and Managers Appointed) (in liq) v Davey* [2010] FCA 1163 at [54]. See too *Textile Footwear and Clothing Union of Australia v Bellechic Pty Ltd* FCA VG574/1997, 19

November 1998 at 7.

[88] PPL was the entity through which the plaintiffs were paid. Their wages and salaries were accounted for by PPL, rather than in PCL's books. The plaintiffs received payslips from PPL on a monthly basis. PPL accounted for PAYE to IRD, and paid ACC levies.

[89] Both counsel agreed that 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. That was, however, the extent of counsels' agreement on the point. Mr Clarke submitted that in the circumstances of this case it was a "neutral" indicia of an employment relationship.25 Mr Skelton submitted that the fact that PPL undertook the payroll function was entitled to weight, and was a factor indicating that it was

joint employer, referring in particular to a judgment of the Court of Appeal of British Columbia in *Sinclair v Dover Engineering Services Ltd*.26

[90] *Sinclair* involved an engineer who worked for Dover Engineering but was paid by Cyril Management Ltd (Cyril), a related management company. Dover Engineering had no payroll. Each month Cyril billed Dover Engineering for the gross value of Mr Sinclair's time, plus 30%. Dover paid to Cyril the amount of the invoice, providing funds to pay Mr Sinclair. Payslips were provided by Cyril, as Mr Sinclair's employer. All income tax, unemployment insurance and pension plan payments were deducted and remitted to the government by Cyril as employer. Cyril entered into group insurance programmes and contracted for medical insurance, for the plaintiff's benefit. When his employment ended, he received a record of employment form, showing Cyril as employer. Cyril had the authority to move personnel from one company to another, as required by particular job requirements. The company, for whom the services would be performed, would be billed for the salary of the particular employee. Mr Sinclair had no control over what was charged

to Dover for the services he performed.

25 Citing *Australian Insurance Employees Union v WP Insurance Services Pty Ltd* (1982) 42 ALR 598 (FCA) at 606; *Textile Footwear*, above n 24, at 2; *Golden Plains Fodder Australia Pty Ltd v Millard* [2007] SASC 391, (2007) 99 SASR 461 at [35] and [69] and *Clifford v Rentokil Ltd* [1995] 1 ERNZ

407 at 429 in support of this proposition.

26 (1998) 49 DLR (4th) 297 (BCCA).

[91] In a separate concurring judgment, Craig JA observed that he would have held that the mere fact that Dover employed Mr Sinclair on the basis that the company would employ him but Cyril would pay his salary would be sufficient to conclude that he was an employee of both companies.27 With respect, I consider that such an approach is too narrow. Nor is it one that I took Mr Skelton to be advancing. As *Sinclair* makes clear, a range of factors is relevant to an assessment of whether an

employment relationship exists, and with whom, and much will depend on the facts of each case. It is for this reason that, while the authorities may provide some useful guidance, there is no substitute for an analysis of the particular relationship in its particular factual context.

[92] Issues relating to which company name, IRD number, and company bank account would be used for the combined payroll were considered in around June

2008. The decision to integrate the payroll, and for PPL to perform the payroll function for staff within the Payment Solutions business unit, was one that was made for practical reasons. Ms Makaea, a payroll officer who had been with Provenco Group for 27 years, reinforced the practical nature of the decision. And while PPL was selected to undertake this role, it was clear that a number of companies within the Payment Solutions Business unit could have done so, as Mr Gibson (the Chief Financial Officer within the unit, and who is one of the other plaintiffs) accepted.

[93] It is notable that the payroll function was moved to PPL from 1 August 2008, following the merger but before any of the six plaintiffs had signed their employment agreement naming PCL as employer by some months and expressly stating that the agreement with PCL replaced any earlier agreement.

[94] Mr Skelton submitted that this was not a case of PPL simply providing payroll services. He referred to Mr Gibson's evidence that the salary and wages were accounted for in the books of PPL and there was no evidence of a charge-back of those costs to PCL. However, the fact that the integration of the payroll with PPL pre-dated the employment agreements with PCL by some time reinforces the view that the payroll function, and who performed it within the group of companies, was

unrelated to the identity of the employer (given that four of the six plaintiffs had no

27 At [19].

previous employment agreement with PPL), the date on which they signed their new agreement, and whether they provided services to one company or another across the Business unit. Relevantly, the discussions that took place in relation to the integration of the payroll did not include reference to who the employer was.

[95] PPL not only discharged the payroll function, but also paid PAYE and ACC levies on behalf of the plaintiffs. Mr Skelton submitted that PPL had accordingly held itself out as the employer. However, as Mr Bharan observed in evidence, a person who pays the salary is obliged to pay the PAYE.28 And, as Mr Clarke submitted, the general purpose of the PAYE regime is to provide a mechanism for collecting income tax, not determining employment status in the employment law context. Similar issues arise in relation to the obligation to pay ACC levies.

[96] In *Golden Plains Fodder* the full Court of the Supreme Court of South

Australia held that:29

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.

[97] I am satisfied that the arrangements relating to pay, PAYE and employer contributions to ACC were put in place for the administrative convenience of the group of companies. I do not consider that, in the particular circumstances, they point to joint employment.

[98] The question of who was or was not the employer is informed by consideration of who benefited from the services provided by the plaintiffs. The six plaintiffs accepted that they provided services to the Payment Solutions business unit, carried out their duties for that unit, and reported to managers within the unit.

Notably, the focus of the plaintiffs' evidence in this regard was on the unit, rather

28 Income Tax Act 2007, s RA 5.

29 *Golden Plains Fodder*, above n 25, at [35] and [69].

than PPL. PPL was simply one part of the Payment Solutions business unit (albeit an important part, given that it was the major trading entity within the group of companies).

[99] Mr Gibson's evidence was that the Payment Solutions business unit was used for financial reporting purposes, budgets were prepared for the unit, and employee time was charged to the unit. He said that costs were apportioned between business units or divisions within the group of companies. Accordingly, it was not PPL itself that was meeting the costs of the plaintiffs' services, and nor was it PPL that was solely benefiting from them, although it was carrying out the payroll function. And Mr Skelton accepted in closing that PCL benefited, at least indirectly, from the services provided by the plaintiffs.

[100] PCL sat at the top of the corporate structure. It was from PCL that delegations relating to administrative and other matters flowed. It was a holding company that did not trade in its own right. PPL was one of 14 subsidiary companies within the Payment Solutions business unit. The unit had its own management team, which reported (through its Chief Executive Officer) to the PCL Board. The unit was managed and administered as a body. While the plaintiffs' position was that they provided their services to PPL itself, there is evidence that they provided services more generally to the unit. Rather than being integrated into PPL, I am satisfied on the evidence that they were integrated more broadly into the Payment Solutions business unit.

[101] Each of the six plaintiffs gave evidence that they received bonus payments based on the business results for the Payment Solutions business unit. While PPL was the trading company within the Payment Solutions business unit that generated the most business, I do not consider that the fact that the six plaintiffs had access to a bonus scheme based on the results of the unit as a whole, materially assists the plaintiffs' argument that PPL was an employer.

[102] There was a paucity of evidence indicating that PPL exercised control or direction over the six named plaintiffs.

[103] Each of the plaintiffs was required, under the terms of their employment agreements with PCL, to comply with PCL's policies, rules and procedures. The business organisation structure (as reflected in the Delegations of Authority Manual) was based on the lines of the Payment Solutions business unit, which had its own management team (including Mr Corrick, Mr Gibson, and Mr Beavis - the Chief Executive Officer). The unit consisted of a number of trading entities managed and administered as a unit. It is also clear that delegations flowed from the PCL Board, through to the Group Chief Executive Officer, and down to the CEO (Payment Solutions Business unit), and the Payment Solutions business unit management team.

[104] As Mr Clarke pointed out, there was no evidence that PPL had practical and legal control and direction over the six plaintiffs, in terms of making decisions about hiring, disciplinary matters, remuneration, and termination of employment. Each of these activities is normally incidental to an employment relationship.30 Mr Bharan's evidence was that he had conducted searches of the companies' records (including the server) but that those searches had failed to disclose any documentation that

suggested that PPL dealt with such issues.

[105] Two of the six plaintiffs (Mr Khan and Mr Barnes) gave evidence that their leave applications were dealt with by PPL, rather than by PCL.

[106] It is clear from Mr Khan's records that he submitted leave applications to his Manager, Mr Chinnamunian, throughout the relevant period. On 13 May 2008 (just after the merger but before Mr Khan signed his new employment agreement with PCL) the leave form bore the words "Advantage Group Limited" (which had been the previous name for Provenco) and Provenco. However, on 7 October 2008 (a month after Mr Khan had signed his new employment agreement with PCL, on 3

September 2008) the leave form was in the name of "ProvencoCadmus Ltd."

[107] Mr Barnes referred to a leave form dated 10 October 2008, which was submitted to Ms Butler (Customer Services Operations Manager), his manager. Mr

30 See, for example, *Gothard*, above n 24, at [60].

Barnes signed his employment agreement with PCL the previous month, on 30

September 2008. The form itself is noted as being a PCL form.

[108] I do not consider that the fact that applications for leave continued to be referred to the plaintiffs' line managers is indicative of joint employment with PPL. The fact that the leave forms are clearly noted as being PCL forms, following the signing of the individual employment agreements, undermines the argument being advanced on the plaintiffs' behalf.

[109] The lead plaintiffs claim that they thought that they were all employed by PPL, at the latest, on the date PPL took over the payroll function, and that their employment ended when PPL was sold. However, the parties' conduct is inconsistent with the position now being advanced.31 None of the six plaintiffs objected that they were already employed by PPL when they were offered, and subsequently signed, their employment agreements with PCL after having been paid through PPL for some months. Nor did they say that they were jointly employed by PPL when they received notice of the termination of their employment with PCL.

None of the six plaintiffs pointed out that they were jointly employed by PPL when, the same day, they were offered a new employment agreement to sign with PCL (in receivership). There is no evidence before the Court that any of the six plaintiffs asserted at any time during the course of their employment relationship with PCL before the receivership that they were jointly employed by PPL.

[110] It is revealing that the first occasion on which the point was raised was when issues began to arise about whether there would be sufficient assets within PCL to meet their preferential creditor claims.32 Mr Skelton submitted that, to the extent that the subjective beliefs of the plaintiffs in relation to the identity of their employer/s was relevant, each considered that there had simply been a name change at the time they entered into the written employment agreement with PCL. There

was evidence that some of the plaintiffs had experienced a number of company name

31 Counsel for the plaintiffs accepted that conduct subsequent to the creation of an alleged employment relationship may be taken into account. See *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

32 Similarly, in *Colosimo v Parker* (2007) 8 NZELC 98,622 at [41] the Employment Court had regard to the employee's lack of awareness as to the identity of the employer until after the employment had come to an end.

changes over time. However, it is clear that what occurred was not a simple name change. Significant steps were taken to identify for staff that they would be employed under a *new* individual employment agreement and with a *new* employer, namely the newly merged company. I am satisfied that each of the six named plaintiffs were aware that they were being offered employment by the newly merged company. Each of the six plaintiffs accepted in cross examination that they were aware that a merger was occurring, that they understood at the time that the proposal was to move everyone to one employment agreement, and that that employment agreement was with the newly merged company. They each accepted that they were aware of the importance of signing a contract, and that they would be bound by its terms, and that they had been given an opportunity to take advice. And the employment agreements that they signed stated that it was intended to replace any existing employment agreement.

[111] In his opening, Mr Skelton made the point that the employment agreement with PCL stated that if the person was already employed by "us" (defined to mean PCL) then the agreement replaced any previous agreements between the parties. Read literally, such a clause would have no effect as none of the plaintiffs was employed by the newly formed PCL. However, viewed in the context I have just described, I am satisfied that the parties intended and understood that their new employment agreements were to replace any previous understandings with any of the entities which were controlled by PCL. Any other interpretation is commercially unrealistic and inconsistent with the intent of the parties to agree new employment contracts in a new corporate environment.

[112] I am satisfied that the intention of the parties was that there would be one employer only, and that that employer would be PCL.

[113] While their pay and arrangements relating to PAYE and ACC levies were organised through PPL, this was an arrangement instigated for administrative convenience within the company structure. It is clear that PCL ultimately exercised control through the Payment Solutions business unit, and via delegated authority. The plaintiffs performed their duties for the benefit of the unit as a whole, and for the (indirect) benefit of the first defendant.

[114] Mr Skelton made the point that the legislation conferring preferential status on employees is designed to protect

employees who lose their jobs as a result of an insolvency situation. He submitted that, in considering the issues in dispute in the present case, regard should be had to the statutory context and objective of employee protection. He referred to the Protection of Workers' Claims (Employer's

Insolvency) Convention 1992,33 which appears to have been the genesis of

provisions in the Receiverships and Companies Acts. While I accept that the legislation is designed to extend important protections to employees in the event of an employer's insolvency, it does not operate to confer employment status where otherwise it would not exist.

[115] A number of witnesses said that, with the benefit of hindsight, they would not have signed the agreement with PCL if they had understood the "implications" of their decision. It is clear that at the time they signed their individual employment agreements with PCL cited as their employer, the six plaintiffs were focused on whether the terms and conditions of their employment would be affected under the new agreement. As it transpired, the "implications" of the decision they made only became apparent the following year, when PCL went into receivership and there was no money with which to meet their preferential creditor claims. While Mr Corrick made the point in evidence that there had never been an intention to undermine or reduce the plaintiffs' job security or rights, the fact that PCL would be going into receivership the year after the restructuring, was not known when the employment agreements were entered into.

[116] The implications that the six plaintiffs now complain about were not, and could not, have been known at the time. Mr Gibson, himself a plaintiff and formerly Chief Financial Officer for the Payment Solutions business unit, accepted in cross examination that at the point of signing the employment agreement with PCL, receivership was by no means a foregone conclusion and the expectation was that the

company's position would improve.

33 Convention concerning the Protection of Workers' Claims in the event of the Insolvency of their

Employer 1886 UNTS 3 (adopted 23 June 1992, entered into force 8 June 1995).

[117] The identity of the employer that each of the six plaintiffs say they had an employment relationship with, in addition to PCL, appears to have remained unclear at the time a grievance was filed in the Employment Relations Authority. That is reflected in the fact that there were seven named defendants, rather than the two now cited.

[118] I accept the defendants' submission that the six plaintiffs' conduct at the time of, and immediately following, termination is at odds with the assertion now being advanced that PPL is their joint employer together with PCL.

[119] I am not satisfied on the balance of probabilities that PPL was joint employer with PCL.

**Misleading or deceptive conduct in employment**

[120] Section 12 of the Fair Trading Act 1986 (FTA) provides that:

**Misleading conduct in relation to employment**

No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.

[121] Section 2(2) makes it clear that conduct for the purposes of the FTA includes not only the doing of an act but also refusing or omitting to do an act. Silence, it was submitted, may amount to misleading or deceiving conduct if there are circumstances which give rise to a duty of disclosure.34 The plaintiffs contend that such a duty arose in the present case. Mr Skelton submitted that the plaintiffs were entitled to rely on the first defendant to draw to their attention the key differences in the agreements they were asked to sign and that when it chose to undertake the task of highlighting those key differences, it assumed the responsibility of ensuring that

all key differences were identified. This duty was said to be founded on the statutory

duty of good faith under s 4 of the Act, the duty to be responsive and

34 *Mills v United Building Society* [1988] 2 NZLR 392 (HC) at 406. See also *Hieber v Barfoot and*

*Thompson Ltd* [1996] NZHC 1373; (1996) 5 NZBLC 104,179 (HC).

communicative, and the trust and confidence implied into the employment relationship.35

[122] Section 9 of the FTA provides that:

**Misleading and deceptive conduct generally**

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[123] As the Supreme Court observed in *Red Eagle Corporation Ltd v Ellis*,36 s 9 is:37

... directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances.

[124] While s 9 is directed at conduct in trade, there is nothing to suggest that the approach to s 12 ought to be different. Counsel for the plaintiffs urged me to adopt the two stage approach followed in *Red Eagle*. Mr Clarke did not take issue with such an approach.

[125] The two stages involve, firstly, determining whether a breach has occurred and consideration of whether the conduct objectively had the capacity to mislead or deceive a reasonable person in the claimant's position.38 Secondly, the Court must examine whether the plaintiffs suffered loss or damage by the conduct complained of. This second stage requires consideration of whether the plaintiffs were actually misled or deceived by the conduct, and (if so) whether the conduct was an operating cause of the plaintiffs' loss. There must be a "clear nexus" between the conduct and the loss or damage.39

[126] A breach will be found if:40

35 Section 162 of the Employment Relations Act 2000 gives the Authority or Court power to make any order that the High Court may make under the FTA in any matter related to an employment agreement subject to certain requirements.

36 [2010] NZSC 20, [2010] 2 NZLR 492.

37 At [28].

38 At [28].

39 At [29].

40 At [28].

...a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived.

[127] It is not necessary at stage one to prove that the impugned conduct actually misled or deceived the plaintiffs. Rather, the issue is whether the conduct objectively had the capacity to mislead or deceive a hypothetical reasonable person.41 In this case, it is the failure to identify the identity and nature of the employer which must be capable of misleading in the particular circumstances.

[128] Mr Skelton submitted that the key differences document did not disclose that one of the key differences between the old individual employment agreement and the new proposed individual employment agreement was the identity of the employer party. He submitted that, in particular, the plaintiffs were not told that they were no longer being employed by a trading company, that the first defendant's only significant assets were shares in the subsidiary companies, and that it had significant debts. In this regard, it was said that the key differences document was capable of misleading the lead plaintiffs as they thought at the time this was simply a name change and not a change in the identity of their employer.

[129] Mr Skelton drew a distinction between conduct towards a sophisticated business person, or an arm's length business transaction, and conduct towards an employee, who is entitled to repose trust and confidence in his or her employer. The former may be less likely to be objectively regarded as capable of misleading or deceiving. Mr Skelton submitted that it was relevant that some of the lead plaintiffs had already experienced a number of name changes during the course of the employment relationship and could not reasonably have been expected to understand the intricacies of the Group's corporate structure.

[130] Mr Clarke made the point that there was an absence of evidence as to the context in which the key differences document was prepared. He submitted that the document only purported to provide a clause by clause analysis of the old and new agreements, and did not purport to represent any other differences between the

existing and proposed employer. Mr Clarke further submitted that even if the

41 At [28].

plaintiffs could establish that one or other or all of them were misled by the key differences document, the identity of the new employer became clear when they received the intended employment agreement. At this stage there could have been no mistaken belief.

[131] There are a number of difficulties with the position advanced on behalf of the plaintiffs. The first stumbling block is the

scope of the duty of disclosure contended for, having regard to the circumstances of the case. I do not accept Mr Skelton's submission that the first defendant was under a duty to set out in the key differences document details of the employing entity's status (as a trading company) and the extent to which it had assets and liabilities.

[132] The key differences document was created following a staff meeting held on

15 August 2008. None of the witnesses could recall precisely what had taken place at that meeting and the context and discussions which gave rise to the creation of the key differences document. It is however apparent that staff had some issues about the restructuring proposals, most particularly in relation to whether, under the proposed new agreement, they would receive the same entitlements as to pay, leave, and the like. The key differences document was prepared to address these particular issues. There is nothing to suggest that it was designed, or expected, to address broader issues. That is hardly surprising given that it was understood that the proposal was to move staff onto one agreement with the new, merged, entity. It is clear that numerous staff meetings were held and that staff had an opportunity to ask questions. None of the plaintiffs said that the identity of the employing party was of moment to them at the time. Rather, the focus was very much on the particular terms and conditions.

[133] This is supported by the wording of the document itself. It is entitled "Key Differences between the new Individual Employment Agreement (IEA) and older IEAs". It states in its introductory section that it compares the two most recent individual employment agreements for Provenco and Cadmus with the new individual employment agreement template. Relevantly, it also makes clear that the comparison "will not highlight every small difference in wording, but will note key

changes or differences in the *operation of the standard clauses*".42 The standard clauses are those relating to pay, leave, and the like.

[134] The body of the document is focused solely on a comparison of the standard clauses. Mr Marter's evidence, as one of the lead plaintiffs, reinforced the point:

Q. So you understood that this table was simply comparing clause by clause? A. That was our understanding.

[135] The document did what it purported to do, and that was set out a clause by clause analysis of each of the specific terms and conditions of the old and proposed new agreement. The document did not highlight the identity of the new employing entity, its status as a holding (rather than trading) company, or its financial position but this is explicable in the circumstances, and cannot be regarded as an actionable omission.

[136] The document did not purport to set out for staff the business prospects of the old and new employer, and nor could the omission of such material be said to have lulled the plaintiffs into a false sense of security. I am unable to discern any basis for the submission that the first defendant was under an obligation to present financial information and advice as to corporate structure simply because it generated a document comparing individual clauses in the old and new agreements, in response to queries raised by staff about whether their specific entitlements would be affected.

[137] While I accept that a number of the plaintiffs had been involved in numerous company name changes over time, the evidence established that it had been made clear to staff that the underlying purpose of the restructuring was to form a newly merged entity and that they would be employed by this entity. This was known to them at the time the key differences document was posted on the intranet and is relevant to an assessment of what a reasonable person, in the plaintiffs' shoes, would have taken from it.

[138] As Mr Skelton submitted, the situation at issue was not akin to an arm's

length commercial negotiation. However, given the context in which the document

42 Emphasis added.

was produced, and what it was aimed at addressing in terms of staff issues, I do not consider that it had the capacity to mislead or deceive the plaintiffs.

[139] I conclude that the key differences document, when viewed objectively, was

not capable of misleading or deceiving a reasonable person in the plaintiffs' position.

[140] Even if the key differences document did have the capacity to mislead or deceive, I would not have found that it actually did so. I am not satisfied that any of the plaintiffs were misled by the omission complained about. Each of the plaintiffs gave evidence that they had seen the key differences document, although it became clear that a number had paid it scant attention. And Mr Barnes expressed some uncertainty in cross-examination as to whether he had, in fact, seen the document.

[141] There was a considerable lapse in time in most cases between the plaintiffs seeing the document and ultimately signing their individual employment agreements. None of the plaintiffs claimed in evidence that they relied on the key differences

document when deciding to sign the new employment agreement.

[142] There are additional difficulties for the plaintiffs' claim. The essence of the claim is that they signed the employment agreement with the first defendant because of the failure to advise, in the key differences document, that the first defendant was not a trading company and had few assets and a considerable amount of debts. However, only one plaintiff (Mr Shipman) gave evidence suggesting that he may not have signed the agreement if this information had been disclosed in the key differences document, and he accepted that this was only with the benefit of hindsight.

[143] The evidence was that no one at the stage the agreements were offered and signed anticipated that PCL would go into receivership. It is notable that Mr Gibson, who had a level of awareness of the financial position, nonetheless signed the agreement.

[144] The identity of the employing entity was put beyond doubt when the employment agreements citing PCL as employer were provided to staff. The

reference to PCL as employer was prominently referred to, in bold, on the front page of the document and again on the final page of the document (again in bold, capital, letters). Any misunderstanding which might previously have arisen would have been dispelled at this time.

[145] Standing back, it cannot be said that the omission complained about in a document made available to staff months prior to signing their new employment agreements (in relation to which they were invited to seek legal advice) was an operating or effective cause of their loss. This arose some 18 months after the agreements were signed, when the first defendant went into receivership. In these circumstances, there was no clear nexus between the conduct and the loss or damage relied on by the plaintiffs.

[146] For completeness, I refer to Mr Clarke's alternative submission that because Mr Corrick was employed by another subsidiary (Cadmus Payment Solutions Limited) at the relevant time, his actions in preparing the key differences document could not be attributed to the first defendant. I do not need to express a concluded view on this alternative submission, given the findings I have already made. It is, however, clear that Mr Corrick was undertaking various functions in respect of the integration process, to ensure that identified milestones were reached in relation to bringing staff within the single merged entity. He was working closely with Ms Balchin in this regard. The nature of the tasks being performed (including preparation of the key differences document) and for whom (the merged company) tends to undermine the submission advanced on behalf of the first defendant.

[147] I conclude that the plaintiffs' claim of misrepresentation must fail.

**Conclusion**

[148] The six plaintiffs were not jointly employed by PCL and PPL. Their sole employer at the relevant time was PCL. Nor did the first defendant engage in misleading or deceptive conduct in relation to them.

[149] Costs may be the subject of an exchange of memoranda if they cannot otherwise be agreed, with the defendants filing and serving any such memoranda and supporting documentation within 30 days of the date of this judgment and the plaintiffs filing and serving any material in reply within a further 30 days.

Christina Inglis

Judge

Judgment signed at 3pm on 6 December 2012

---