



[3] Maureen Jackson, who is the registered director and a shareholder of Hibiscus Coast Security Limited (HCSSL) filed a statement in reply denying that HCSSL employed Mr Lowndes and saying Mr Preston was the employer.

[4] Both Ms Jackson and Mr Dowden (who is Ms Jackson's partner and the other shareholder in HCSSL) asserted in their statements in reply that Mr Preston leased the business trading as Safeguard Security and employed Mr Lowndes in that capacity.

[5] Mr Preston was not cited as a party to this employment relationship problem. Although the prospect of adding him as a party was discussed during a conference call between the Authority and the parties, Mr Lowndes elected not to proceed in that way. The reason was that Mr Preston is understood to be in the UK and no contact details were available.

[6] This determination addresses the identity of the employer.

### **Background**

[7] Mr Dowden has worked in the security industry for many years and, as recorded, said he trades as Safeguard Security.

[8] Mr Dowden portrayed HCSSL as a management company, offering clerical, accounting and administrative support to Safeguard Security. However Mr Dowden also asserted in evidence variously that HCSSL employs him and that he is an employee of Safeguard Security. The latter is not possible in law. The former was supported by summaries of earnings from the IRD showing Mr Dowden was employed by 'Hibiscus Security Services Limited'. The summaries were for years ending March 2007, 2008 and 2009 respectively.

[9] Documents which Mr Dowden produced indicate Graham Preston has a chequered background. According to a CV, in the period immediately prior to commencing his association with Mr Dowden and his interests in September 2007 Mr Preston's activities had included employment in management positions and employment with another company as a static security guard. The association with

Mr Dowden began in the context of negotiations about Mr Preston's possible purchase of some or all of Mr Dowden's business.

[10] In or about September 2008 Mr Lowndes telephoned Mr Dowden to ask for work. Mr Lowndes said he did so in response to an advertisement he saw in a local newspaper. Mr Dowden's name was not mentioned in the advertisement, but Mr Lowndes recognised the telephone number as he was already acquainted with Mr Dowden. Mr Dowden said Mr Preston had placed the advertisement and he was not involved in the matter.

[11] It was common ground that Mr Dowden told Mr Lowndes he should talk to Mr Preston. Mr Dowden said he did not tell Mr Lowndes any more than that.

[12] Mr Lowndes said Mr Dowden went on to tell him Mr Preston was 'the manager'. I consider it likely that in the natural course of such a conversation Mr Dowden would have given some indication to Mr Lowndes of who Mr Preston was. I therefore accept Mr Lowndes' account.

[13] Mr Lowndes went to see Mr Preston, who interviewed Mr Lowndes for the position of security guard but did not discuss his own role. There was a discussion about hours of work and rates of pay. Mr Lowndes was employed for the route known as 91 nights, which operates on the North Shore.

[14] Mr Lowndes produced an unsigned and undated employment agreement in which he was identified as a 'security patrol officer'; Safeguard Security and Hibiscus Coast Security Limited were identified as the employer; and Mr Preston was named as 'general manager' on behalf of Safeguard Security and Hibiscus Coast Security Limited. I accept that Mr Preston provided the document to Mr Lowndes at the time of recruitment.

[15] As a result Mr Lowndes understood Mr Preston to be acting in the capacity of a manager employed by either or both of Safeguard Security and HCSL. In addition to the above information, he produced a copy of a bank statement showing his wages were paid by J A Dowden t/as Safeguard Security.

[16] This lack of clarity was compounded in that the HCSSL and Safeguard Security businesses were operated from the registered office of HCSSL, and Mr Dowden and Mr Preston could be seen there. There was little if anything in the observable day to day running of the businesses to identify the differing legal entities or indicate to Mr Lowndes that his employer was Mr Preston, not Mr Dowden or his interests.

#### **Arrangements between Mr Dowden, HCSSL and Mr Preston**

[17] In support of his position on the identity of the employer Mr Dowden produced material prepared for his objection to applications made under the Private Investigators and Security Guards Act 1974 (PISG Act) by Mr Preston and his interests, and filed when Mr Preston's association with Mr Dowden ended. According to the material, Mr Preston was contracted to 'Safeguard Security' as an operations manager from September 2007. The material made no mention of a lease of the Safeguard Security business. However included in the material was a copy of Mr Preston's application for employment as a 'security officer/patrol North Shore' at 'Safeguard and Hibiscus Coast Security,' dated 12 September 2007.

[18] I understood the material to have been produced for the purpose of persuading me that Mr Preston is a dishonest person whose word cannot be trusted, and to identify difficulties he has caused. Even if that is so, Mr Preston is neither a party to this matter nor a witness in it. Of more direct relevance here is Mr Lowndes' account of the employment arrangements entered into with or through Mr Preston, and Mr Dowden's account of the arrangements he and HCSSL had with Mr Preston.

[19] Further to that, and with reference to the commencement of his association with Mr Preston, Mr Dowden produced a copy of a letter to him from Preston Management Services (Mr Preston) dated 15 August 2007. The letter read in part:

“... I would like to take up the contract offer of supplying manpower for the run known as 91 nights. I would employ staff to man this shift and be responsible for all the outgoings in relation to these people in respect of PAYE, holiday pay, ACC etc.”

[20] However it would appear the arrangement entered into in September 2007 was not concluded in terms of the suggestion in the above letter, although Mr Dowden was unable to provide details of the arrangement that was reached. No other

contemporaneous written material was produced to shed light on the matter. Instead there was a letter Mr Preston wrote to Mr Dowden in July 2008, describing himself as general manager and saying agreement had been reached in April that he would take over 50% of the 91 day patrol. There was no further detail of that alleged agreement, and no supporting documentation.

[21] The state of the evidence was such that I required further documentary information from Mr Dowden in support of his account of the nature of the relationships between the various parties, and the parties' roles. For example, when asked to explain why Mr Lowndes' wages appeared to have been paid by him, he agreed he had made the payment but alleged that the payment was accounted for in contract payments made to Mr Preston. He purported to produce invoices from Mr Preston in support, but all relevant details were obscured and even if I accepted they were copied from genuine invoices the documents were useless.

[22] I directed that business records be produced to support the explanations of the arrangements between Messrs Bowden and Preston, and HCSSL, including banking or accounting records and unobscured copies of Mr Preston's invoices. They were not produced.

[23] At the same time I give no weight to Mr Preston's abandoned attempt in mid-2009 to raise a personal grievance in respect of the end of his association with Mr Dowden or HCSSL, or to comments allegedly made by the advocate who raised the grievance. Similarly I give no weight to a media account of an issue arising out of Mr Dowden's objections under the PISG Act.

[24] I do, however, return to the provisions of the PISG Act. The Act provides for the licensing of people in business as security guards, whether as individuals or companies. Licensed security guards can apply to the relevant office of the District Court for certificates of approval for people they employ to provide security services as part of the business. Certificates of approval permit the security guard to employ a person as a 'responsible employee'.

[25] Part of the objection referred to earlier in this determination was to the issue of a certificate of approval of Mr Preston. In an earlier decision on an objection to an

application by a previous employer for a certificate of approval of Mr Preston, the registrar of private investigators and security guards granted the application with a condition. The registrar also tagged the file for review in the event that Mr Preston was employed by another security guard licensee<sup>1</sup>.

[26] In the decision on Mr Dowden's objection<sup>2</sup> the registrar recorded that Mr Dowden 'notified the change of employment to my secretary'. In other words, when Mr Dowden left the previous employer and began his association with Mr Dowden, the arrangement was referred to as one of employment for the purposes of the PISG Act. The condition imposed previously was not drawn to the registrar's attention when Mr Preston's 'employment' with Mr Dowden commenced, and Mr Preston's certificate of approval was renewed for the 08/09 licensing year.

[27] Not only does Mr Dowden now say Mr Preston was not his or HCSSL's employee, but under the scheme of the PISG Act if Mr Preston was not himself a licensee he could not in his own right lawfully employ Mr Lowndes to act as a security guard or provide security services. Even if Mr Dowden used the word 'employee' loosely in his dealings with the registrar under the PISG Act, this is another example of inaccuracy and inconsistency in Mr Dowden's definitions of the parties' relationships. It highlighted the importance of the supporting documentation whose production was directed.

### **Conclusion**

[28] On the basis of the above information I am not satisfied that Mr Preston was Mr Lowndes' employer. I conclude that Mr Dowden trading as Safeguard Security and HCSSL were Mr Lowndes' employers jointly.

[29] Mr Dowden's approach to the production of material when directed was unsatisfactory. Some of his oral explanations were inconsistent or inaccurate, and did not make sense in law. Had he produced the material I required I might have been in a position to reach a different conclusion about the identity of the employer.

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<sup>1</sup> District Court Auckland, SG(e) 734609, 2 August 2007

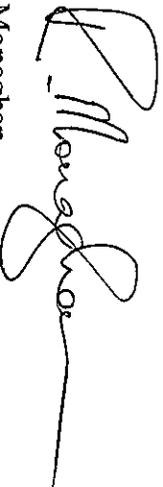
<sup>2</sup> District Court Auckland, SG 755365, 18 August 2009

[30] Mr Lowndes may now proceed to have the merits of his personal grievance heard. The Authority will contact the parties shortly to make the necessary arrangements.

**Costs**

[31] Costs are reserved.

[32] The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a reply.



R A Monaghan

Member of the Employment Relations Authority

